

PACKAGING

Standard packaging must be stated correctly. When it is necessary to bid a standard pack that is different from that stated in the bid invitation, provide a description of the packaging to be used under brand and grade. Alternate packaging and/or packing will be given consideration. All packaging shall conform to the current standards, acceptable by the trade and ICC regulations.

(Record, p. 45).

Chemline bid \$33.54 per twelve 32 oz. bottle case of Palmolive liquid detergent. Versatile Enterprises, Inc., bid \$34.19 per case of Joy detergent, however, its unit case consisted of fifteen 32 oz. bottles. Chemline's price per ounce was 8.7 cents while Versatile's was 7.1 cents.

On its bid, Versatile struck through the "12/32 oz. per case" notation and indicated that its case size was fifteen 32 oz. bottles. (Record, p. 61). It is undisputed that 32 oz. size Joy comes only in fifteen bottle cases.

Because of the discrepancy in case size, State Procurement calculated each bid on a lowest price per ounce basis and awarded Item 6 to Versatile.

Item 3 of the IFB concerned household ammonia. (Record, p. 51). Chemline was the lowest bidder on Item 3, however, State Procurement determined in writing pursuant to S. C. Code Ann. § 11-35-1810 (1986) that Chemline was not a

responsible vendor because of its past performance on seven state contracts, as follows.¹ (Record, pp. 30-31).

1. On May 4, 1989, the Department of Corrections filed a formal vendor complaint against Chemline for failure to deliver two orders of galvanized garbage cans within the 21-day delivery time specified in a statewide contract. (Record, p. 110). On May 18, State Procurement sent a letter to Chemline to show cause why the contract should not be terminated for default. (Record, p. 112). No timely response was forthcoming and the contract was terminated for default on June 6, 1989. (Record, p. 114).

On June 7, State Procurement received a letter from Chemline indicating that the orders were late because the manufacturer was having "production and shipping problems". (Record, p. 115). At the hearing before the Panel, Mr. Norman McBean, President of Chemline, testified that the problems with delivery were caused by a fire at the manufacturing plant. Chemline did not mention the fire in its response to the show cause letter.

2. The second incident concerned Chemline's failure to deliver brooms to the Department of Corrections according

¹The CPO determined that the State's consideration of one of the prior contracts - involving the supply of abrasive cleaner and laundry detergent - was improper because the determination of the nonresponsibility of Chemline on that contract was stated to be "without prejudice." The CPO's determination was not appealed by the State and that issue is not before the Panel except insofar as it provides background information.

to its contract dated March 17, 1989. The contract called for a unit of 50 dozen brooms to be delivered as per a contract schedule until 550 dozen brooms had been delivered. The Department of Corrections ordered a shipment on June 5, 1989, with delivery to be made on June 19. No delivery was made and on June 30, the Department of Corrections filed a formal vendor complaint against Chemline. (Record, p. 118).

A second delivery scheduled for mid-July was also not forthcoming. A show-cause letter was sent to Chemline on July 20. (Record, p. 119). Chemline responded on July 26, denying that its orders were late and stating that it never received the June 5 purchase order. (Record, p. 121). The supplier of the brooms, Dixie Mop and Broom Company sent a letter to the Department indicating that it would not honor any more credit orders from Chemline because of Chemline's financial problems. (Record, p. 122).

On August 1, 1989, the State terminated the contract for default. (Record, p. 127).

3. On November 14, 1989, the State awarded Chemline a contract to supply neoprene, leather, and cotton work gloves to the Highway Department. (Record, p. 87). Chemline was unable to deliver the neoprene or leather gloves and when, at Chemline's request, the Highway Department called the leather glove manufacturer, the Department was told that the manufacturer would not extend credit to Chemline for the purchase of the gloves. The Department cancelled the neoprene and leather glove portion of the contract for

nonperformance on February 9, 1990. (Record, pp. 82-83). The portion of the contract dealing with cotton work gloves was performed satisfactorily by Chemline.

4. After Chemline failed to deliver vinyl examination gloves to the Department of Mental Retardation pursuant to its contract, the Department filed a formal vendor complaint against Chemline on August 21, 1989. (Record, p. 68). In a September 1 letter, Chemline apologized for the inconvenience and blamed the delay on the manufacturer. (Record, p. 69). Chemline indicated that the shipment was sent on August 30 and should be received no later than September 8. On September 11, only 41 of the 300 cases of gloves arrived. Chemline admitted that it could not deliver the rest but blamed the problem on the manufacturer. The contract was cancelled for nonperformance on September 11, 1989. (Record, p. 70).

5. The Highway Department awarded Chemline a contract to supply eye wash stations, which were to be delivered as ordered within 3-4 weeks of order. On November 16, 1989, the Department ordered 26 machines. Three additional machines were ordered on various dates up to December 21, 1989. On January 29, 1990, the Highway Department filed a formal vendor complaint against Chemline and cancelled the purchase orders after Chemline failed to deliver any of the machines. (Record, p. 154). The vendor complaint indicates that the Department contacted the manufacturer and was told that financial concerns prevented the sale of products on

credit to Chemline. (Record, p. 154). At the hearing before the Panel, Mr. McBean testified that the dispute between it and the manufacturer concerned a \$314.00 debt.

