

the Highway Department for a period of one year. (Record, p. 62). The proposals were to be on a "cost per completed license" basis and were to include the cost of furnishing at least 110 cameras, film, laminating equipment and supplies and a negative file with an instant retrieval system. The cost per completed license also included the costs of set-up, training, service, maintenance, shipping and mailing. The contract was renewable for four one-year periods at the option of the Highway Department.

In response to its Request, MMO received two proposals - one from Polaroid and one from NBS (the present provider of the services solicited). Polaroid proposed to furnish the services for \$.596 per license, while NBS' proposal came to \$.6137 per license. The difference based on the estimated number of licenses for the duration of the contract (including optional extensions) is \$57,464.

The procedure for evaluating the proposals was twofold. First, MMO determined that each offerer met the technical requirements of the Request and that each offerer was financially responsible. MMO also calculated the point value to be assigned each offerer based on relative cost.¹ MMO then turned the proposals over to a team of three evaluators for further rating according to the criteria set

1. The formula used was Proposal Cost Being Evaluated divided by Lowest Price Offered X Maximum Points Available (25).

forth in the Request. Those criteria in order of importance were as follows:

- A. Cost (Supplied by MMO)
- B. Compliance with Technical Specifications
 - 1. Required System
 - 2. Optics
 - 3. Exposure Control
 - 4. Lighting
 - 5. Film Loading
 - 6. Camera Mechanism
 - 7. Operational Features
 - 8. Finished License Description
 - 9. Film
 - 10. Negative Film
 - 11. Training and Maintenance
- C. Quality of License (based on samples submitted)
 - 1. Size
 - 2. Legibility - Clarity
 - 3. Color
 - 4. Lamination
- D. Demonstrated Capability to Provide Functional Requirements
 - 1. Completed drivers' license price including all associated costs;
 - 2. Remakes of Drivers' Licenses
 - 3. Number and Distribution of Camera Systems
 - 4. Method of Accounting (Payments)
 - 5. Camera System Demonstration
- E. Organizational/Key Personnel Qualifications - Current and Previous Experience in Related Projects of Comparable Scope
 - 1. Recent Relevant Experience
 - 2. Prior Work which allows the contractor to be abreast of current developments
 - 3. Emphasis which management places on this effort - specifically its ability to commit staff
 - 4. Identity and Qualification of Staff committed to contract
- F. Camera System Set Up and Operational by October 1

(Record, pp. 76-77).

The evaluation team consisted of three experienced employees of the Highway Department: Thomas R. Easler,

Driver Services Administrator, Fred Sojourner, Assistant Director of Motor Vehicles Division and F. D. McCarty, Motor Vehicles Division Field Administrator. Each judge performed an independent evaluation of each proposal except that the judges met to view and perform security tests on the sample licenses submitted.

The proposals were rated by the three judges as follows:

POLAROID

<u>Category(Total Points Available)</u>	<u>Easler</u>	<u>McCarty</u>	<u>Sojourner</u>
Cost (25)	25	25	25
Compliance w/Technical Specs (20)	20	18	18
Quality of Samples (15)	14	15	14
Capability to Provide Functional Requirements (15)	14	14	15
Organization/ Personnel Qualifications (15)	14	12	14
System Set Up and Operational by Deadline (10)	10	10	10
TOTAL	<u>97</u>	<u>94</u>	<u>96</u>

NBS IMAGING SYSTEMS, INC.

<u>Category(Total Points Available)</u>	<u>Easler</u>	<u>McCarty</u>	<u>Sojourner</u>
Cost (25)	24.3	24.3	24.3

Compliance w/Technical Specs (20)	20	20	19
Quality of Samples (15)	15	15	15
Capability to Provide Functional Requirements (15)	15	15	15
Organization/ Personnel Qualifi- cations (15)	15	15	15
System Set Up and Operational by Deadline (10)	10	10	10
TOTAL	<u>99.3</u>	<u>99.3</u>	<u>98.3</u>

(Record, pp. 260-265).

Based on the total average points awarded by the judges, MMO decided to award the contract to NBS Imaging Systems. Polaroid protests the decision to award on a number of grounds.

First, Polaroid claims that because cost was the primary factor and its price was the lowest, Polaroid's proposal should have received more favorable consideration than it did. Polaroid argues that only a .7 point mathematical difference was assigned the approximate \$12,500 difference in cost between the two proposals; yet as much as a 3 point subjective difference was assigned in categories ranking very low in order of importance. Polaroid urges that a proper evaluation would have factored cost into all

cost into all the categories.²

NBS argues that the completed license cost is not the only cost involved and calls the Panel's attention to the cost of replacing the insert plate, which is required every time a change in Highway Department personnel necessitates a change in the signatures on a license. NBS presented evidence that over the last five years the insert plate was replaced five times. NBS claims that, if the cost of the insert plate is factored in, its bid is nearly the same as Polaroid's.

