

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND) CASE NO. 1991-10

IN RE:)
)
PROTEST OF DICTAPHONE CORPORATION,) O R D E R
APPEAL BY SUDBURY SYSTEMS, INC.)
)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on June 26, 1991, on the appeal by Sudbury Systems, Inc., ("Sudbury") of a decision by the Chief Procurement Officer ("CPO") upholding the protest of Dictaphone Corporation ("Dictaphone").

Present at the hearing before the Panel were Dictaphone, represented by Trisa Thompson, Esq., and Robert Knowlton, Esq.; Digital Information Systems Corporation ("Digital") and Sudbury, represented by Robert D. Coble, Esq., and John C. B. Smith, Esq.; the Medical University of South Carolina, represented by its General Counsel, Joseph C. Good, Jr., Esq.; and the Division of General Services, represented by Helen Zeigler, Esquire.

FACTS

In November 1990, the Office of Information Technology Management issued a request for proposals ("RFP") on a new digital dictation system for the Medical University of South Carolina's radiology department. (Record, pp. 183-204). Dictaphone filed a protest of the specifications on the grounds that they favored one product. (Record, pp. 171-172). The CPO heard the protest and found that the

specifications were not unduly restrictive and ordered the solicitation to proceed. (Record, pp. 174-180).

On January 30, 1991, the responses to the RFP were opened and evaluated. Digital and Dictaphone were the only offerors. Dictaphone bid its own dictation equipment. Digital bid equipment manufactured by Sudbury Systems, Inc. On March 26, 1991, the State issued an intent to award to Digital. (Record, p. 20).

On April 10, Dictaphone protested, alleging as grounds that Digital was not a responsible vendor because (1) Digital had been incorporated only a short time before the RFP was issued; and (2) Digital is not authorized by the Secretary of State to do business in South Carolina. Dictaphone challenged the responsiveness of Digital's proposal on the grounds that Digital could not respond to certain questions in the RFP because of its lack of operating history. (Record, pp. 51-57). Dictaphone also raised several issues at the hearing before the CPO concerning the responsiveness of Digital to warranty, service, and governing law requirements of the RFP.

The award to Digital was stayed pending determination of Dictaphone's protest. (Record, p. 19).

The CPO heard all of the issues before him and issued a decision on May 6, 1991. (Record, pp. 5-17). The CPO essentially found in Digital's favor on all of the issues except those concerning the responsiveness to the warranty, service and governing law requirements of the RFP. On those

issues, the CPO found that Digital was not responsive to the requirements of the RFP and he ordered award to the next lowest offeror whose proposal was determined to be most advantageous to the State, and if none, then rebid of the contract.

On May 16, 1991, Sudbury Systems, Inc., appealed the decision of the CPO to the Panel. In its appeal letter, addressed to the CPO, Sudbury states, in part, "Sudbury Systems, Inc. (SSI), under the South Carolina Procurement Code Section 11-35-4410, requests that the Procurement Review Panel review your decision to cancel the intent to award Bid No. B100826 to SSI through its agent, Digital Information Systems Corporation (DISC)." (Record, p. 2).¹

At the hearing before the Panel, Dictaphone and the Division of General Services moved to dismiss Sudbury's appeal on the grounds that Sudbury lacks standing as a "person adversely affected" by the decision of the CPO under S. C. Code Ann. §11-35-4210(5).

The evidence presented to the Panel on this issue indicates that the nature of the relationship between Sudbury and Digital relative to this solicitation is murky. It is not disputed that Sudbury is a corporation under the laws of Massachusetts and that Digital is incorporated in

¹Notwithstanding Sudbury's assertion to the contrary, the Intent to Award in this case was made out to Digital Information Systems Corporation and not to Sudbury. (Record, p. 20).

Florida or that Digital and Sudbury share no common officers, directors, or employees. However, Sudbury offered the testimony of its Vice-president for Marketing, Joe Weber, that Digital is an agent for Sudbury, which acted on Sudbury's behalf in bidding on the contract in question. This agency agreement for purposes of bidding on the MUSC contract was apparently oral.²

Digital's President, Scott Hurley, testified that for some purposes Digital is an authorized agent and representative for Sudbury Systems, while for other purposes it is an authorized dealer. According to Mr. Hurley, Digital intended to make an offer on the MUSC contract for both itself and for Sudbury Systems. Mr. Hurley understood that the contract and purchase order for the dictation equipment would be issued directly to Sudbury while Digital would be available to service the equipment, if needed, and to sell accessory items.

