

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1992-18

IN RE:)
)
PROTEST OF CHAMBERS MEDICAL TECHNOLOGIES)
OF SOUTH CAROLINA, INC.; APPEAL BY) O R D E R
CHAMBERS MEDICAL TECHNOLOGIES OF SOUTH)
CAROLINA, INC.) APPEALED
)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on October 6, 1992, on the appeal by Chambers Medical Technologies of South Carolina, Inc. ("Chambers") from a decision by the Chief Procurement Officer ("CPO") dismissing as untimely Chambers' protest of the award to Incendere, Inc. ("Incendere") of a contract to dispose of medical waste for the Medical University of South Carolina ("MUSC").

Present and participating in the hearing before the Panel were Chambers, represented by Daniel T. Brailsford, Esq.; Incendere, represented by David C. Eckstrom, Esq.; and the Division of General Services, represented by James W. Rion, Esquire. MUSC was present but did not participate as a party.

FINDINGS OF FACT

On March 25, 1992, State Procurement issued an Invitation for Bids (IFB) for medical waste disposal services for the Medical University of South Carolina. (Record, pp. 27-45). The IFB required the bidder to submit a quote on various kinds of waste packaging including the following:

ITEM B

Unit Cost per Box and Bags

Estimate 40-60 lbs. per box; 5000 boxes per year.

Unit Cost per box and bags ___ x 5000 = _____

(Record, p. 43). This bidding schedule was issued to each bidder on April 20, 1992, as Amendment #002 to the IFB. (Record, pp. 46-50).

Prior to bid opening on May 5th, Chambers raised the question of the accuracy of the 40-60 lbs. per box estimate to State Procurement. Chambers doubted the estimate because of its experience that hospital waste boxes range from 20 to 25 pounds. State Procurement advised that the weight estimates came from MUSC and should be considered accurate. Chambers used an estimate of 50 lbs. per box to calculate its bid.

The IFB also contained an affidavit by which a bidder could claim the 2% South Carolina resident vendor preference given by S. C. Code Ann. § 11-35-1520(9)(e)(1986). Both Incendere and Chambers claimed the preference. (Record, p. 37).

In its bid, Incendere indicated that it planned to incinerate the waste collected from MUSC at its Norfolk, Virginia incinerator. Pickup and transport of the waste would be handled through Incendere's Lexington, South Carolina office. (Record, p. 44).

Chambers' incinerator is located in Hampton, South Carolina.

On May 5, 1992, State Procurement opened the bids and determined that Incendere was the low bidder at \$679,925.00 and Chambers was the next low bidder at \$687,970.00. (See Protestant's Ex. #2). Because both Incendere and Chambers claimed the South Carolina resident vendor preference, the preference was not applied.

On May 11, 1992, State Procurement issued a Final Award Report indicating its intent to award the contract to Incendere. The Final Award Report gave the effective date of the contract as May 28, 1992. (Record, p. 22).

On May 15, Chambers protested the award to Incendere on the grounds that (1) the bid process did not give due weight to Chambers' status as a South Carolina corporation versus Incendere's status as a Virginia corporation; (2) the State failed to consider that award to Chambers, a South Carolina corporation, would generate approximately \$55,000 in fees which would be lost if Incendere received the contract; and (3) the bid specifications failed to provide actual box weights resulting in a flawed procurement process. (Record, pp. 4 - 5).

On June 25, Chambers filed an amendment to its May 15 letter of protest seeking to add as an additional ground that Incendere could not meet the requirement that the contractor be able to handle reusable waste containers because Incendere's Virginia license prohibits it. (Record, pp. 6 - 7).

In his decision dated July 27, 1992, the CPO found all of Chambers' grounds of protest untimely. Chambers appealed to the Panel on August 3, 1992.