Polaroid further argues that its proposal offers superior economic value to the State because Polaroid proposes to provide new equipment that is smaller, lighter, safer, more efficient and more secure than NBS'. In particular, Polaroid claims:

a. It intends to provide newly manufactured equipment while NBS proposes to "rehabilitate" the old equipment it already has in place at the Highway Department. Polaroid presented testimony that it will specially manufacture the equipment needed to fill the contract at issue. The manufacturing process will take at least four months.

2. For example, Polaroid claims that the correct way to view the 3 point rating difference in the Organization and Personnel category in Mr. McCarty's evaluation is, "If a \$12,500 difference is worth .7 points, then is Polaroid's Organization and Personnel deficiency \$39,000 (3 points) worse than NBS'?"

NBS presented testimony that it intends to use the equipment currently in place. According to NBS, these cameras are no older than seven to eight years while the developers are no older than two years. NBS further contends that it modernizes its equipment in place to reflect advances in its technology.

b. Polaroid proposes to provide 121 cameras, 11 more than required, to insure that there are always backup cameras available. NBS counters that it is necessary for Polaroid to provide these backup cameras because Polaroid has no in-state personnel to repair and service its equipment. NBS offered evidence that its in-state employees repaired or replaced malfunctioning equipment usually within several hours of a reported breakdown.³

c. Polaroid's system is safer because it does not involve a process that uses caustic chemicals which are susceptible to spilling and potentially endangering users. According to Polaroid, NBS' process does. Although the parties offered conflicting testimony on the alleged hazards of NBS' process, it is undisputed that NBS' system requires the introduction of liquid chemicals (including bleach containing sulfuric acid) from sealed bottles into a

3. Polaroid offered the testimony of Beth Grant, an employee of the Highway Department in its Lexington County Office, that on at least one occasion broken equipment was not repaired or replaced by NBS until the following day.

developer component into which film is fed through a series of rollers. The changing of chemicals takes approximately five to ten minutes and is performed by Highway Department personnel. NBS offered evidence that, when used and handled properly, the chemicals do not leak or spill in quantity.

Polaroid's system works in approximately the same manner as the familiar system offered for sale directly to consumers, i.e., the developing process is accomplished in the film component, which when peeled apart after the requisite time reveals the photograph. The gel chemical containing portion of the film is discarded.

d. Polaroid's system has only one component, making it lighter, smaller and more portable than NBS'. Polaroid's system consists of a camera and weighs 55 pounds. NBS' system contains a camera and a developer and weighs 140 pounds. Both systems require a laminator to make finished licenses.

e. Polaroid's system can deliver licenses in about two and one-half minutes while NBS' takes at least five minutes. Polaroid's system also needs no warm-up time other than five minutes for the laminator, while NBS' takes approximately twenty minutes. NBS does not dispute that Polaroid's system is faster than its own. It argues that the Request For Proposals only requires license production in five minutes or less, which it meets. Polaroid, however, offers a study performed by an industrial engineer at its

request which purports to show that NBS' system delivers licenses in an average of 5 minutes, 15 to 53 seconds.

f. Polaroid contends that the licenses produced by it are more secure than NBS' licenses.⁴ Polaroid's personnel testified that its use of a camera number plus its lip seal method of laminating a license by chemically fusing the photograph into the plastic rendered its license more resistant to tampering than NBS'. Agent Michael L. Nelson of the Alcoholic Beverage Control Commission stated that, in his opinion, the lip seal lamination and the gold strip lettering of the words "South Carolina" over the birth date area make Polaroid's license more secure from alteration than NBS'.

NBS, on the other hand, offered evidence that its license was safer from counterfeiting (as distinguished from alteration) than Polaroid's because Polaroid's film, cameras, and plates (or usable substitutes) could be purchased over the counter. In contrast, NBS' equipment is for sale only to its government users.

Polaroid also claims that it unfairly received point deductions because it requested the State to perform an

4. The Request For Proposals required the license to be laminated in "such a manner that when the laminate is removed, the license itself shall be destroyed to the extent that such removal is evident to the naked eye." (Record, p. 71). Further the license was required to incorporate special features so that authenticity and integrity could be verified without special equipment or lengthy examination. (Record, p. 72)

inventory of supplies once a year and because it required the State to assist Polaroid in moving back-up equipment.

As part of its proposal, Polaroid asked the State to help it conduct inventories of film supplies on hand once a year. Polaroid claims that this inventory will take only five to ten minutes per year of one employee of each location plus some time for one central person to collect all the results and forward them to Polaroid. Polaroid asserts that this five to ten minutes per year should have been balanced against the five to ten minutes per week for chemical changing which is required by NBS' present system but not Polaroid's.

