

STATE OF SOUTH CAROLINA)
) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND) CASE NO. 1989-6

IN RE:)
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PROTEST OF RIGDON OFFICE SUPPLY)
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This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on June 22, 1989, on the appeal by Rigdon Office Supply Company ("Rigdon") of a decision by the Chief Procurement Office to rebid a contract to furnish an open end furniture plan to the Department of Mental Retardation (the "Department").

Present at the hearing were Rigdon Office Supply, represented by John E. Duncan, Esq., and the Division of General Services, represented by Helen Zeigler, Esquire. Also present but not participating in the hearing was the Department of Mental Retardation, represented by Cliff Scott, Esquire.

FACTS

On January 18, 1989, the Department of Mental Retardation, under the supervision of its Director of Engineering and Planning, Eruch Tata, solicited bids for the supply and installation of an open end furniture plan for its main office building. The Department hired Incore-Summit Design, Inc., ("Incore-Summit") as its design consultant to assist in choosing what types of furniture and fabrics would be solicited by the Department.

The original specification for fabric for the panel system allowed only two manufacturers' brands to be bid: Allsteel Woolscape and Haworth Basketweave. The bid documents permitted bidders to submit a request no later than ten days prior to bid opening that other brands be declared equal to the two fabric brands specified.

Under this procedure, Addendum #1 to the solicitation was issued on February 6 and allowed four brands to be bid: Allsteel Woolscape, Haworth Flannel, Herman Miller Flannel, and Westinghouse Textura Saxony.¹ The solicitation was amended a second time on Friday, February 10, to allow only the following four brands to be bid: Allsteel Woolscape, Haworth Basketweave, Herman Miller Vertical Surface Solid and Westinghouse Textura Saxony. Addendum #2 was apparently issued as a result of comments made to Incore-Summit sometime after the issuance of Addendum #1 on February 6.

According to Mr. Boyce Haigler, its president, Contract Interiors received Addendum #2 on Monday February 13, the day before the bids were to be opened. In Mr. Haigler's opinion, Addendum #2 allowed his competitors who carried the Haworth and Herman Miller fabric lines to bid a cheaper

¹Although it was not directly testified to, apparently the vendors in this case were limited in what manufacturer's brands they could bid by commercial agreements with the manufacturers. Contract Interiors, the protestant before the CPO, was limited to bidding the Westinghouse Textura Saxony brand. Rigdon, the protestant before the Panel, had to bid Allsteel Woolscape as its specified brand.

grade of fabric than Contract Interiors could. Mr. Haigler testified that the Textura Saxony fabric is a grade six fabric, the highest grade fabric manufactured by Westinghouse. The Premiere fabric, which he considered to be equal to the specified Haworth and Herman Miller brands, is only a grade two fabric. (General Services Ex. #1).

Mr. Haigler instructed his son, Kyle, an account manager for Contract Interiors, to call Incore-Summit to see whether Contract Interiors could bid the cheaper Premiere fabric. According to Kyle Haigler, on Monday February 13, he telephoned Anna Lucas, one of Incore-Summit's account managers, who advised that Contract Interiors could bid the cheaper Premiere fabric as its base bid and the more expensive Textura Saxony as an alternate. Both Messrs. Haigler testified that they were familiar with the bid instructions which forbid oral modification of the bid requirements. (See Record, p. 25).

The bids were opened February 14 with the following results:

Contract Interiors	\$221,300.00
Contract Interiors (alt)	\$239,588.00
Rigdon Office Supply	\$249,256.52
Miller's of Columbia	\$249,939.32

Contract Interiors bid Westinghouse Premiere fabric at \$221,300 as its base bid. Its alternate bid at \$239,588.00 was Westinghouse Textura Saxony. (Record, p. 34).

When the bids were opened, the Department and its agent Incore-Summit in violation of the Procurement Code² contacted Mr. Boyce Haigler and asked whether Contract Interiors would provide the more expensive Textura Saxony for the cheaper Premiere price. Mr. Haigler testified that he advised Incore that he could not provide the Textura Saxony at the quoted base price without receiving authorization from the manufacturer. On February 17, Incore-Summit wrote Contract Interiors that its bid was nonresponsive because the specified fabric was not being supplied at the base bid price. (Record, p. 47).

