

INTRODUCTION

The crux of OC's eleven-ground protest relates to the responses ASV provided on page 13 (Record, p. 115) of the Invitation for Bids (I.F.B.). These responses relate to the radiant warmer, the deluxe drawer kits, the tube support and the phototherapy units.

FINDINGS OF FACT

1. Both the OC, Ohio and the ASV, C-100 models were approved for this solicitation. (I.F.B., p. 5; Record, p. 70) Therefore, these models were deemed to be responsive prior to the time the solicitation was mailed to the vendors.

2. The Panel finds and the uncontroverted testimony revealed that effectively, OC and ASV are the only two vendors that can supply the type of incubator/isolette that meets the needs of MUSC in the environment in which it will be used. The Panel further finds that the vendors knew and understood that they were the only two companies that could bid on this solicitation at the time the bids were submitted, as no evidence was presented that any other vendors sought to have their equipment approved as provided in the I.F.B. (See IFB, p. 5; Record, p. 70).

3. The I.F.B. called for vendors to supply equipment in addition to the incubator/isolette. Those items relevant to

this protest include tubing supports, radiant warmers and phototherapy units.

4. With regard to the phototherapy units, ASV submitted the following responses to the I.F.B.:

Describe phototherapy lamp (to be included with unit): Air-Shields manufactures [sic] three distinctly different excellent phototherapy systems, but our market research indicates most hospitals don't require a separate phototherapy light.

(Record, p. 109)

32.ea. Ohmeda Mfr. 304-3300-900
Phototherapy Units \$ N/A \$ N/A
Air-Shields manufactures three types of phototherapy systems, but each are mobile and are not permanently affixed to the unit. The PT1400-2 and the Shannon unit can both be used in conjunction with the C-100 isolette. I will include literature on both of these units.

(Record, p. 115)

The Panel finds that these responses effectively qualified ASV's bid, thereby creating an uncertainty as to whether the phototherapy units were, in fact, included in the bid and bid price.

5. Mr. Michael Hanna, East Coast Sales Manager, ASV, testified that he worked with Mr. David Grimes, who prepared the ASV bid, in an oversight capacity concerning the responses to the

I.F.B. Mr. Hanna testified that the response of "N/A" on page 13 of the I.F.B. (Record, p. 115) was designed to prevent OC from knowing the costs of the individual items. His explanation of the use of "N/A" in the column calling for a price concerning the radiant warmer, deluxe drawer and tube support was that these items were not needed with the C-100. Thus, since the items were not being bid, no price was required for these items. As to the phototherapy unit, Mr. Hanna testified that the use of "N/A" in the price column meant that ASV would supply the units requested at no additional cost. In other words, the phototherapy units would be provided as part of the total price bid of \$186,260.

6. The I.F.B., Page 2 (Record, p. 65) under "INSTRUCTION TO BIDDERS", #3 states: "Quote prices on units specified with packing included."

7. Ms. Linda Pittman, Procurement Specialist, MUSC, testified she telephoned Mr. David Grimes but spoke with Mr. Michael Hanna. The Panel finds, and the testimony revealed, that Ms. Pittman made the telephone call to clarify the response ASV made regarding the phototherapy unit and the other items on p. 13 of the I.F.B. (Record, p. 115). Although she testified that she considered ASV to be responsive to the I.F.B. prior to the telephone call, there was enough uncertainty in her mind to

necessitate the telephone call to Mr. Grimes. Indeed, her testimony on this point (i.e., her comment that she felt ASV was responsive prior to telephoning Mr. Grimes) is inconsistent with the memo she wrote, by her own admission, very shortly after the telephone call. In that memo, (Record, p. 41) under #4, she wrote: "The phototherapy unit was not bid but literature was supplied for two (2) units."

8. The Panel finds, and the uncontroverted testimony revealed, that ASV caused the uncertainty as to whether the phototherapy units were, in fact, part of the items included in the I.F.B. ASV, and only ASV, could have prevented this ambiguity and inconsistency among the responses on page 13 of the I.F.B. (Record, p. 115).

9. Based on the foregoing findings of fact, the Panel further specifically finds that the responses relating to the phototherapy units were ambiguous.

DISCUSSION AND CONCLUSION OF LAW

The ambiguity caused by ASV regarding the responses to phototherapy goes to the very essence of the solicitation. To cause an ambiguity of this nature and then cure it, after the bids are submitted, does not further the policies of the Procurement Code when there is effectively only one other

vendor competing for the state's business. (See §11-35-20(d), (e), (f), (h), 1976 S. C. Code, 1976, annotated) Mr. Hanna, at the time Ms. Pittman called, had to presume that they were the low bidder. In this instance, there would have been no need to confirm or clarify a response of vendor who had not submitted the low bid (either in first instance or after the other vendors have been deemed nonresponsive). If Mr. Hanna indicated to Ms. Pittman that the phototherapy units were not part of the bid, he knew that ASV would not be awarded the contract. Unquestionably, correcting this ambiguity, i.e., mistake, caused ASV to be deemed the lowest responsive and responsible vendor in the notice of intent to award. This violates §11-35-1520(7) and (8) and Regulation 19-445.2085(B) promulgated pursuant thereto, and the Panel so concludes.

The Panel further concludes that the ambiguity regarding the phototherapy and the failure to quote unit prices, as required by the I.F.B., causes ASV to be nonresponsive to the I.F.B.

Therefore, for the foregoing reasons, the Panel concludes that bid #2-410-1200500-3/24/87A should be awarded to OC and not ACV. The Panel thus overrules the Order of the CPO.

Having awarded the contract to OC, the Panel refuses to grant OC's request for bid prep or other costs as, in this instance, these costs are part of the cost of doing business with the state.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Hugh K. Leatherman", written over a horizontal line.

Hugh K. Leatherman
Chairman, S. C. Procurement
Review Panel

Columbia, South Carolina

August 13th, 1987