Polaroid, unlike NBS, also indicated that the State would be required to assist it in moving back-up equipment in case of breakdown. Polaroid contends that because its system is more reliable than NBS', this request is not unreasonable. Polaroid offered evidence that NBS' maintenance and breakdown problems are overwhelmingly with the developer rather than the camera component. Polaroid's system has no developer.

Polaroid makes a similar argument concerning the large deductions it received in the Maintenance and Personnel categories for the absence of in-state employees assigned to the contract. NBS offered evidence that it has six full time employees in South Carolina, five of whom travel the state making service and repair calls. In contrast, Polaroid offered only a toll free telephone number in its

proposal as a contact in case of breakdown. Polaroid did offer the name of an out-of-state individual as overall manager of the project. (Record, p. 138). At the hearing Polaroid presented evidence that it would handle breakdowns by shipping backup equipment by UPS or similar services within two hours of a breakdown.

In addition to arguing the merits of its own proposal, Polaroid argues that NBS' proposal is not responsive because the specifications require, "All equipment must be U.L. listed or certified to meet Underwriters Laboratory standards." (Record, p. 56). Polaroid states that its equipment will be U.L. listed. NBS' equipment is not listed and it states only that its equipment was "purchased, designed, and built to meet the requirements" of Underwriters' Laboratory. Polaroid contends that NBS' certification is insufficient to meet the specification because it is signed by Jack L. Craven, Vice-President for NBS. William W. Wilson, an independent certification consultant formerly employed by Polaroid, testified that, in his opinion based on industry standards, the certification requirement of the Request For Proposals can be met only by third party certification by a qualified professional such as an engineer and that a statement from NBS' vice-president is inadequate.

William Doug Horton, the Procurement Specialist responsible for the Request For Proposals at issue, testified the Underwriters Laboratory certification

requirement evolved through a series of amendments designed so that both offerers could meet it, thus insuring competition. Mr. Horton testified that the Request requires only that someone certify that the equipment offered meets U. L. standards. In his opinion, NBS met the certification requirement.

Finally, Polaroid claims that NBS is not a responsible bidder because NBS' parent company, National Business Systems, Inc., is allegedly experiencing legal and financial difficulty. Polaroid offered as evidence a Securities and Exchange Commission Form Q-10 report which indicates that National Business Systems' "ability to continue operations as a going concern and to realize its assets and discharge its liabilities in the normal course of business is dependent upon the successful completion of current discussions with its lenders regarding its bank and other debt and its ability to reorganize its capital structure" (Pltf.'s Ex. 1, p. 8). NBS does not dispute the SEC information, but argues that it has the financial capability to perform the contract and that the requirement of a \$100,000 bond adequately protects the State. (Record, p. 75). Although it produced only a \$25,000 bond at the hearing before the Panel (apparently as a result of a mistake), NBS offered testimony that it was prepared to post the required \$100,000 bond. Mr. Horton testified that posting the full bond is a condition precedent to NBS' obtaining the contract.

CONCLUSIONS OF LAW

The bidding device used to solicit bidders on the contract in question was a Request For Proposals ("RFP") as set forth in S.C. Code Ann. 11-35-1530 (1976). A RFP differs from an invitation for competitive sealed bids in that a RFP is evaluated using a number of criteria only one of which is price.

Although a RFP by its nature requires some subjective evaluation, the Procurement Code sets some boundaries on the evaluator's exercise of judgment by providing:

The request for proposals shall state the relative importance of price and of each other evaluation factor

* * *

No other factors or criteria shall be used in evaluation and there shall be adherence to any weightings specified for each factor in the request for proposals.

11-35-1530(5), (7) (1976 and 1987 Cum. Supp.) As with any duty or act performed pursuant to the Procurement Code, the evaluation of proposals must be done in good faith with observance of reasonable standards of fair dealing. 11-35-30. Therefore, each proposal must receive fair and equal consideration by the State.

In this case, the RFP set forth six factors, with numerous subcategories, against which each proposal was to be evaluated. Polaroid raises questions about the grading

in five of these categories.⁵ The Panel finds that Polaroid's proposal was not fairly and equally considered in at least some of the categories.⁶

In the category "Compliance With Technical Specifications," which is second only to cost in importance, Polaroid is unquestionably superior to NBS in a number of subcategories. NBS does not dispute that Polaroid's system consists of only one component, weighs about one-third as much as NBS', requires only five minutes warm-up time, and delivers licenses twice as fast as NBS'. Yet in reviewing the scores assigned by the evaluators and in listening to their testimony, it is apparent to the Panel that Polaroid's superiority in these areas was not considered by the evaluators or, if considered, was not credited. For example, both Mr. McCarty and Mr. Easler were apparently unaware that Polaroid delivered licenses twice as fast as NBS. (Tr., p. 55 line 4 - p. 56 line 5; p. 88, lines 16-23). Both assigned NBS a perfect score.