Notwithstanding its finding that Contract Interiors was nonresponsive, on February 23 the Department through its agents Incore-Summit met with Contract Interiors to discuss its bid. On February 24, Contract Interiors wrote Incore-Summit that, "The Textura fabric as approved by addendum will be furnished in our base bid price for either base bid (1) or (5), whichever your client selects." (Record, p. 48). On February 28, Incore-Summit responded to Contract Interiors, "I am in receipt of your letter of February 24, 1989 informing us that you will furnish the fabric as specified. Let us know if you cannot fulfill the

²Section 11-35-3020(2)(b) of the Procurement Code provides, "Bids shall be accepted unconditionally without alteration or correction, except as otherwise authorized in this code." Negotiations are authorized only when the competitive bidding process has been unsuccessful. S. C. Code Ann. §11-35-3020(c).

requirements clarified above and as written in the specs. Please respond as soon as possible." (Record, p. 49). The requirements "clarified above" concerned other matters related to the panel system.

Mr. Tata testified that it was not the intent of the Department to "negotiate" with Contract Interiors but only to clarify certain aspects of the solicitation. Whatever the Department's intent, it is clear from the correspondence that its agents Incore-Summit were doing more than clarifying matters. The statement by Incore-Summit that Contract Interiors should respond as soon as possible whether it could fulfill the requirements as specified strongly supports Mr. Haigler's assertion that, even after the February 17 letter of nonresponsiveness, he believed Contract Interiors might still receive the contract.³

On March 27, the Department mailed a letter of intent to award the contract to Rigdon Office Supply as the lowest responsive bidder. A copy of the notice was addressed to of Contract Interiors but was missing the zip code. Mr.

³This is significant because there is some question whether Contract Interior's protest was timely. The Panel finds that the subsequent negotiations with Contract Interiors negated the significance of the February 17th letter insofar as that letter might have alerted Contract Interiors that it had a reason to protest on the responsiveness of its bid. Contract Interiors was required to protest the timing and contents of Addendum #2 within 10 days after its receipt. See §11-35-4210(1) (1976).

Haigler testified and the Panel finds that Contract Interiors did not receive the notice as mailed.

On April 10, Mr. Haigler phoned the Department of Mental Retardation and asked when a decision would be made on the contract. At that time, he was told of the notice of intent to award to Rigdon Office Supply. Mr. Haigler went to the Department and picked up a copy of the notice on April 10. Contract Interiors filed a protest with the Chief Procurement Officer on April 17 on the grounds that its bid was responsive and it should receive the contract.

The CPO in his decision dated May 12, 1989, held that Contract Interiors' protest was timely and that it was unnecessary to address whether the Department should have accepted Contract Interiors' alternate bid because other irregularities in the procurement process mandated rebidding. Specifically, the CPO found that the issuance of Addendum #2 only four days prior to bid opening violated the bid solicitation requirements that application for equal product status be made 10 days prior to bid opening and that addenda be issued in time to reach the bidders four days prior to bid opening (Record, pp. 87, 88). The CPO further found that the late issuance of addendum #2 was anticompetitive and violated one of the main policies of the Procurement Code to create a competitive environment for all vendors seeking to do business with the State. (Record, pp. 15-16).

ISSUES

Rigdon appeals the decision of the CPO on the grounds that, because Contract Interiors is nonresponsive, the proper remedy is not to rebid but to award the contract to Rigdon as the next low bidder.

There does not appear to be much dispute whether Contract Interior's bid complied with the bid specifications. The Procurement Code defines a "responsive bidder" as one "who has submitted a bid which conforms in all material aspects to the invitation for bids." S. C. Code Ann. § 11-35-1410 (1976). The bid documents did not provide for the bidding of alternates. The standard bid form has one blank for each base bid lump sum price (Record, p. 33-34). Contract Interiors quoted a price on an unspecified fabric in the base bid blank and then added its own blank for the specified fabric which was bid as an alternate.

Further the bid documents forbid oral changes to the bid requirements and caution bidders not to rely on such changes.⁴ Both Messrs. Haigler testified that they were aware of the prohibition on oral modification when they decided to bid Premiere fabric as approved in a telephone

⁴ 3.2 INTERPRETATION OR CORRECTION OF BIDDING DOCUMENTS: 3.2.3 Interpretations, corrections and changes of the Bidding Documents will be made by Addendum. Interpretations, corrections, changes of the Bidding Documents made in any other manner will not be binding, and Bidders shall not rely upon them. (Record, p. 25).

conversation with Incore-Summit. Contract Interiors may not use the oral approval of its bid as an excuse for failing to comply with the written bid instructions. The bid of Contract Interiors is not responsive to the bid solicitation.

