

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
CASE NO. 1988-9

IN RE: )  
 )  
PROTEST OF DAVIS-GARVIN AGENCY, INC. ) O R D E R  
\_\_\_\_\_ )

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on August 31, 1988, on the protest by Davis-Garvin Agency, Inc., ("Davis-Garvin") of the August 1, 1988 Order of the Chief Procurement Officer ("CPO"). Present at the hearing before the Panel were the Division of General Services, represented by Helen Zeigler, Esq., The Thomas C. Brown Agency ("Brown"), represented by Helen T. McFadden, Esq., and Robert E. Kneece, Jr., Esq., and the protestant Davis-Garvin, represented by James B. Richardson, Esq..

#### FINDINGS OF FACT

##### A. Procedural History

This is the second case<sup>1</sup> to arise from the solicitation of bids to provide property reinsurance to the South Carolina Insurance Reserve Fund. Four bids were submitted in response to the solicitation - one by the Thomas C. Brown Agency and three by Davis-Garvin. After the bid opening, General Services issued a Notice of Intent to Award the contract to Brown as the lowest responsive and responsible bidder. Davis-Garvin protested and the Panel

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1. This case is a companion to Case No. 1988-7 In Re: Protest of Davis-Garvin Agency, Inc. and reference is made to the June 24, 1988 Order of the Panel therein for additional background information.

found Brown's bid nonresponsive on the grounds that it lacked a cut through endorsement adequate to satisfy bid specifications. The Panel made no findings on the bids submitted by Davis-Garvin but instead remanded the matter back to General Services for further action. General Services examined all three Davis-Garvin bids, declared each of them nonresponsive and cancelled the bid solicitation. The Budget and Control Board subsequently awarded the contract to Brown.<sup>2</sup>

Davis-Garvin protested General Services' declaring its three bids nonresponsive. The CPO held a hearing on July 21, 1988, and issued his order on August 1, 1988 affirming the decision of General Services. This case is Davis-Garvin's appeal of that order. At the hearing before the Panel, Davis-Garvin made arguments on bids #2 and #3 but abandoned its appeal on bid #1.

#### B. Facts

General Services argues that the two Davis-Garvin bids are deficient in a number of areas. Its main contention is that the bids are nonresponsive because the companies participating in the bids failed to verify the extent of their participation and failed to indicate mutual agreement to the required joint and several endorsements.

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2. After it cancelled the bid solicitation, General Services, with the approval of the Budget & Control Board, negotiated a contract with Brown outside the confines of the Consolidated Procurement Code. The negotiations were conducted pursuant to a 1982 exemption granted by the Budget & Control Board under the authority given it in S.C. Code Ann. § 11-35-710(1976).

General Services points to the language of the joint and several endorsement required by the bid specifications, which contemplates that the companies agreeing joint and several liability be listed or somehow referenced in the endorsement(Record, p. 195) and to the bid specifications, which require:

All companies participating on a direct basis MUST be listed and the extent of their involvement MUST be indicated.

Verification of participation MUST be provided by an officer of the company.

The list of participating companies and their extent of involvement and their verification must be submitted with the bid or the bid will be rejected.

(Record, p. 170).

Davis-Garvin contends that each of its bids must be considered as a whole package rather than as a series of separate agreements. When viewed this way, Davis-Garvin argues, the bids are in compliance with the solicitation requirements.

To facilitate the understanding of the positions of the parties, the relevant portions of each bid are reproduced below. The bids are considered separately and in order.

#### BID #2

Bid #2 (Record, pp. 161-196) is a layered bid which shows International Insurance Company and Fireman's Fund Insurance Companies as unequal co-participants on the first \$30 Million of insurance and Fireman's Fund as the sole

insurer of the remaining \$715 Million layer. Bid #2 is set up as follows:

PAGE 1 OF 22 PAGES

STATE OF SOUTH CAROLINA <b>BID INVITATION</b>		MAIL ROOM TO: MATERIALS MANAGEMENT OFFICE P.O. BOX 10012 COLUMBIA, SOUTH CAROLINA 29201
SEALING BIDS WILL BE RECEIVED UNTIL 3:00 P.M. MAY 3, 1988		MAIL DELIVERED MON-FRI EXCEPT MAIL BIDS TO: MATERIALS MANAGEMENT OFFICE 1201 MAIN STREET - STATE 300 CAPITOL CENTER - STAT BUILDING COLUMBIA, SOUTH CAROLINA 29201
LOCAL TIME. TIME POLICIES OPENED.		PH. (803) 737-0000 SEE BIDDING INSTRUCTIONS TO BE FURNISHED ON GOVERNMENT 5-793-1107200-05/03/88-2
BID TITLE: PROVIDE REINSURANCE FOR PROPERTY POLICIES ISSUED TO VARIOUS GOVERNMENTAL ENTITIES IN S.C. BY THE INSURANCE RESERVE FUND		
MAILING DATE: MARCH 3, 1988	DIRECT CONTRACT TO: TOM DELDACH, P.S.	LOT NO. 00909
PLACES V. SALTER, EPPS, S.P.S. PLANT PRODUCTION OFFICES		
VENDOR NAME Davis-Garvin Agency, Inc.		REASON FOR NO BIDS
VENDOR MAILING ADDRESS P.O. Box 21627		REASON FOR NO BIDS
CITY, STATE, ZIP Columbia, South Carolina 29221		REASON FOR NO BIDS
AREA CODE TELEPHONE NUMBER 777-0000		REASON FOR NO BIDS
907 TELEPHONE NUMBER		REASON FOR NO BIDS
I certify that the bid is made without any understanding, agreement, or collusion with any competitor, firm, or person submitting a bid for the same material, supplies, or equipment, and is in all respects the true and correct statement of value. I agree to abide by all conditions of the bid and certify that I am authorized to sign the bid for the owner.		THIS BIDDING IS ATTACHED, WITH LETTERS, IN THE AMOUNT OF: \$ 1
		<i>Hinton G. Davis</i> Hinton G. Davis, President AUTHENTIC SIGNATURE (TYPE NAME)

Figure 1.  
(Record, p. 161)

Davis-Garvin contends that the signature of Hinton G. Davis on the above cover sheet is a blanket authorization of all the information and quotations contained in Bid #2. According to the testimony of Mr. Carl Reh, Marketing Manager for Davis-Garvin, Mr. Davis, on behalf of Davis-Garvin, has the authority to bind both International Insurance Company and Fireman's Fund Insurance Companies pursuant to a standing agency agreement. Mr. Reh admitted that Davis would not have the authority to bind Fireman's Fund for an amount as large as the bid in question absent specific permission. (Davis-Garvin makes the same argument with regard to bid #3 and its cover sheet).

Brown and General Services contend that all Mr. Davis' signature signifies is Davis-Garvin's agreement to the collusion and fraud statement to the left of the signature.

The statement that the signer is authorized to sign for the bidder applies only to Davis-Garvin because the insurance companies are not considered "bidders" under the solicitation.

The next relevant portion of Bid #2 is what Davis-Garvin has captioned Bidding Schedule #1. (There is no bidding schedule #2).

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BIDDING SCHEDULE # 1

Bidding Schedule

Non-personal service to provide reinsurance on all property insurance (Fire, Inland Marine, Data Processing, and Business Interruption) excluding boiler and machinery, issued by the Insurance Reserve Fund, including engineering services.

Reinsurance for property losses (including Business Interruption) greater than \$500,000 per risk per occurrence, \$1,000,000 per location per occurrence, and \$5,000,000 per occurrence up to a maximum of \$743,000,000 per occurrence.

The following reinsurance rate is to be fixed for the term of the contract (60 months).

The bid MUST be firm for a period of 90 days from the date of the bid opening.

The State reserves the right to select either the option of paying the total annual premium or quarterly installment, whichever is deemed to be in the best interest of the State.

A "cut through" endorsement MUST be included with bids in which a single company is submitting the bid and purchasing "re-reinsurance". A "step down" endorsement MUST be included for layered bids. A "joint and several" endorsement MUST be included for pro-rata bids. If the appropriate endorsement is not submitted the bid will be rejected.

All companies participating on a direct basis MUST be listed and their extent of involvement MUST be indicated.

Verification of participation MUST be provided by an officer of the company.

The list of the participating companies and their extent of involvement and their verification MUST be submitted with the bid or the bid will be rejected.

Reinsurance Company(ies) SEE ATTACHED  
(attach additional pages if needed)

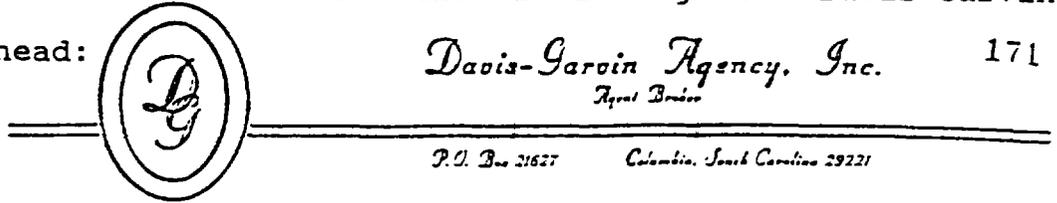
Signature of Officer of Reinsurance Company(ies) SEE ATTACHED  
(attach additional pages if needed)

