

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1989-13

IN RE:)
) O R D E R
PROTEST OF NATIONAL COMPUTER SYSTEMS, INC.)
)
_____)

This case came before the South Carolina Procurement Review Panel (the "Panel") for hearing on August 29, 1989, on appeal by Data Recognition Corporation, Inc. ("DRC") of a decision by the Chief Procurement Officer ("CPO") to reaward to National Computer Systems ("NCS") a contract for testing and scoring services for the South Carolina Department of Education's ("DOE") Basic Skills Assessment Program.

Present at the hearing before the Panel were DRC, represented by Dwight Drake, Esq., Carolyn Adams, Esq., and Jack Smith, Esq.; NCS, represented by Elizabeth Crum, Esq., and Clarence Davis, Esq.; DOE, represented by Helen McFadden, Esq., and Garland McWhirter, Esq.; and the Division of General Services, represented by Helen Zeigler, Esquire.

FACTS

On April 7, 1989, the Department of Education, working through General Services' Materials Management Office, issued a Request for Proposals ("RFP") to solicit testing and scoring services for the South Carolina Basic Skills Assessment Program ("BSAP"). The testing of students conducted under BSAP is mandated by S. C. Code Ann. ~~§~~59-30-10 et seq. (1976).

Only two offerors responded to the Request for Proposals - NCS, the current holder of the contract, and DRC. On June 6, 1989, a twelve member evaluation team, headed by Doug Horton, State Procurement Specialist, met to receive copies of each proposal and instructions on how to conduct scoring. According to Mr. Horton, at this initial meeting a member of the evaluation committee noticed in glancing through the proposals that DRC's proposal did not include xerox copies of a test paper set. Those copies were required by section 2.06.03(a)(1) of the Request for Proposals. That section provides:

Committee Consensus Paper Sets: For each grade, the Contractor must develop, according to Department specifications, committee paper sets which will consist of 20 papers each. Additionally, for each grade, the Contractor must reproduce 20 to 30 copies of each of these paper sets (one for each member of the Writing Committee). The Offeror must base cost estimates on 20 committee members at Grade 6 and at Grade 8 and 30 members for the Exit Examination Committee. The Contractor is responsible for insuring that the copies are sufficiently dark so that they can be easily read. As part of their Technical Proposal, the Offeror must submit copies of the paper set that is provided in the RFP Supplement to demonstrate copying quality. (Experience indicates that obtaining legible copies of student handwritten copies is difficult.) The Contractor will be required to meet the Department's quality requirements with respect to reproduction of all paper sets. . . .

(Emphasis in original)¹ (Record, p. 61-62). Instead of copying the paper sets provided by DOE, DRC provided two copies of student paper it had in its possession. One copy was of an unenhanced version of the paper; the other copy was of the paper after it had been enhanced by tracing with a pencil. (Record, pp. 257-259).

Noting that the evaluation process was in its earliest stages, Mr. Horton instructed the evaluation committee to go ahead and evaluate both proposals but to be prepared to discuss any apparent nonresponsiveness at the next meeting of the committee. The committee then adjourned and each member independently scored the two proposals.

At the second meeting of the committee, the issue of the missing xerox copies again came up. Mr. Horton testified that after consulting with the DOE members of the committee on the purpose and nature of the copying requirement and the effect of DRC's failure to include the copies, he advised the committee that DRC should be considered responsive but should be scored accordingly for its failure to supply the required copies. Mr. Horton testified that he based his decision on the fact that DRC's proposal contained a copy sample, though not the right one,

¹Doug Horton and Elizabeth Jones testified that use of underlining and/or the word "must" in the RFP indicates a mandatory requirement. Section 3.02(b) of the RFP indicates that underlined text requires a specific response. (Record, p. 96).

and that DRC stated in its proposal, "DRC's handscoring staff is well aware of the problems that arise when photocopying student responses; we have methods to ensure readable copies." (Record, Ex. 3, DRC Technical Proposal, p. 70).

Elizabeth Jones, of the DOE Office of Research, testified before the Panel that section 2.06.03(1)(a) of the RFP concerns Committee Consensus paper sets, which are a representative sample of old student test papers used by DOE and the contractor to train scorers and develop grading standards. The old test papers are xeroxed in quantity² and the same paper is graded by several scorers in order to establish consistency among the scorers.