²Sudbury offered a written "Certified Copy of Corporate Resolutions", purporting to be a resolution of the Sudbury Board of Directors in effect on November 15, 1990, which authorizes Digital to submit a bid on the MUSC contract on behalf of Sudbury Systems, Inc. (Plaintiff's Ex. #1). Testimony before the Panel reveals that this "resolution" was in fact prepared on the day of the hearing before the Panel and is Mr. Weber's rendition of the apparently unwritten "understanding" which the Board had in regards to Digital's conduct in this solicitation.

The general agency/dealer/representative agreement between Digital and Sudbury, although referred to in the testimony, was not produced by either Digital or Sudbury.

According to the testimony, MUSC employees viewed Digital and Sudbury as one and the same entity for purposes of providing the needed dictation equipment. Witnesses employed by MUSC, Sudbury and Digital all testified that the contract was to have been made out to Sudbury and Digital jointly.

Notwithstanding the intent of Sudbury and Digital to make a joint offer, however, the written offer is from Digital only. The cover sheet to Digital's proposal states, "Thank you for the opportunity to bid on the Digital Dictation needs at MUSC radiology. I hope the superiority of the RTAS 8000 [Sudbury system] for the specific needs of a radiology department is evident in the enclosed answer to the bid requirements." The letter is signed, "Scott J. Hurley, President, DISC." The letter is on Digital stationary, which identifies Digital as a "Sudbury Systems Authorized Dealer", "Specialists in Digital Dictation & Medical Reporting Systems, Sales * Service * Software." (Record, p. 65). The proposal is signed only by "Scott J. Hurley." (Record, p. 159).

Nothing in the proposal indicates that Sudbury is making any portion of the offer or that Digital is an agent for Sudbury or that Digital is acting on Sudbury's behalf in making the offer. To the contrary, the only indication of any relationship between Digital and Sudbury is that of an "authorized dealer", specializing in sales of digital equipment, and a manufacturer. (Record, p. 65). Although

portions of the proposal respond with information on Sudbury and its equipment (See, eg., pp. 66 and 89), the sample service agreement attached to, and incorporated by reference in, the proposal indicates that Digital is the seller. (Record, pp. 78-82).

The Panel finds as a fact that Sudbury Systems, Inc., is not an "offeror" on the MUSC contract, as that term is used throughout the Consolidated Procurement Code.

CONCLUSIONS OF LAW

The only issue before the Panel is whether Sudbury has standing to appeal the decision of the CPO to the Panel.

S. C. Code Ann. §11-35-4210(1) provides that only an "actual or prospective bidder, offeror, contractor or subcontractor" may file a protest of a solicitation or award of a contract with the CPO. The Panel has so held in several of its recent cases. See In re: Protest of ACMG, Inc., Case No. 1990-4 and In re: Protest of Laurens County Service Council for Senior Citizens, Case No. 1990-18.

However, for the first time the Panel today considers directly the question of who may appeal to the Panel from a decision rendered by the CPO.³ Appeal rights are set forth in §11-35-4210(5). That section provides:

³ The Panel almost reached this question in In re: Protest of Cathcart & Associates, Case No. 1990-13, in which the Panel determined that an affiliate corporation of a protestant/offeree was not an offeror in that case and denied its motion to intervene. The question whether the affiliate even needed to be an offeror in order to join in
(Footnote Continued)

Finality of Decision. A decision under this subsection (3) shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a review, in writing, setting forth the grievance, to the . . . Panel.

The Division of General Services and Dictaphone argue that Sudbury is not an offeror on the RFP in question and, therefore, could not file a protest of the solicitation or award of this contract. Only Digital or Dictaphone had that right. Because Sudbury could not file a protest, the argument goes, it cannot appeal a decision concerning a protest to the Panel.

Although the Panel agrees with the premise that Sudbury is not an offeror in this matter and, therefore, could not file a protest under §-4210, the Panel does not read the "person adversely affected" language as limited strictly to those who could protest before the CPO originally.⁴ An issuing or using state agency lacks the ability to bring a protest because it is not an actual or prospective bidder,

(Footnote Continued)

an appeal to the Panel was not specifically argued. The requirement of offeror status was assumed.

⁴No evidence was presented whether Sudbury had notice of and attempted to participate as a "party" in the proceedings before the CPO, although the record indicates that no representative from Sudbury signed the attendance sheet (Record, p. 18) and the CPO does not list Sudbury as being represented. (Record, p. 5). The Panel, therefore, does not reach the question whether a person with notice who did not seek party status before the CPO may appeal an adverse decision to the Panel.