Exposure eff. 2-15-68	X	Reinsurance Rate/\$100	=	Annual Prem.
\$11,128,881,090		.0295		\$3,283,020.00
7-1-68/7-1-69		Reinsurance Premium if paid annually		\$3,283,020.00
7-1-68/7-1-69		Reinsurance Premium if paid in four quarterly installments		\$ 820,755.00

Figure 2.  
(Record, p. 170)

For name of reinsurance company and signature of officer of company on the above, Davis-Garvin has "SEE

ATTACHED." Attached is the following on Davis-Garvin letterhead: 171



PARTICIPATING COMPANIES

- I REINSURANCE PRIMARY LAYER - \$30,000,000.  
International Insurance Company and Fireman's Fund Insurance Companies will share this layer on a pro-rata basis of 36 2/3 and 33 1/3 respectively.  
Joint and Several Endorsements and signed Verification of Participation included.
- II REINSURANCE EXCESS LAYER - \$715,000,000. EXCESS OF \$30,000,000.  
Fireman's Fund Insurance Companies will provide this entire layer.  
Scap Down Endorsement and signed Verification of Participation included.

(Record, p. 171)  
Figure 3.

There are no signatures on this page. However, attached to it is the following "Verification of Participation."

VERIFICATION OF PARTICIPATION

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Bidding Schedule

Non-personal service to provide reinsurance on all property (Insurance Office, Inland Marine, Data Processing, and Business Interruption) including boiler and machinery, issued by the Insurance Reserve Fund, including engineering services.

Reinsurance for property losses (including Business Interruption) greater than \$500,000 per risk per occurrence, \$1,000,000 per location per occurrence, and \$2,000,000 per occurrence up to a maximum of \$745,000,000 per occurrence.

The following reinsurance rate is to be fixed for the term of the contract (30 months).

The bid MUST be firm for a period of 90 days from the date of the bid opening.

The State reserves the right to select either the option of paying the total annual premium or quarterly installment, whichever is deemed to be in the best interest of the State.

A "cut through" endorsement MUST be included with bids in which a single company is submitting the bid and purchasing "re-reinsurance". A "scap down" endorsement MUST be included for layered bids. A "joint and several" endorsement MUST be included for pro-rata bids. If the appropriate endorsement is not submitted the bid will be rejected.

All companies participating on a direct basis MUST be listed and their extent of involvement MUST be indicated.

Verification of participation MUST be provided by an officer of the company.

The list of the participating companies and their extent of involvement and their verification MUST be submitted with the bid or the bid will be rejected. \$30,000,000. Primary Layer

Reinsurance Company(ies) INTERNATIONAL INSURANCE COMPANY  
(attach additional pages if needed) 2/3 Participation

Signature of Officer of Reinsurance Company(ies) [Signature]  
(attach additional pages if needed)

Expense off. 2-13-48 X Reinsurance Rate/3100 = Annual Prem

\$11,128,381,070	.0179	\$1,992,070.00
7-1-48/7-1-49 Reinsurance Premium if paid annually		1,992,070.00
7-1-48/7-1-49 Reinsurance Premium if paid in four quarterly installments .004788		532,950.00

\*SEE ATTACHED JOINT AND SEVERAL ENDORSEMENT  
\*\*LAYER PRICING ONLY - SEE BIDDING SCHEDULE # 1

Figure 4.

This document clearly indicates that International Insurance Company, by James A. Dixon, its vice-president, has bound itself to 2/3 participation in the \$30,000,000 primary layer. General Services agrees that the above verification meets the bid specifications as to the requirement of verifying extent of participation.

The verification also indicates "SEE ATTACHED JOINT AND SEVERAL ENDORSEMENT." Attached as the next page is the following:

Exhibit IX

JOINT AND SEVERAL ENDORSEMENT

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It is agreed that in the event the Company issuing this policy shall become insolvent or financially unable to meet its obligations with respect to the property insurance as reinsured under this policy, the listed participating reinsuring Companies shall assume (pro rata according to their shares) the liability of such Company as reinsured under this policy, and shall pay any incurred losses directly to the insured on the basis of the liability of such Company without diminution because of its insolvency or financial inability to meet its obligations, provided the insured shall execute and deliver agreements, assignments or evidence of subrogation satisfactory to the above named Companies respecting any payment or assumption of liability made by them.

By virtue of an agreement between the listed participating reinsuring Companies, it is provided that if any shall become insolvent or financially unable to meet its obligations with respect to the property insurance as reinsured under this policy, the remaining Companies shall assume the liability of such Company as reinsured under this policy and shall pay any unpaid incurred losses directly to the insured, provided the insured shall execute and deliver agreements, assignments or evidence of subrogation satisfactory to such remaining Companies respecting any payment or assumption of liability made by them.