Ms. Jones testified that in the past DOE had experienced difficulty in obtaining legible xerox copies of the student papers, which are written in pencil, to the extent that it was necessary to trace over some of the papers before xeroxing. If a paper cannot be sufficiently darkened, it is discarded and another is used in its place. The xeroxed papers are not used in actual scoring but only as training and standard-setting tools.

According to Ms. Jones, DOE required the offerors to include xerox copies of a sample paper set in their proposals to alert the offerors to the legibility problem

²The Panel heard differing testimony that put the number from 1200 to 48,000 xerox copies of test papers.

and to demonstrate to DOE that the offerors had the means to deal with the problem.

Following Mr. Horton's determination that DRC was responsive, the committee evaluated and scored both proposals on the technical and other requirements. NCS had the highest score after this portion of the process. After the cost factor was added in, DRC became the high scorer. The final scores were DRC 2062.5 and NCS 2040.82. DRC's cost is \$5,543,302.00 and NCS's is \$6,621,780.00. An intent to award the contract was issued to DRC.

NCS protested the intent to award to DRC to the Chief Procurement Officer on the grounds that the failure to provide the copies required in section 2.06.03(1)(a) of the RFP rendered DRC's proposal nonresponsive.³ DRC admitted that it did not comply with the copying requirement but argued that its omission is a minor informality or technicality which can be waived by the State.

In his decision dated August 16, 1989, the CPO found DRC's failure to include the required copies was not a minor technicality which could be waived. The CPO ordered award of the contract to NCS. DRC and DOE appeal the decision of the CPO to the Panel.

³NCS raised two additional grounds before the CPO which were abandoned before the Panel.

CONCLUSIONS OF LAW

The sole issue to be decided by the Panel is whether the requirement of section 2.06.03 that "As part of their Technical Proposal, the Offeror must submit copies of the paper set that is provided in the RFP Supplement to demonstrate copying quality" is an essential requirement of the RFP, the failure to comply with which requires rejection, or a nonmaterial requirement which can be waived and corrected.

The relevant sections⁴ of the Procurement Code are as follows:

19-445.2070 Rejection of Individual Bids. A. General Application.

Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.

19-445.2080 Minor Informalities and Irregularities in Bids.

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from the minor informality or

⁴The quoted sections dealing with bids are made applicable to the request for proposal situation by Reg. 19-445.2095(E).

irregularity in a bid or waive any such deficiency where it is to the advantage of the State.

Examples of minor informalities or irregularities given in Reg. 19-445.2080 include but are not limited to: failure to furnish the required number of copies of signed bids, failure to furnish required information concerning a bidder's size or number of employees, failure to execute certifications with respect to Equal Opportunity and Affirmative Action Programs, failure to furnish an affidavit concerning affiliates, failure to sign a bid in certain circumstances, and failure to acknowledge an amendment to the bid invitation in certain circumstances.

When the two regulations quoted above are construed together, along with the rest of the Procurement Code, as they must be, the following conclusions of law emerge. In order to be responsive, a proposal need not conform to all of the requirements of the RFP; it must simply conform to all of the essential requirements of the RFP.⁵

"Essential" is not defined in the Code. However, in In re: Protest of American Sterilizer Co., Case No. 1983-2, the Panel determined what was "nonessential" with reference to

⁵The Procurement Code defines "responsive bidder" as "a person who has submitted a bid which conforms in all material aspects to the invitation for bids." S. C. Code Ann. § 11-35-1410 (1976) (Emphasis added). The Panel sees no reason not to extend the concept of responsiveness as related to material or essential requirements to the RFP situation.

Reg. 19-445.2808. In that case, the Panel found that, because the Code requires rejection of a proposal when it fails to meet an essential requirement but allows waiver of an immaterial variation from exact requirements, a requirement is not "essential" if variation from it has no, or merely a trivial or negligible, effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured.⁶ Waiver or correction of a variance from such a requirement is appropriate under the Code when relative standing or other rights of the bidders are not prejudiced.