CONCLUSIONS OF LAW

Chambers' first issue is that Incendere does not meet the resident vendor preference requirement of a "representative inventory of commodities on which the bid is submitted". (§11-35-1520(9)(e)). Chambers contends that the requirement of a "representative inventory" means that Incendere must own and operate an actual waste disposal site, i.e., an incinerator, in South Carolina. Because Incendere does not, it cannot qualify as a resident vendor. Therefore, the argument goes, the resident vendor preference should have been applied in Chambers favor and Incendere's price should have been increased by 2%.

Incendere and General Services argue that this ground of Chambers' protest is untimely under S. C. Code Ann. §11-35-4210(1)(1986) because Chambers knew or should have known when it got the IFB that no in-state incinerator was required. The IFB resident vendor affidavit defines "representative inventory" as consisting of "expendable items located in South Carolina at the time of this bid having a total value of \$10,000 or more based on bid price, but not to exceed the amount of the contract, which inventory is representative of the general type of commodities on which the bid is submitted." (Record, p. 37).

They argue that, in the face of this definition, Chambers could not have logically interpreted "representative inventory" to mean an incinerator and, therefore, Chambers had ten days from the date it received the IFB (sometime around March 25, 1992) to protest the State's allowing Incendere to claim resident vendor status.

The Panel holds that Chambers' protest of Incendere's resident vendor status is timely in this case. Section 11-35-4210(1) requires an "aggrieved" protestant to file its protest within ten days of learning of the facts giving rise thereto. Chambers was not aggrieved and did not know of all of the facts giving rise to its protest until it learned, first, that Incendere had claimed and been afforded resident vendor status and, second, whether the 2% preference would make any difference between Incendere and Chambers' relative prices. In sum, Chambers was not required to protest Incendere's resident vendor status until ten days from bid opening.¹

Although the Panel holds that Chambers' ground #1 is timely, the Panel agrees with Incendere and General Services

¹See, In re; Protest of Smith Setzer & Sons, Inc., Case No. 1989-21, at note 1. Had Chambers protested Incendere's resident vendor status at the time it received the IFB, it would have been protesting only the mere possibility that Incendere would claim the preference, be afforded resident status and that such status would mean the difference between Chambers' losing and winning the contract. Any decision by the CPO or the Panel at that stage would be in the nature of an advisory opinion. Neither the Panel nor the CPO has authority to render such opinions.

that it lacks merit. Section 11-35-1520(9)(e) lists as a prerequisite to resident vendor status that a bidder maintain a representative inventory of commodities on which the bid is submitted. Neither the ordinary meaning of "commodities" nor the definition given in the IFB of "expendable items" covers a waste disposal plant.

The State is not soliciting incinerators rather it is soliciting a service whereby waste is picked up from MUSC and taken away for disposal. Incendere indicates that its Lexington, South Carolina office will perform pickup and transport functions. The Panel holds that this local activity is sufficient to qualify Incendere as a resident vendor in this case.²

Chambers argues as its second ground³ that the State failed to state actual box weights in Item B of the IFB and, therefore, Chambers was forced to calculate its bid using higher numbers than required. Chambers presented evidence of its "strong belief" that, although Item B estimates box weight at 40-60 lbs. per box, the actual weight range will be 20-25 lbs. per box. Chambers' belief is based on its

²No question has been raised whether Incendere meets the other requirements of resident vendor status, i.e., authorized to transact business in the state, maintains an office in the state, and has paid all assessed taxes.

³At the hearing before the Panel, counsel for Chambers summarized Chambers' grounds of protest into three grounds, abandoning ground #2 stated in the May 15 protest letter that the State failed to considered the tax and fee advantage to South Carolina of awarding the contract to Chambers.

experience and historical data from other hospital contracts.

Incendere and General Services argue that this ground is not timely because Chambers knew all of the facts giving rise to its protest when it received Amendment #2 around April 20. Under §11-35-4210(1), Chambers had ten days from that date to file its protest.

Chambers contends that it did not fully appreciate the effect of the alleged overestimated box weights until bid opening when Chambers observed that Incendere's bid on Item B was substantially lower than that of its next four competitors. (See, Protestant's Ex. #2).