*Figure 5.*

(Record, p. 173)

This appears to the Panel to be a photocopy of a portion of Exhibit IX to the bid solicitation. Missing from this endorsement, however, is the third paragraph required by the specifications. That paragraph concerns the relationship of the insurance companies to each other in the

event payment is made under the joint and several liability agreement.<sup>3</sup>

General Services contends that International's joint and several endorsement is deficient because it is missing the third paragraph and because there is no indication with whom International is agreeing to be jointly and severally bound. The endorsement itself refers to "listed participating Companies" and "above named Companies" but no companies, including International, are listed. The endorsement is also unsigned.

Davis-Garvin argues that the missing paragraph affects only the other insurers and not the State and, therefore, its absence is waivable. Davis-Garvin further contends that it is clear from the entire bid #2 who the participating companies are.

Like International, Fireman's Fund also submitted a "Verification of Participation" signed by an officer of the company. General Services contends that, unlike International, however, Fireman's Fund did not verify the extent of its participation. Fireman's verification is as follows:

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3. The missing paragraph provides, "Any loss payment made by or on behalf of the above named Companies, or any of them, under this endorsement shall pro tanto relieve them of liability to the insurer and shall constitute a performance of the reinsurance obligation to the insurer."

Bidding Schedule

Non-personal services to provide reinsurance on all property (excluding Fire, Inland Marine, Data Processing, and Business Interruption) including boiler and machinery, issued by the Insurance Reserve Fund, including engineering services.

Reinsurance for property losses (including Business Interruption) greater than \$300,000 per risk per occurrence, \$1,000,000 per location per occurrence, and \$1,000,000 per occurrence up to a maximum of \$75,000,000 per occurrence.

The following reinsurance rate is to be fixed for the term of the contract (60 months).

The bid MUST be firm for a period of 90 days from the date of the bid opening.

The State reserves the right to select either the option of paying the total annual premium or quarterly installment, whichever is deemed to be in the best interest of the State.

A "cut through" endorsement MUST be included with bids in which a single company is submitting the bid and purchasing "co-reinsurance". A "step down" endorsement MUST be included for Layered Wds. A "Joint and Several" endorsement MUST be included for "FIREMAN'S FUND". If the appropriate endorsement is not submitted the bid will be rejected.

All companies participating on a direct basis MUST be listed and their extent of involvement MUST be indicated.

Verification of participation MUST be provided by an officer of the company.

The list of the participating companies and their extent of involvement and their verification MUST be submitted with the bid or the bid will be rejected.

Insurance Company(ies) FIREMAN'S FUND INSURANCE COMPANIES (attach additional pages if necessary)

Signature of Officer of Insurance Company(ies) [Handwritten signature: Robert D. Biddle, President, Fireman's Fund Insurance Company]

Exposure eff. 7-13-88 X Reinsurance Rate/\$100 = Annual Prem.

\$11,128,881,000

7-1-88/7-1-89 Reinsurance Premium if paid annually

7-1-88/7-1-89 Reinsurance Premium if paid in four quarterly installments

\* SEE ATTACHED JOINT AND SEVERAL ENDORSEMENT AND STEP DOWN ENDORSEMENT \*\*SEE BIDDING SCHEDULE #1 FOR PRICING

MAY - 2 1988

Figure 6. (Record, p. 179)

General Services points to the absence of any information (including pricing) which indicates the extent to which Fireman's Fund agrees to be bound.

Davis-Garvin again argues that the bid must be taken as a whole: Fireman's Fund's verification references Bidding Schedule #1, which references the information on Davis-Garvin letterhead. Davis-Garvin contends that following the trail of "see attacheds" yields the conclusion that Fireman's Fund has bound itself to provide 1/3 of the \$30 Million first layer of insurance and the entire \$715 Million second layer.

Finally in bid #2 is Fireman's joint and several endorsement in the form of a letter from Gerald A. Dupre, Excess and Special Risk Property Manager.

**FIREMAN'S FUND**  
REINSURANCE CONTRACTS  
Atlanta Inland Property  
202 Peachtree Center North  
PO Box 60400  
Atlanta, GA 30368  
Local 763-0400  
800 448-2626  
AL, FL, NC, SC 1-800-841-0244  
Pennsylvania 1-800-299-7971  
Texas 800-952-0400

150

David A. Dupre, Jr.  
Excess Property Manager

MAY 8, 1988

ATTN: HINTON DAVIS  
DAVIS-GARVIN AGENCY  
91 BERMANDINA COURT  
COLUMBIA, SOUTH CAROLINA 29212

RE: STATE OF SOUTH CAROLINA REINSURANCE FUND

DEAR HINTON:

THIS LETTER IS TO SERVE AS CONFIRMATION THAT THE FIREMAN'S FUND INSURANCE COMPANIES ARE AUTHORIZING QUOTATIONS FOR THE ABOVE DESIGNATED BID PROSPECT AND WILL INCLUDE THE FOLLOWING ENDORSEMENTS IN OUR REINSURANCE CONTRACT, WORDED AS FOLLOWS:

**JOINT AND SEVERAL ENDORSEMENT**

IT IS AGREED THAT IN THE EVENT THE COMPANY ISSUING THIS POLICY SHALL BECOME INSOLVENT OR FINANCIALLY UNABLE TO MEET ITS OBLIGATIONS WITH RESPECT TO THE PROPERTY INSURANCE AS REINSURED UNDER THIS POLICY, THE LISTED PARTICIPATING REINSURING COMPANIES SHALL ASSUME (PRO RATA ACCORDING TO THEIR SHARES) THE LIABILITY OF SUCH COMPANY AS REINSURED UNDER THIS POLICY, AND SHALL PAY ANY INCURRED LOSSES DIRECTLY TO THE INSURED ON THE BASIS OF THE LIABILITY OF SUCH COMPANY WITHOUT THE DEDUCTION BECAUSE OF ITS INSOLVENCY OR FINANCIAL INABILITY TO MEET ITS OBLIGATIONS, PROVIDED THE INSURED SHALL EXECUTE AND DELIVER AGREEMENTS, ASSIGNMENTS OR EVIDENCE OF SUBROGATION SATISFACTORY TO THE ABOVE NAMED COMPANIES RESPECTING ANY PAYMENT OR ASSUMPTION OF LIABILITY MADE BY THEM.

BY VIRTUE OF AN AGREEMENT BETWEEN THE LISTED PARTICIPATING REINSURING COMPANIES, IT IS PROVIDED THAT IF ANY SHALL BECOME INSOLVENT OR FINANCIALLY UNABLE TO MEET ITS OBLIGATIONS WITH RESPECT TO THE PROPERTY INSURANCE AS REINSURED UNDER THIS POLICY, THE REMAINING COMPANIES SHALL ASSUME THE LIABILITY OF SUCH COMPANY AS REINSURED UNDER THIS POLICY AND SHALL PAY ANY UNPAID INCURRED LOSSES DIRECTLY TO THE INSURED, PROVIDED THE INSURED SHALL EXECUTE AND DELIVER AGREEMENTS, ASSIGNMENTS, ASSIGNMENTS OR EVIDENCE OF SUBROGATION SATISFACTORY TO SUCH REMAINING COMPANIES RESPECTING ANY PAYMENT OR ASSUMPTION OF LIABILITY MADE BY THEM.

ANY LOSS PAYMENT MADE BY JR ON BEHALF OF THE ABOVE NAMED COMPANIES, OR ANY OF THEM, UNDER THIS ENDORSEMENT SHALL PRO TANTO RELIEVE THEM OF LIABILITY TO THE INSURER AND SHALL CONSTITUTE A PERFORMANCE OF THE REINSURANCE OBLIGATION TO THE INSURER.

**CUT THROUGH ENDORSEMENT**

IN RESPECT OF THE RISKS REINSURED HEREUNDER THE REINSURER AND THE CEDING COMPANY HEREBY AGREE THAT IN THE EVENT THAT THE CEDING COMPANY SHALL GO INTO THE HANDS OF A RECEIVER, ASSIGNEE, TRUSTEE OR SUCCESSOR FOR THE PURPOSE OF LIQUIDATION, OR ON ACCOUNT OF INSOLVENCY AND IF WRITTEN NOTICE BE GIVEN TO THE REINSURER OF SUCH AN EVENT THEN THE REINSURER IN LIEU OF PAYMENT TO THE COMPANY SHALL PAY THE ASSURED THE REINSURER'S SHARE OF ANY LOSS OR LOSSES INCURRED BY THE CEDING COMPANY WHICH ARE WITHIN THE LIMIT, TERMS AND CONDITIONS OF THIS POLICY. PROVIDED THAT THE LIABILITY OF THE REINSURER TO THE ASSURED SHALL BE REDUCED BY THE AMOUNT OF PAYMENTS MADE BY THE REINSURER ON ACCOUNT OF THE SAME LOSS OR LOSSES TO THE COMPANY AND PROVIDED FURTHER THAT THE REINSURER SHALL BE ENTITLED TO DEDUCT FROM THE AMOUNT OF LOSS OR LOSSES ANY PREMIUMS OR OTHER MONIES DUE TO THE REINSURER UNDER THIS POLICY. IT IS FULLY UNDERSTOOD AND AGREED BY THE CEDING COMPANY THAT IT IS A CONDITION PRECEDENT TO THIS POLICY THAT ANY PAYMENTS MADE DIRECTLY TO THE ASSURED SHALL ABSOLVE THE REINSURER FROM MAKING ANY PAYMENTS TO THE COMPANY OR ITS RECEIVER, ASSIGNEE, TRUSTEE OR SUCCESSOR AND SHALL CONSTITUTE A FULL DISCHARGE AND RELEASE OF THE REINSURER FROM ANY AND ALL FURTHER LIABILITY IN CONNECTION THEREWITH.

