

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

OCT 11 1996

10-11-96

United Waste Services, Inc., d/b/a)
Waste Tire Management,)
)
Plaintiff,)
vs.)
)
Florence County, South Carolina,)
)
Defendant.)
_____)

CIVIL ACTION NO: 4-96-0979-23

ORDER

This is a diversity jurisdiction action for equitable relief heard by the court without a jury. Plaintiff is seeking a declaration that the award of a scrap tire disposal contract by the County Council of Florence County, South Carolina, to Environmental Golf Systems U.S.A., Inc. was illegal, and that the contract between the two parties, executed after the commencement of this action, is void. Plaintiff is also seeking an implementing injunctive order directing Florence County to execute a contract with plaintiff for the scrap tire disposal project.

Having heard and considered the testimony, evidence, and arguments of counsel, this court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.

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I. FINDINGS OF FACT¹

1. On or about August 27, 1995, Florence County ("County") issued a Request for Proposal #06-95/96 for a scrap tire disposal project. The Request for Proposal ("RFP") sought written sealed proposals from qualified vendors for removal of all scrap tires located at two sites in the County with an estimated 3,000,000 to 4,000,000 tires at one site (Effingham) and 50,000 to 100,000 tires at the other site (the operating landfill).

The RFP specified that the proposals would be evaluated by a committee ("Evaluation Committee") designated by the Chairman of the County Council. It also specified that the evaluation of all offers and the awarding of the contract would be based on the provisions of the Florence County Procurement Code ("the Procurement Code").

Attached to the RFP was a listing of four "evaluation criteria" with assigned point values. The criteria were: (1) record of firm on similar projects, (2) job creation in The County to accomplish project, (3) cost for Effingham site and cost per tire at current landfill, and (4) time frame to accomplish project. The assigned point values were 40, 30, 10 and 20, respectively, for a total of 100 points.

The RFP also specified a number of requirements and conditions for the proposals which included detailed information such as a resume of experience in scrap tire disposal, demonstration of "satisfactory operation of similar projects", South Carolina Department

¹The categorization of matters by the court as either findings of fact or conclusions of law is not determinative. Accordingly, the mere delineation of a conclusion of law as a finding of fact, or vice versa, does not alter its effect in this order.

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of Health and Environmental Control ("DHEC") approval of the plan (to be submitted with the proposal), and submission of a certified financial statement with the proposal. The RFP also mandated that the clean up, recycling, and end use disposal "must accomplish the recycling goals" of the South Carolina Solid Waste Policy and Management Act of 1991.

2. Section 11-48(6) of the Procurement Code provides that a three-member evaluation panel or committee "will be appointed to formally conduct the evaluation of each response." Subsection 6 also requires evaluation factors or criteria be set forth in the RFP in their relative order of importance which may be indicated by assigned weights to each criteria. Subsection (6)(f) contains the caveat that "price cannot be the primary factor" in assigning relative importance of criteria.

Section 11-48(7) of the Procurement Code provides that evaluation of the proposals ". . . must be done utilizing all the stated evaluation criteria. No other factors may be used." This subsection also states that "[a]ll factors identified in scope of work must be met." Pursuant to §11-48(7), the award of the contract ". . . shall be made to the responsible vendor whose proposal is determined in writing by the evaluation committee to be responsive to all criteria and be most advantageous to the county." (Emphasis supplied.) As defined in §11-18(20), the word "shall" denotes the imperative.

3. By the specified date, eight companies had submitted proposals. The County's Director of General Services, Bill Parrott (also the designated Director of Procurement), requested that County Council appoint an evaluation panel. The Chairman of the County Council, on October 5, 1995, appointed Mr. Parrott, Don McCain, and

Council member Herbert Ames to the Evaluation Committee.

4. The Evaluation Committee met on October 12, 1995. In undertaking its responsibility under the Procurement Code, the members agreed to use an evaluation methodology suggested by Mr. Parrott. Under this methodology, the "best" proposal as to each of the four criteria in the RFP was to receive the maximum point values for that particular category. Once the "best" response was determined, the points for the other companies for that particular category were to be determined on a percentage basis as compared to the best response and multiplied by the assigned point value for that category. The methodology also specified that if a response were given as a range, the midpoint of the range would be used to calculate points. Under this methodology, the company with the highest total number of points for all criteria combined would be recommended for the award.

5. Based upon its review of the responses and its calculation of points, the Evaluation Committee, at its only meeting on October 12, 1995, determined that Environmental Golf Systems U.S.A., Inc. ("EGS") received the highest total number of points with 65.40 and that plaintiff in this action, United Waste Services, Inc., d/b/a Waste Tire Management ("WTM"), received the second highest number of points with 63.20. The third highest company received 57.00 points.