The Panel holds that ground #2 of Chambers protest is not timely. Chambers admits that prior to bid opening it held the strong belief that the 40-60 lbs. per box estimate was not accurate. Chambers belief was based on the experience and historical data it had in its possession prior to bid opening. Chambers admits that it was concerned enough about the effect of this overestimate to raise the matter with State Procurement prior to bid opening.

When it received Amendment #002, Chambers knew or should have known of all of the facts giving rise to its complaint about the accuracy of the box weights. Further, Chambers was aggrieved because it knew or should have known of the disadvantage it faced if it bid using weights it considered to be more than twice the actual weight.

Chambers stated at the hearing before the Panel that it is not protesting Incendere's alleged use of lower box weights rather it is claiming that the State erred in stating the wrong weights in the IFB. Because Chambers is protesting the bid specifications and the State's alleged errors therein, Chambers was required to file its protest within ten days of receipt of those specifications.

⁴ This Chambers failed to do.

As its third and final ground of protest, Chambers contends that Incendere is not a responsible bidder and cannot be awarded the contract because Incendere is not permitted by its Virginia waste disposal license to handle reusable containers at its Norfolk facility. The IFB requires the use of reusable containers.

Incendere and General Services argue that this ground is not timely under §11-35-4210(1) because it was not filed within thirty days of notification of award. Chambers first raised this ground on June 25, 1992, some 45 days after the issuance of the Final Award Report.

Chambers argues that the thirty-day deadline does not run from the issuance of the Final Award Report but rather

⁴One reason protestants are required to promptly protest bid specifications they believe are defective is to allow the State to correct them prior to bid opening and receive benefit of the correction. If Chambers is right in this case that the actual box weights are half those stated, the State may have benefited from a timely protest which resulted in lower prices based on proper weights.

from the stated effective date of the contract, in this case, May 28th.

The Panel finds no support for Chambers' position in either the plain words of § 11-35-4210 or in the Panel's previous holdings.⁵ In In re: Protest of My Sister's House, Case No. 1991-1, the Panel adopted General Services' argument that the term "notification of award" in § 11-35-4210(1) means issuance of the final award statement. The Panel stated:

The Panel finds that § 11-35-1520(10) of the Consolidated Procurement Code compels agreement with General Services' interpretation of the notice requirements in this case. Section -1520(10) provides that "when a contract has a total or potential value in excess of fifty thousand dollars, notice must be given to all bidders responding to the solicitation as to the agency's determination that a certain bidder is the lowest responsive and responsible bidder . . . Notice may be given by first-class mail of this intent to contract to the name and address on the bid documents."

The Panel affirms its holding in My Sister's House that the thirty-day time limit for protest begins to run from the issuance of the document which the State uses to satisfy the notice of intent to contract requirements of § 11-35-1520 (10). This document may be captioned any number of ways -

⁵As authority on this point, Chambers cites the Panel's previous holdings in Oakland Janitorial, Case No. 1988-13, and In re: Protest of AT&T, Case No. 1983-12, while General Services cites In re: Protest of Carter-Goble. The Panel does not find that any of these cases control the result in this case.

for example, "Notice of Intent to Award", "Final Award Report" or "Statement of Award." So long as the document puts the reader on notice that the State (or agency) has "determined that a certain bidder is the lowest responsive and responsible bidder", it suffices to begin the thirty-day period for filing protests.

In this case, the Final Award Report notified Chambers that the State had determined that Incendere was the lowest responsive and responsible bidder. Because Chambers protest of Incendere's responsibility was filed more than thirty days after this Final Award Report was issued, it is therefore untimely.

Notwithstanding its holding that Chambers' third ground of protest is untimely, the Panel is confident that, before the contract is awarded, State Procurement will conduct a thorough review of Incendere's responsibility under 11-35-1810 in order to assure that Incendere can by law perform the contract.

For the reasons stated above, the Panel affirms the July 27, 1992, decision of the Chief Procurement Officer, except as noted, and dismisses the protest of Chambers Medical Technologies of South Carolina, Inc.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Gus J. Roberts
Chairman

Columbia, S.C.
October 26, 1992