**STEP-DOWN ENDORSEMENT**

NOTWITHSTANDING ANYTHING TO THE CONTRARY, THIS REINSURANCE IS EXCESS OVER PRIMARY REINSURANCE AND CERTAIN SELF-INSURED RETENTION. IF ANY OF THE LIMITS OF LIABILITY OF THE PRIMARY OR UNDERLYING REINSURANCE ARE EXHAUSTED, EXHAUSTED, OR NOT IN FORCE, THIS REINSURANCE SHALL THEN STEP DOWN AND ATTACH TO COVER SUCH LOSS WITHOUT GAP OR INTERRUPTION AGAINST BOTH THE PERILS AND/OR PROPERTY INSURED UNDER THIS AGREEMENT EXCESS OVER THE SELF-INSURED RETENTIONS.

I AWAIT YOUR ADVICES. THANK YOU AGAIN FOR GIVING FIREMAN'S FUND THE OPPORTUNITY TO WORK ON THIS ACCOUNT FOR YOU.

SINCERELY,

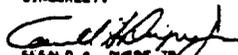
  
DAVID A. DUPRE, JR.  
EXCESS AND SPECIAL RISK  
PROPERTY MANAGER

Figure 7.

(Record, pp. 180-181)

General Services found Fireman's joint and several endorsement defective because there is no indication who

Fireman's is agreeing to be bound with. Davis-Garvin argues the identity of the participating companies is obvious from the entire bid.

To summarize, General Services asserts that bid #2 is nonresponsive because Fireman's Fund has not verified the extent of its participation, International's joint and several endorsement is not signed and is missing a required paragraph, and neither joint and several endorsement names the companies who are agreeing to answer for the obligations of the other. General Services also argues that it is not possible to tell who the primary company is<sup>4</sup> or what the exact amount of the premium is.<sup>5</sup>

#### Bid #3

Bid #3 (Record, pp. 196-234) is structured essentially the same as bid #2 except that the first \$30 Million layer is shared equally by International, Fireman's Fund and The Travelers Insurance Company.<sup>6</sup>

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4. Amendment to Solicitation No. 1 states, "The primary company will be responsible for the payment of all reinsurance claims presented by the State of South Carolina." (Record, p. 194)

5. Mr. John Trussell, Manager of the Property & Casualty Department for the Insurance Reserve Fund, calculated the various ways one could figure the premium bid in bid #2. The main problem is whether the amount listed on International's Verification of Participation should be added or subtracted from the amount listed on Bidding Schedule #1.

6. Mr. Trussell also testified as to the confusion in bid #3 whether The Travelers Insurance Company or The Travelers Insurance Companies was the participating company. The Panel considers this harmless error which does not, by itself, render bid #3 nonresponsive.

Bidding Schedule #1 for bid #3 and its attachment are reproduced as follows:

BIDDING SCHEDULE # 1

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Bidding Schedule

Non-personal services to provide reinsurance on all property insurance (Fire, Inland Marine, Data Processing, and Business Interruption) excluding boiler and machinery, issued by the Insurance Reserve Fund, including engineering services.

Reinsurance for property losses (including Business Interruption) greater than \$300,000 per risk per occurrence, \$1,000,000 per location per occurrence, and \$5,000,000 per occurrence up to a maximum of \$75,000,000 per occurrence.

The following reinsurance rate is to be fixed for the term of the contract (60 months).

The bid MUST be firm for a period of 90 days from the date of the bid opening.

The State reserves the right to select either the option of paying the total annual premium or quarterly installment, whichever is deemed to be in the best interest of the State.

A "cut through" endorsement MUST be included with bids in which a single company is submitting the bid and purchasing "re-reinsurance". A "step down" endorsement MUST be included for layered bids. A "joint and several" endorsement MUST be included for pro-rata bids. If the appropriate endorsement is not submitted the bid will be rejected.

All companies participating on a direct basis MUST be listed and their extent of involvement MUST be indicated.

Verification of participation MUST be provided by an officer of the company.

The list of the participating companies and their extent of involvement and their verification MUST be submitted with the bid or the bid will be rejected.