The remaining question before the Panel is whether irregularities in the bidding process warranted rebidding. Section 11-35-1710 gives the CPO the right to reject all bids and cancel the award when it is in the best interests of the State. Regulation 19-445.2065 provides that, unless there is a compelling reason to reject one or more bids, award shall be made to the lowest responsible and responsive bidder. The regulation counsels against unnecessary exposure of bid prices.

There is little question in this case that the issuance of Addendum #2 violated the requirements of the bid solicitation insofar as timeliness.⁵ Contract Interiors

⁵The bid solicitation provides:

ADDENDA: Changes or corrections may be made in the Contract Documents after they have been issued and before bids received. In such case a written addendum describing the change or correction will be issued by Incore-Summit Design, Inc., to all bidders. Such addendum or addenda shall take precedence over the portion of the Contract Documents concerned and shall be considered as part of the Contract Document. An addendum will be issued to reach the Bidder at least four (4) days prior to bid opening time. (Record, p. 87).

(Footnote Continued)

further claims that the changes in specified fabric made by Addendum #2 placed it at a competitive disadvantage. Even if this were true,⁶ Contract Interiors' remedy was to protest the changes made by Addendum #2 within ten days of its receipt. Ultimately, it was Contract Interiors' reliance on Incore-Summit's oral approval to bid other than as was specified in the written bid instructions which led to its problems and the confusion surrounding the responsiveness of its bid. As was stated earlier, this reliance was not reasonable based on the bid instructions.

Finally, the irregularities in the procurement procedure do not appear to have prejudiced the remaining bidders. All of the evidence supports the conclusion that the other bidders bid as was required by the bid specifications. Likewise, the negotiations after bid

(Footnote Continued)

APPROVAL OF EQUAL PRODUCTS: All bidders requesting approval of equal products shall submit technical data to the designer no later than ten (10) days prior to bid opening. . . . Determination of equal products shall be the decision of the designer and Department of Mental Retardation and shall be final. An addendum will be issued no later than four (4) days prior to bid opening. (Record, p. 88).

⁶Although Mr. Haigler testified that the Textura Saxony fabric specified for Contract Interiors was a higher grade than that specified for the Haworth and Herman Miller bidders, Contract Interiors' bid was the lowest. The second low bid was Rigdon's on the Allsteel Woolscape fabric.

opening did not taint the process because Contract Interiors did not receive the contract.

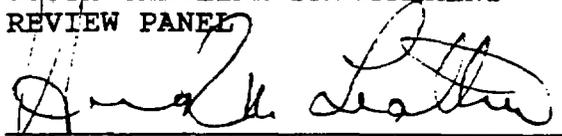
The Panel finds no compelling reason to invalidate the entire procurement process in this case. The proper remedy is to award the contract in question to the next lowest responsive and responsible bidder. That appears to be Rigdon Office Supply in this case.

The Panel by its holding does not mean to minimize the misconduct of the Department of Mental Retardation. All of the evidence in this case leads to the conclusion that the Department was operating in ignorance or total disregard of the requirements of the bid instructions and the Procurement Code. It is no excuse that most of the misconduct was on the part of the Department's consultants. To the contrary, this is further evidence of the Department's lack of care and responsibility in its expenditure of public funds. The State may not abdicate its responsibilities under the Procurement Code by hiring so-called "experts" from the private sector.

It should also be noted as to the negotiations after bidding in violation of the Procurement Code that the State Engineer's Office was apparently copied on the correspondence memorializing the negotiations. Greater care in overseeing this procurement on the part of the State Engineer's office might have avoided having Contract Interior's confusion as to its status drag on for months.

For the reasons stated above, the May 12, 1989, Decision of the Chief Procurement Officer is reversed, the bid of Contract Interiors is declared nonresponsive and it is hereby ordered that the contract in question be awarded to the next low responsive and responsible bidder.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Hugh K. Leatherman, Sr.
Chairman

July 7, 1989, 1989
Columbia, South Carolina