The Evaluation Committee arrived at its point totals by crediting EGS and WTM

with the following raw numbers (a "best" submitted response is designated by bold type):

	EGS	WTM
Similar Projects	4	11
Job Creation	20	15
Time	12 months	1.5 years
Cost	1.95 million	2.18 million

6. Upon the suggestion of Council member Ames, the Evaluation Committee decided to recommend to the Council that both EGS and WTM be asked to give presentations to the Administration and Finance Committee of the Council rather than recommend to County Council that the contract be awarded to the highest evaluated company (EGS). The Evaluation Committee then recommended to County Council that "the Administration and Finance Committee be designated to receive presentations from the two firms and make a recommendation to full Council on the selection of the firm to begin work on our scrap tire reduction program." Council approved this recommendation.

7. Presentations to the Administration and Finance Committee were made by representatives of WTM and EGS at its meeting on November 2, 1995. The members of the Administration and Finance Committee were not provided with the Evaluation Committee's evaluation worksheet. Instead, the Administration and Finance Committee based its decisions on the subjective "quality" of the presentations and did not discuss nor consider the evaluation criteria listed in the RFP. On motion of Council member Ames, the Administration and Finance Committee voted at its November 16, 1995 meeting to

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recommend that Council approve acceptance of the EGS proposal, conditioned upon the County obtaining grant funds and further conditioned upon DHEC approval of EGS' plan. Should EGS not obtain DHEC plan approval, the proposal of WTM was to be accepted. On the same day at the subsequent meeting of the full Council; Mr. Ames moved that Council accept the recommendation of the Administration and Finance Committee and the motion was approved.

8. After the conditional award on November 16, 1995, and prior to the final award by Council to EGS on February 16, 1996, Council and County administrative officials received certain information from DHEC and the state Department of Commerce concerning EGS and WTM. By letter of January 3, 1996, representatives of DHEC and the Department of Commerce provided Council with a "due diligence" report. This report was supplemented by a January 29, 1996 letter from the Department of Commerce to the County Attorney.

The due diligence information, based on contacts with solid waste enforcement officials in several states, indicated that the County had incorrect information concerning EGS' prior experience. This information also showed that two companies with whom EGS had claimed joint project experience, had not satisfactorily performed on certain projects cited in the EGS proposal.

Testimony and evidence received at the trial of this case established to the satisfaction of the court that the County had incorrect information concerning EGS' prior experience. The Evaluation Committee accepted the information concerning prior experience at face value and undertook no due diligence or investigation concerning EGS.

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The County also failed to give adequate weight to the due diligence information supplied by DHEC and the Department of Commerce in January, 1996, prior to Council's final award of the contract to EGS on February 16, 1996.

9. During the pendency of WTM's administrative protest of the award, the County Administrator was informed by Mr. Parrott that the Evaluation Committee had committed an error during its original evaluation in the calculation of criteria points for WTM. By memo of March 21, 1996, he advised the Administrator that the Evaluation Committee should have credited WTM with 12 references, rather than 11, in the "record in similar projects" category. With this "adjustment" in points, WTM's total points under the evaluation criteria specified in the RFP were 65.00 (versus 65.40 for EGS).

Mr. Parrott also admitted that "after closer examination" of the wording of WTM's proposal, WTM's thirteenth reference should have been counted by the Evaluation Committee. By counting all 13 references for WTM, its point total for that category should have been 23.63. This would have increased WTM's total evaluation criteria points to 66.83 (versus 65.40 for EGS), with the result that WTM would have had the highest point total of all responding companies, if the Evaluation Committee had properly conducted its evaluation.

The court additionally finds that the Evaluation Committee did not calculate the point totals for EGS and WTM in accord with its own methodology in the "jobs" and "time" categories. The effects of these miscalculations are addressed in Conclusion 5.

10. By letter dated March 21, 1996 (the same date as Mr. Parrott's memorandum), the County Administrator rejected WTM's protest. Citing WTM's protest

that there was a miscalculation of points by the Evaluation Committee, the Administrator stated that "the amount of points awarded by the Evaluation Committee was not the determining criteria for the award of the contract." The Administrator further stated that he was not convinced that EGS "is not a responsible proposer."