Reinsurance Company(ies) SEE ATTACHED  
 (attach additional pages if needed)  
 Signature of Officer of Reinsurance Company(ies) SEE ATTACHED  
 (attach additional pages if needed)

Exposure off. 3-13-68	Reinsurance Rate/\$100	Annual Prem.
\$11,128,881,090	.0295	\$3,283,220.00
7-1-68/7-1-69	Reinsurance Premium if paid annually	\$3,283,220.00
7-1-68/7-1-69	Reinsurance Premium if paid in four quarterly installments	\$ 820,753.00

Figure 8.  
 (Record, p. 206)



P.O. Box 21637      Columbia, South Carolina 29228

PARTICIPATION COMPANIES

I REINSURANCE PRIMARY LAYER - \$30,000,000.

International Insurance Company, The Travelers Insurance Companies and Fireman's Fund Insurance Companies will share this layer on a pro-rata basis of 33 1/3, 33 1/3 and 33 1/3 respectively.

Joint and Several Endorsements and signed Verification of Participation included.

II REINSURANCE EXCESS LAYER - \$715,000,000. EXCESS OF \$30,000,000.

Fireman's Fund Insurance Companies will provide this entire layer.

Step Down Endorsement and signed Verification of Participation included.

Figure 9.  
 (Record, p. 207)

As with bid #2, no signatures appear on the attachment which would indicate that Fireman's or Travelers agrees to the percentage listed for it. International verifies its percentage in its Verification of Participation.

Regarding Fireman's Verification of Participation and joint and several endorsement, General Services finds the same defects in bid #3 as in bid #2.

In addition in Bid #3, General Services questions whether International has even submitted a joint and several endorsement. Although International's verification states, "SEE ATTACHED JOINT AND SEVERAL ENDORSEMENT", there is nothing purporting to be a joint and several endorsement for the next fifteen pages. At that point appears a document identical to that reproduced as Figure 5 herein. There is no reference to International nor is there any signature.

Finally, General Services attacks the Verification of Participation and joint and several endorsement submitted on behalf of Travelers. As with Fireman's, there is no information, including pricing, which indicates the extent to which Travelers agrees to be bound. Davis-Garvin points to the references back to Bidding Schedule #1 and the information on Davis-Garvin letterhead. The Verification of Participation is as follows:

Bidding Schedule

Non-personal services to provide reinsurance on all property insurances (Fire, Inland Marine, Data Processing, and Business Interruption) excluding boiler and machinery, issued by the Insurance Reserve Fund, including engineering services.

Reinsurance for property losses (including Business Interruption) greater than \$300,000 per risk per occurrence, \$1,000,000 per location per occurrence, and \$1,000,000 per occurrence up to a maximum of \$743,000,000 per occurrence.

The following reinsurance rate is to be fixed for the term of the contract (60 months).

The bid MUST be firm for a period of 90 days from the date of the bid opening.

The State reserves the right to select either the option of paying the total annual premium or quarterly installments, whichever is deemed to be in the best interest of the State.

A "cut through" endorsement MUST be included with bids in which a single company is submitting the bid and purchasing "re-reinsurance". A "step down" endorsement MUST be included for layered bids. A "joint and several" endorsement MUST be included for pro-rata bids. ~~If the appropriate endorsement is not submitted the bid will be rejected.~~

All companies participating on a direct basis MUST be listed and their extent of involvement MUST be indicated.

Verification of participation MUST be provided by an officer of the company.

The list of the participating companies and their extent of involvement and their verification MUST be submitted with the bid or the bid will be rejected.

Reinsurance Company(ies) THE TRAVELERS INDEMNITY COMPANY  
(attach additional pages if needed)

Signature of Officer of Reinsurance Company(ies) [Signature]  
(attach additional pages if needed) ASSISTANT SECRETARY

Exposure eff. 7-15-48 X Reinsurance Rate/\$100 = Annual Prem.  
\$11,128,881,090 \_\_\_\_\_ = \_\_\_\_\_

7-1-48/7-1-49 Reinsurance Premium if paid annually \_\_\_\_\_  
7-1-48/7-1-49 Reinsurance Premium if paid in four quarterly installments \_\_\_\_\_

\*SEE ATTACHED JOINT AND SEVERAL ENDORSEMENT  
\*\*SEE BIDDING SCHEDULE # 1

Figure 10.  
(Record, p.233)

Travelers' joint and several endorsement is in the form of a letter to Davis-Garvin from Robert J. Chaffin, Asst. Secretary for Travelers, which states in its entirety, "As regards my quotation for the account of The State of South Carolina Insurance Reserve Fund and representative for the Travelers Indemnity Companies, may this letter serve as our agreement to provide insurance coverages including a joint and serveral [sic] endorsements [sic] as provided in Exhibit IX of the insured's bid specifications." (Record, pg. 234).

Attached is a joint and several endorsement identical to that reproduced as Figure 5 herein. Notwithstanding Mr.

Chaffin's statement that Travelers will agree to be bound as required by Exhibit IX to the bid specifications, the joint and several endorsement provided is missing the required third paragraph. It is also unsigned and does not identify the companies, including Travelers, who agree to be bound.