6. The Highway Department awarded a contract to Chemline for the delivery of ant and roach insecticide on March 13, 1991. Chemline did not timely deliver and, on June 11, the Department filed a formal vendor complaint against Chemline. (Record, p. 167). On June 14, Chemline responded that the original purchase order had never been received but that Chemline would fill the copy order attached to the complaint.

On July 1, 1991, a second formal complaint was filed by the Department on the grounds that Chemline's product did not meet the specifications, was not labeled in accordance with industry standards and that the bottles shipped had no sprayers as required. (Record, p. 161). The Department refused to accept shipment and cancelled the purchase order.

In none of the above cases did Chemline exercise its right under S. C. Code Ann. §§11-35-4230(1) and (5) (1986) to appeal cancellation of its contract.

CONCLUSIONS OF LAW

The first issue before the Panel is Chemline's protest of the award of Item 6 to Versatile on the grounds that Versatile did not meet the specifications because it bid a fifteen, rather than a twelve, bottle case. Chemline argues that the IFB requested bids per case based on twelve bottle cases and that the State erred in calculating the low bidder

based on a per ounce price. The State argues that the IFB allows consideration of alternate packaging, if necessary, provided the vendor describes the alternate packaging in its bid. (Record, p. 45).

The Panel agrees with the State. It is undisputed that one of the two approved brands - Joy - only comes in fifteen bottle cases. If Versatile desired to bid Joy, it had to bid a fifteen bottle case. Further, Versatile indicated on its bid under Item 6 that it was bidding a fifteen bottle case. (Record, p. 61).

The Panel finds that Versatile's response to Item 6 met the requirements of the IFB. Further, the Panel finds that the State was correct, given the alternate packaging, to calculate the low bidder using a per ounce price. The Panel holds that Versatile is the lowest responsive and responsible bidder on Item 6 of the IFB.

Chemline's second issue is whether the State properly determined that Chemline is a nonresponsible bidder based on its performance on previous State contracts.

Section 11-35-1810 of the Consolidated Procurement Code requires the State to make a determination of responsibility before it awards every contract. Reg. 19-445.2125 lists certain factors to be considered by the State in determining responsibility, including whether the prospective contractor has:

- (1) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to

indicate its capability to meet all contractual requirements;

(2) a satisfactory record of performance;

(3) a satisfactory record of integrity;

. . . .

In this case, the State determined that Chemline's poor performance and ultimate default on seven prior state contracts constitutes an unsatisfactory record of performance. The Chief Procurement Officer disallowed consideration of one of the contracts but held that the other six cases of previous nonperformance justified a finding of nonresponsibility for the contract in question.

The Panel agrees. Within the last three years, Chemline has failed to perform on six state contracts and has had those contracts terminated - the last one within the last six months. Chemline did not contest or appeal the findings of nonperformance or the decision to terminate. Those terminations must, therefore, be considered part of Chemline's record of performance with the State. The Panel holds that this record of poor performance adequately supports the State's determination that Chemline is not a responsible bidder on the July 30 contract in question today.

Chemline argues that State Procurement, in particular Virgil Carlsen, the State Procurement Officer, acted in bad faith towards Chemline and hindered it in its performance of the state contracts in question because Chemline is a minority business enterprise. This hindrance allegedly took

the form of State Procurement's making unreasonable demands on Chemline and inquiring of Chemline's manufacturers concerning the delivery problems.

The Panel finds nothing in the record to substantiate these allegations. As noted earlier, Chemline did not contest the terminations at the time they occurred and it appears from the record in this case that the only demand made on Chemline was for performance pursuant to the terms of its contracts. If anything, the record indicates a great deal of patience with Chemline's lateness and, in some cases, total failure to deliver goods as specified.

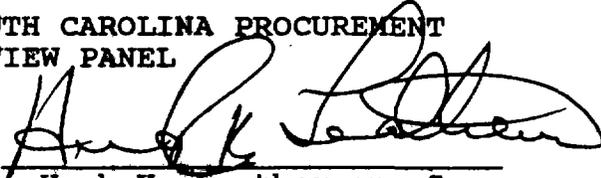
Chemline also argues that, because it is a qualified minority business enterprise, the State may not reject it as nonresponsible but must make every effort to assist it in obtaining this contract. This argument lacks merit.

Article 21 of the Consolidated Procurement Code, S. C. Code Ann. §§ 11-35-5010, et seq., (1986), entitled, "Assistance to Minority Businesses", does not excuse vendors from meeting responsibility requirements. Nor does it waive the State's obligation under § 11-35-1810 to make a determination of responsibility before awarding a contract. In fact, § 11-35-5230 states that one of the criteria to be considered in awarding minority contracts is "insuring that the State shall not be required to sacrifice quality of goods or services." Chemline's status as a minority business enterprise cannot relieve it from the burden of its unsatisfactory prior performance on state contracts.

For the reasons stated above, the Panel affirms the October 10, 1991 decision of the Chief Procurement Officer and hereby dismisses the protest of Chemline Chemical Co., Inc.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Hugh K. Leatherman, Sr.
Chairman

December 31, 1991
Columbia, South Carolina