5. Because both Polaroid and NBS received the maximum number of points in the category "Camera System Set Up and Operational By October 1", this category is not in issue.

6. The parties urged various standards of review on the Panel. MMO argues that the Panel should not reverse the findings of the evaluators absent arbitrary or capricious conduct. The Highway Department argues that the Panel should not substitute its judgment for the findings of the evaluators. Polaroid contends that the hearing before the Panel is de novo and, therefore, the Panel is free to make any findings it chooses. The Panel is not limited as MMO and the Highway Department suggest. S. C. Ann. 11-35-4410(5)(1976). However, that is irrelevant in this case as the Panel finds the error to be that the evaluators failed to consider at all certain aspects of Polaroid's proposal.

Similarly, in the Organization/Personnel Qualifications category, ranked fifth in importance, under subcategories 3 and 4 entitled, "Emphasis which management places on this effort" and "Identity and Qualification of Staff committed to this contract", the evaluators subtracted from one to three points for Polaroid's not having in-state employees and naming only one person as responsible for the account. NBS has six in-state employees and received a perfect score from the evaluators for the entire category.

However, the first two subcategories of this factor are "Recent Relevant Experience" and "Prior Work Which Allows the Contractor to Be Abreast of Current Developments." Although it is plainly stated in Polaroid's proposal (Record, p. 136), at least two of the evaluators testified that they were unaware that Polaroid currently provides drivers' licenses to 29 states (and the District of Columbia) and provides ID's to NASA, the FBI, CIA, National Security Agency, the Secret Service, the Pentagon, both Houses of Congress and the IRS. (Tr., p. 60, lines 1-22 (McCarty; p. 88, lines 16-23 (Easler)). Apparently NBS currently serves only a third as many states including South Carolina. It is obvious from the testimony that this potentially favorable information set forth in Polaroid's proposal was not considered by the evaluators.

A final example is in the category "Quality of License." Evaluator Easler testified that at the time he evaluated the proposals, he believed that NBS' license had

larger letters and numerals. Mr. Easler admitted at the hearing before the Panel that he now believes that Polaroid's lettering is equal or larger in size than NBS'.

In summary, the Panel concludes that Polaroid's proposal did not receive adequate consideration from the evaluators. For that reason, the Panel finds that the contract in question should be rebid.

To aid MMO in rebidding the contract, the Panel makes these further findings. Polaroid claims that it should have received more credit for having the lowest cost because cost is the most important factor. Cost in this case was evaluated using a standard mathematical formula. The Panel can find nothing unfair or unreasonable in crediting each proposal for its price in this objective way and rejects Polaroid's argument in this regard.

The Panel also rejects Polaroid's argument that NBS' proposal is not responsive to the Underwriter's Laboratory certification. MMO commendably drafted the RFP in this case to encourage competition. Mr. Horton testified that NBS met the intent of the U. L. certification requirement by submitting the certification of its vice-president. The Panel accepts Mr. Horton's interpretation of the RFP.

The Panel also upholds MMO's determination that NBS is a responsible bidder. The Panel finds that the requirement of a \$100,000 performance bond adequately protects the State in this case. In this regard, the Panel notes that it is

proper for the State to consider NBS' performance under past contracts to determine responsibility.⁷

Finally the Panel directs the parties' attention to category D(5), which calls for an evaluation based on a "camera system demonstration." Apparently no such demonstration was performed for the evaluators although at least one of them testified that he could not recall whether he had ever seen Polaroid's camera in operation. (Tr., p. 56, lines 4-5 (McCarty)). In situations such as this where there are a minimal number of offerers one of which has had the contract being let for a number of years, the Panel believes that it would be beneficial to the State and fairer to the offerers if the evaluators had the opportunity to view the operation of both systems.

It is therefore ordered that the contract in question be rebid, that MMO shall have the authority to amend or revise the RFP in any manner it deems necessary and that each offerer be allowed to submit its best and final proposal. The proposals submitted shall be carefully

7. S. C. Code Ann. 11-35-1810 requires the State to determine the responsibility of a bidder prior to the contract being let. Responsibility is determined with reference to the following factors: the financial and physical ability of the bidder to meet all contractual requirements, past performance, past record of integrity, legal qualification to contract with the State, and bidder's cooperation in supplying all information requested concerning responsibility. Reg. 19-445.2125.

examined and all aspects of each proposal shall be considered. The September 12, 1988, order of the Chief Procurement Officer is hereby reversed.

IT IS SO ORDERED.

South Carolina Procurement
Review Panel

By: 
Hugh K. Leatherman, Sr.
Chairman

11-7-88, 1988
Columbia, South Carolina