



## STATEMENT OF FACTS

The Information and Technology Management Office (ITMO) issued an Intent to Award the contract on March 17, 1987, which was subsequently amended on March 20, 1987, to include items which were omitted. On March 25, 1987, the CPO received a letter of protest from J&T stating that the "reason for this protest is our proposed prices were significantly lower than those you intend to accept." (Record, p.44) The CPO responded by letter, dated April 1, 1987, and informed J&T that its bid was rejected because, in sum, it was not responsive and that price was only one of the factors considered in a RFP. (Record, p.30-36) This letter also requested a response from J&T if it wished to continue the protest. J&T did so in a letter dated April 27, 1987, which stated "[w]e wish to carry on with our protest of the manner in which the your [sic] department handled and awarded the Educational Computer #1/7/205-12-16-86-42P.... It is our contention that the state placed too much weight on minor evaluation factors and not enough on price for category B. This is evidenced in the prices accepted by your office for category B items." (Record, p.27).

The lack of precision in stating the protest presumably caused the CPO to restate the issue for resolution as, "[w]as the evaluation and award conducted in accordance with Section

11-35-1530, (7) of the Consolidated Procurement Code and the evaluation criteria contained in the request for proposal." (Record, p.8) In a letter dated May 21, 1987, J&T requested a review before the Panel and stated that its grievance remained the same as it was stated in its April 27, 1987, letter. In its opening statement, J&T restated its protest as being based upon the fact that the bid was rejected for what it claimed to be nonmaterial deviations from the specifications.

1. In order to be responsive, an offeror must meet all the material aspects of the solicitation. (§11-35-1410(7)).

(a) Section 4.3 and 4.3.1(a) of the RFP provided:

4.3 EDUCATION AND SUPPORT

Education and continuing support for all equipment purchased must be available during and after the term of any contract(s) established. Proposing vendors will provide detailed information (not sales brochures) stating how the vendor will provide the following services. Responses to this section must provide sufficient information for evaluation of value and acceptability." [Emphasis added]

4.3.1 Education and Training

Response to this section should identify the education and training available, detailing the locations at which training is available, the degree of expertise and audience which the training addresses and the cost of that training. Specific areas which should be addressed are:

(a) Technical training

It is likely that one or more purchasers operating under these contract(s) will elect to establish or continue a self-maintenance program. Proposing vendors should be capable of providing training in the following major categories on a continuing basis.

1. Repair and installation of hardware items - instruction sufficient to train an individual to be a competent service technician.

2. Intensive software training - instruction sufficient to train an individual to respond to question (sic) and problems received from end users.

3. Special feature training (e.g., networking, communications).... [Emphasis added]

2. Mr. Phillip Pickard, the employee or agent of J&T who responded to the solicitation on behalf of J&T, testified that he considered the "should" in Section 4.3.1 to be permissive rather than mandatory. Consequently, J&T qualified its response to Section 4.3.1(a): "J&T Technology, Inc., will not participate in any technical training as outlined in this section." (Record, p. 85). The unwillingness of J&T to provide technical training was reiterated by Mr. Pickard, in sworn testimony, during questioning by the Panel.

3. The Panel finds that the language of Section 4.3 makes it clear that it is related to, and must be read in conjunction with, Section 4.3.1. The Panel further finds that it would be illogical or inconsistent to read "should" in Section 4.3 as being permissive, thereby making the training called for in 4.3.1. optional. Rather, "should" is used in an auxiliary function to express an obligation, i.e., if you must provide

education and continuing support, as required in Section 4.3, a responsive bid should identify the education and training available. In sum, the Panel finds that 'should' in Section 4.3.1., when read with Section 4.3, establishes a mandatory requirement for a vendor to supply the training delineated in 4.3.1. The Panel further finds that J&T had a period of time outlined in the RFP during which it could have sought a clarification of Section 4.3.1., if J&T deemed it necessary. (Record, reverse side of p. 91) No evidence was presented that J&T asked for clarification during this time allowed by the RFP.

4. The Panel further finds that Section 4.3.1(a) provides evidence that this section is material. When a vendor trains a user "to be a competent service technician" with regard to hardware and a vendor provides intensive software training in order for "an individual to respond to question (sic) and problems . . .", the state will save money by reducing the need for routine service calls. Further, the uncontroverted testimony of John Watson, Director of System Engineering, University of S. C., further supports this finding of the Panel, as Mr. Watson testified that technical training was sought to reduce the need for service calls thereby saving the state money.

5. Section 11-35-1530(c) of the S. C. Code authorizes, but does not require, discussion with responsible offerors after the R.F.P. has been submitted, but prior to award, in order to

assure full understanding of, and responsiveness to the solicitation requirements of the R.F.P. J&T failed to submit several items that were required by the solicitation in order to evaluate the equipment in its proposal. The Panel finds that these materials (Record, pp.49-50) were necessary to determine whether the equipment bid was responsive to the RFP. The record is replete with evidence of attempts to obtain and attempts to supply the hardware diagnostic and service manuals and the parts list. The Panel finds that these manuals and the parts list were a material component of the solicitation. Ultimately, a deadline was set by ITMO for the receipt of these items, which J&T missed by one day. J&T admitted it failed to meet this deadline. The burden is on the vendor to supply all of the information required by the solicitation when the RFP is submitted. Had ITMO not requested the material which J&T failed to supply in its bid package, ITMO could have properly rejected the bid as nonresponsive under §11-35-1530(c) of the South Carolina Code and Section 8.4 of the RFP. (Record, p.123) The Panel finds that J&T did not meet its burden to supply the material required by the RFP and consequently failed to meet an essential requirement of the solicitation.

6. The Panel finds, and the evidence reveals, that the evaluation criteria contained in Section 7 of the IFB was properly applied in this solicitation. The Panel further finds that any grievance based upon the relative weight given the different factors in the evaluation criteria is untimely under

§11-35-4210, as it was not raised until April 27, 1987, while the RFP was issued in October 1986.

#### CONCLUSION OF LAW

The Panel concludes that, implicit under §11-35-4210 is the requirement that protestants state their grievance with enough specificity to put all parties on notice of the issues to be decided by the CPO and the Panel. The protestant cannot alter or modify its grievance as the protest develops except as permitted by §11-35-4210. The state is under no obligation to reformulate or perfect a protestant's grievance. The Panel concludes, as a matter of law, that J&T met the bare minimum of what is required under §11-35-4210 in articulating its grievance.

The Panel concludes that, having found that J&T failed to meet the essential requirements of the RFP and thereby it materially deviated from the material aspects of the RFP, J&T's bid is nonresponsive. Based upon Findings of Fact Numbers 3 and 4, the Panel is compelled to conclude J&T's proposal was nonresponsive. The evaluation criteria of the RFP clearly states that the mandatory requirement must be met in order to properly be awarded the contract.

J&T's allegation that it should have been awarded the contract is clearly without merit and the Panel so con-

cludes. A proposal that is nonresponsive cannot, by definition, be the proposal that is most advantageous to the state.

Having reached the aforementioned conclusions, the Panel denies J&T's request for lost profit on the contract during this protest.

The Panel upholds the decision of the CPO and accepts his determinations as its own to the extent that those determinations are not in conflict with those of the Panel.

THEREFORE, the Panel rules that J&T's proposal was properly rejected as nonresponsive and the intent to award stands as issued by ITMO.

IT IS SO ORDERED.



Hugh K. Leatherman  
Chairman, South Carolina  
Procurement Review Panel

July 13<sup>TH</sup>, 1987

Columbia, South Carolina

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