To summarize, General Services finds bid #3 nonresponsive because neither Fireman's nor Travelers verifies the extent of its participation, Travelers' and International's endorsements are unsigned and missing a required paragraph, no endorsement identifies the companies participating and no primary company can be identified.

#### CONCLUSIONS OF LAW

To be considered responsive, a bid must meet fully all the conditions and requirements set forth in the solicitation documents and any amendments thereto. Conversely, only those criteria set forth in the documents may be used to evaluate bids. S. C. Code Ann. §11-35-1520(7) (1976).

Mr. Trussell testified that the requirements of the bid in this case were in large part fashioned in response to past problems experienced by the Insurance Reserve Fund in soliciting insurance. According to Mr. Trussell, the Fund had four main areas of concern, considering the volume of insurance involved in this case: Financial ability of the insurers; Having one primary company to which all claims could be made; Privity between the State and all levels of insurers up to the total amount of insurance coverage; and

Verification by each insurer of the fact and extent of participation. This last requirement was designed to prevent an agent from listing a company as providing coverage when in fact no coverage exists.

The Panel finds that neither bid of Davis-Garvin meets the requirements concerning privity and verification.

The Verification of Participation of Fireman's in both bids fails to indicate the extent of participation. The reference back to Bidding Schedule #1 is for pricing only and does not clarify the extent of participation. The unsigned statement on Davis-Garvin stationery does shed light on what was intended by Davis-Garvin; it does nothing to bind Fireman's to the State. The statement in Mr. Dupre's letter "authorizing quotations" for the bid solicitation is of no comfort because there is no indication what quotations were authorized. Likewise, the signature of Hinton Davis on the bid cover sheet is not sufficient since it is not apparent from the bid documents what authority, if any, Mr. Davis has to bind Fireman's Fund or any other participating insurance company.

Davis-Garvin argues that there is no space on the Verification of Participation form which would alert it to indicate the extent of Fireman's participation. The Panel finds this argument disingenuous given the perfectly conforming Verification of Participation submitted by Davis-Garvin on behalf of International.

The Verification of Participation submitted on behalf of Travelers in bid #3 suffers the same defects as Fireman's'.

The Panel also finds the joint and several endorsements submitted by International in bid #2 and Travelers in bid #3 to be nonresponsive because they are missing the required third paragraph. In In re Protest of Davis-Garvin (1988-7), the Panel found the wording of the joint and several endorsement in the bid invitation to be mandatory. Davis-Garvin sought to hold its competitor Brown to that standard in the earlier case. Davis-Garvin must live with that same standard in this case.

The Panel additionally finds bids #2 and #3 nonresponsive in that the joint and several endorsements of Fireman's and International in bid #2 and of Fireman's and Travelers in bid #3 fail to indicate who the participating companies are. The purpose of the joint and several endorsement is to have co-participants guarantee that if one or more of them becomes insolvent, the others will step in and assume the obligations of the financially troubled institution. It is no doubt important to the insurers to know whose obligations they are guaranteeing. It is equally important to the State to know this so it can be assured that all participating companies have agreed to joint and several liability. None of the joint and several endorsements mentioned above is sufficient to give the State this assurance.

Finally the Panel finds bid #3 nonresponsive because there is no joint and several endorsement from International. Although International's Verification of Participation states "SEE ATTACHED JOINT AND SEVERAL ENDORSEMENT", there is no endorsement for fifteen pages. The endorsement found at that point does not mention International (or any other company) and is unsigned by anyone. The endorsement is simply a photocopy of the form provided in the bid invitation. The State is not required to guess that this is the endorsement referred to as attached.

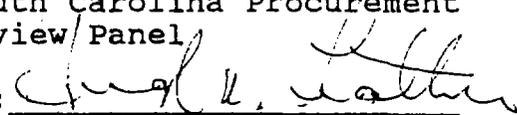
In his testimony, Mr. Trussell noted the importance of having a firm, unambiguous contract in this case. The worst case single loss anticipated under this contract is \$750,000,000, as might occur in the Charleston area in a hurricane or earthquake. With a possible loss of that magnitude, it is essential to the State that there be no room in the contract for coverage to be denied or even litigated. None of the defects discussed above are technical. They each go to the heart of what the State was bargaining for in this case. The bids of Davis-Garvin in no way approach the firm, unambiguous contract contemplated by the bid invitation.

The August 1, 1988 decision of the CPO is affirmed in accordance with the above discussion.

IT IS SO ORDERED.

South Carolina Procurement  
Review Panel

By:

  
Hugh K. Leatherman, Sr.  
Chairman

Sept 14, \_\_\_\_\_, 1988  
Columbia, South Carolina