Evidence was presented that Digital participated as a party and was advised of its appeal rights by the CPO.

offeror, contractor or subcontractor. However, it may have standing to appeal an adverse decision of the CPO to the Panel. See In re: Protest of Kodak and Xerox Corporation, Case No. 1988-15, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 559, 561.

Sudbury argues that, whether or not it was technically an offeror, it would ultimately have been a party to the contract and, therefore, it is adversely affected by the CPO's decision to cancel the award to Digital. Sudbury can take no comfort in the alleged intention of MUSC, Digital and itself that the contract be at least partially in Sudbury's name. Under § 11-35-1530(7) (1990 Cum. Supp.), award must be made to the responsive offeror whose proposal is determined in writing to be the most advantageous to the State. No authority exists for the State to contract with one who is not first a responsive and responsible offeror. See also, S. C. Ann. § 11-35-310(25) (1986). Contracting directly with Sudbury in this case would violate the Procurement Code.

The real question is whether Sudbury's status as a manufacturer/supplier to Digital under Digital's potential contract with the State makes Sudbury "adversely affected" by the CPO's decision cancelling award to Digital. The Panel holds that it does not.

In Black River Electrical Cooperative, Inc., v. Public Service Commission, 120 S.E.2d 6 (1961), the South Carolina Supreme Court determined that Black River had no standing as

an "interested person" to oppose issuance of a license in a proceeding before the Public Service Commission because:

We think that an "interested person" or corporation is one who has a legal right which will be injuriously affected by the [actions of the PSC] Nowhere do we find that an electric cooperative is given an exclusive franchise to serve rural areas. Having no exclusive franchise to serve the area in controversy, no legal right of appellant will be invaded by the Power Company's competition. Any injury from such competition is *damnum absque injuria*.⁵

120 S.E.2d, at 12.

Analogously, in this case, Sudbury has no direct legal interest in the potential contract between Digital and the State. Sudbury occupies the same position as any manufacturer or supplier of component parts would in this case. Its legal relationship is with Digital and not with the State.

Undoubtedly, Sudbury has an ultimate financial interest in seeing that Digital retain award of this contract so that it may supply the equipment. However, this interest is not the direct, legal interest contemplated by Black River.⁶

⁵"A loss which does not give rise to an action for damages against the person causing it." Black's Law Dictionary (5th Ed. 1983) p. 206.

⁶Cf., Dockside Association v. Detyens, 330 S.E.2d 537, 539 (S. C. App. 1985) ("A real party in interest . . . ordinarily is one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal or technical interest in, or connection with, the action." Holding that a condominium homeowner's association lacks
(Footnote Continued)

Professor Shipley in his treatise on administrative law notes that, arguably, Article I, § 22 of the S. C. Constitution requires that notice of a hearing be given to every person who might have standing before an agency or else a decision is not binding on that person. (D. Shipley, South Carolina Administrative Law, p. 5-35 (2d ed. 1989)). Affording notice of a protest hearing to persons with indirect economic interests, such as component parts' manufacturers, suppliers, and even, conceivably, creditors of the winning offeror, would be prohibitive.

To the extent that Sudbury argues that the appeal presented in its letter of May 16 is joined by Digital, which does have standing to appeal, the Panel does not agree. Sudbury's reference to "its agent" Digital concerns "the intent to award Bid No. B100826 to [Sudbury]" and not the appeal. Only Sudbury requests review of the CPO's decision. (Record, p. 2).

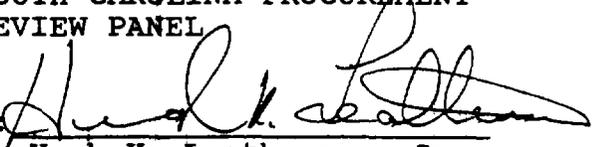
(Footnote Continued)
standing to sue for defects in common elements owned exclusively by individual apartment owners).

See, also, In re: Architectural Services Contract, Procurement Review Panel Case No. 1989-5 (The architectural firm which bid on a contract could intervene in a sua sponte hearing conducted by the Panel, however, its sister corporation, whose only connection with the contract was that it might perform consulting work if the contract was let, lacked standing to intervene).

For the reasons stated above, the appeal by Sudbury Systems, Inc., is dismissed for lack of standing.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Hugh K. Leatherman, Sr.

7-9, 1991
Columbia, South Carolina