NCS and the CPO focus on the mandatory nature of the copying requirement of Section 2.06.03 as evidence that it is essential. However, a requirement is not "essential" simply because it is mandatory. The RFP in question states that sixteen copies of a proposal "must" be submitted (Record, p. 95). However, Reg. 19-445.2080 specifically lists the failure to do this as a minor informality. Completion of the affidavit of noncollusion in the American Sterilizer case, cited above, was mandatory. (See, Decisions of the South Carolina Procurement Review Panel 1982-1988,

⁶NCS argues and the Panel agrees that the State may not waive an essential requirement. The RFP in this case exceeds the authority granted the State and is invalid to the extent that it purports to allow the State to be the sole judge of whether a proposal's failure to conform to the essential requirements of the RFP is "significant enough to reject the proposal." (Record, p. 109).

p.. 49). Nevertheless, the Panel held that the bidder's failure to include a completed affidavit of noncollusion was a minor technicality because it had no effect on price, quality, quantity, or delivery of the required performance.

The requirement of section 2.06.03 at issue is not the requirement that paper sets produced under the contract be legible. That is a separate requirement of the contract which the winning offeror must meet whether or not it provides the sample copies. The requirement at issue concerns an offeror's demonstrating at the time it submits its proposal that it can trace or otherwise enhance a student essay so that it is legible when xeroxed. There is no evidence that DRC cannot legibly reproduce the required copyset. It simply failed to prove it could within the proper time frame.⁷ The question for the Panel is whether proof of copying ability within the required time frame is so essential to the RFP that DRC cannot now be allowed to submit such proof.

The Panel finds that the copying requirement of section 2.06.03 is not an essential requirement because failure to meet it has at best a negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured. Section 2.06.03 does not require

⁷DRC did state in its proposal that it was aware of the problems with obtaining legible copies and that it had "methods to ensure readable copies." (Record, p. 70).

that copying of the sample set actually be performed by the offeror. Testimony indicated that an offeror could use any professional copying service to meet the requirement. There is no prohibition against tracing or other means of enhancement to obtain legibility. Most importantly, there is no requirement that the winning offeror use the same method or means of enhancing copies once it has the contract.⁸

The Panel finds that DRC's failure to submit the required copyset with its proposal does not render its proposal nonresponsive because the omission has no, or merely a trivial or negligible, effect on price, quality, quantity, or delivery of the performance of the services being procured. Further, the Panel finds that allowing DRC to submit the required copyset at this time or waiving the

⁸ Contrast this with the situation in In re: Protest of Miller Tire Service, Case No. 1984-6, in which the Panel found that the failure of a product to pass a performance test on the first try was not a minor informality since it did affect the quality of the goods. In that case, the product being tested was the rubber to be used by the winning bidder to recap tires for the Department of Education.

Other cases dealing with this issue are In re: Protest of CNC Company, Case No. 1988-5 (Failure to include installation charges was not a minor technicality because it potentially affected price); In re: Protest of Brown & Martin Co., Case No. 1983-4, and In re: Protest of ECB Construction Co., Case No. 1989-8 (Failure to list subcontractors is not a minor technicality because the Procurement Code states that failure to list renders a bid nonresponsive).

requirement altogether is not prejudicial to NCS and is advantageous to the State.

The Panel notes that this case is decided specifically upon the facts presented here and is not meant to open the proverbial floodgates to every unsuccessful bidder or offeror. The Code is purposely designed to achieve a balance between the need for procuring products and services at the lowest possible price and the need for competition and fair and equitable treatment of all vendors. Unfettered discretion in a procuring agency would bode a return to the pre-Code days when purchasing was for the most part subjective. Too little discretion and too much rigidity in interpreting requirements would result in the intolerable situation of the State's paying more (in this case \$1,100,000 more) because of minor technical errors. It is the intent of the Panel in this case to leave intact this delicate balance. The discretion to waive noncompliance with bid requirements is still limited and should be judiciously exercised with the above in mind.

For the reasons stated above, the Panel overturns the decision of the Chief Procurement Officer and directs that the contract be awarded to the Data Recognition Corporation as the responsive and responsible offeror whose proposal is the most advantageous to the State.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Hugh K. Leatherman, Sr.

Columbia, South Carolina

September 5, 1989