II. CONCLUSIONS OF LAW

1. The parties agree that an award by a county council of a contract pursuant to a county procurement code involves the exercise of discretion by the county council. Defendant argues that when local governmental officials exercise discretionary powers, the courts may not interfere with the exercise of that discretion in the absence of proof of fraud, collusion, bad faith, or arbitrary action equating to an abuse of discretion. Plaintiff agrees that, under South Carolina law, the discretionary acts of a county government are reviewable by the courts for, inter alia, clear abuse of authority and illegality. Owens v. Magill, 419 S.E. 2d 786 (S.C. 1992); Lomax v. City of Greenville, 82 S.E.2d 191 (S.C. 1954); Schroeder v. O'Neill, 184 S.E. 679 (S.C. 1936). However, the parties disagree as to scope of the County's discretion. This court finds that the County's discretion is necessarily limited by the mandatory requirements of the Procurement Code.

2. The Procurement Code, as a county ordinance, is "the law." An ordinance is a legislative enactment and is the equivalent of legislative action. Eli Witt Co. v. City of West Columbia, 425 S.E.2d 16 (S.C. 1992); Dunbar v. City of Spartanburg, 85 S.E.2d 281 (S.C. 1955). Florence County is bound by the mandatory requirements of the Procurement Code and is not free to disregard those requirements.

3. The County did not follow the Procurement Code in awarding the contract to EGS. The award procedure for competitive sealed proposals, specified in §11-48 of the Procurement Code, requires that evaluation of the proposals ". . . must be done utilizing all the stated evaluation criteria. No other factors may be used." Pursuant to §11-48(7), the award of the contract ". . . shall be made to the responsible vendor whose proposal is determined in writing by the Evaluation Committee to be responsive to all criteria and be most advantageous to the County." As defined in §11-18(20), the word "shall" denotes the imperative.

The Procurement Code, as applied to competitive sealed proposals, does not provide for nor allow an award of a contract based upon the subjective "quality" of a presentation to a subcommittee of Council which did not consider the evaluation criteria specified in the RFP. In considering the award of this contract, the County was obliged to follow the Procurement Code. The County violated the provisions of the Procurement Code, and its award of the contract to EGS was therefore illegal. Because the award of the contract was illegal, the subsequently executed contract is illegal and is declared void. A contract issued in violation of public competitive bidding statutes is void and of no effect. Funderburg Builders, Inc. v. Abbeville County Memorial Hospital, 467 F.Supp. 821, 823 (D.S.C. 1979).

4. The proposal submitted by EGS was nonresponsive to the RFP. EGS did not provide a certified financial statement nor DHEC approval for its plan. The proposal by EGS, on its face, raised questions as to EGS' financial ability and demonstrated that EGS had not previously contracted with any governmental entities for scrap tire abatement

projects.

5. The Evaluation Committee improperly calculated the points called for by the RFP. If the Evaluation Committee had properly credited WTM for all 13 references for "similar projects", to which it was admittedly entitled, its total point value at the time of the committee review would have been the highest of all the responsive bids. Additionally, the Evaluation Committee failed to properly calculate the points for the "ranges" provided by EGS. If the Evaluation Committee had properly credited 10 jobs to EGS as the midpoint of its range of "up to 20" jobs, and if it had properly properly credited 13 months as the midpoint of the range of 12 to 14 months for job completion proposed by EGS, then the total points for EGS would have been 50.40 compared to 67.83 total points for WTM (with the admitted adjustments for its "similar projects").

6. Equitable relief is a proper remedy to compel compliance with public contract award procedures. Funderburg Builders, Inc. v. Abbeville County Memorial Hospital, 467 F.Supp. 821, 825 (D.S.C. 1979). Because of the County's illegal award of the contract, the court concludes that plaintiff is entitled to the equitable relief sought.

III. CONCLUSION

It is, therefore,

ORDERED, that the award of the scrap tire disposal project by Florence County Council to Environmental Golf Systems U.S.A., Inc., and the contract subsequently executed between those parties based upon the award, are illegal and void;

ORDERED that Florence County shall forthwith award the contract for the scrap


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tire disposal project to plaintiff, upon such terms as would have applied had the contract originally been awarded to plaintiff offsetting, however, an amount to be approved by the court for the tires already removed by Environmental Golf Systems U.S.A., Inc.;

ORDERED that this court shall maintain jurisdiction over this matter until the award of the contract between plaintiff and Florence County is completed, the adjustment or offset is determined, and any other matters necessary to the enactment of this Order are decided; and

ORDERED that the clerk shall enter judgment for plaintiff in accordance with this Order.

IT IS SO ORDERED.



PATRICK MICHAEL DUFFY
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina

October 18th, 1996