



The proposals were opened on January 5, 1994, and evaluated by a committee of employees of Tech. The RFP lists the Evaluation Criteria as: General Requirements, 25 points maximum; Vendor Qualifications, 50 points maximum; Costs, 25 points maximum. (Record p. 31). Digital received 67.5 points from the evaluation committee, and Systems received 39.5 points. (Record p. 49). Systems received the full 25 points for cost, giving Systems a total score of 64.5 points. Digital's total score was 88.48, after it received 20.98 points for cost. A Notice of Intent to Award to Digital was posted January 19, 1994.

Systems protested the Intent to Award to Digital on January 22, 1994. (Record p. 6-7). The CPO conducted a hearing on February 9, 1994 and posted his decision on March 1, 1994. (Record p. 6-11). The CPO found some irregularities in the solicitation and therefore canceled the award to Digital. Systems protested the CPO's decision to the Panel on March 4, 1994. (Record p. 2-5). Systems raises seven (7) issues in its protest letter:

- (1) the evaluation committee was partial to Digital,
- (2) "the process is partial in that 75% of the evaluation points relied upon the decision by the Tech Board",
- (3) Code Section 11-35-1530(7) prohibits numerical weightings of criteria,
- (4) award was made to Digital without consideration of the cost criteria,
- (5) unfair for Digital to get the contract as Systems provided lower prices,
- (6) the procurement process, by design, is not competitive and is not in the best interests of taxpayers,
- (7) Systems is not in violation of Regulation 19-445.2070(D)

Issue (7) was added to the letter for review in response to the CPO's decision finding Systems in violation of the Regulation. System requests the following

remedies in its appeal letter: (1) award of contract to Systems; (2) forbid Digital to sell directly to the State; (3) Damages, if the solicitation is canceled, in the form of: (a) attorney fees, (b) bid preparation fees, (c) damages for loss of contract, (d) reimbursement for lodging, travel and meals.

At the beginning of the Panel's hearing, General Services made motions to dismiss and for summary judgment.

## CONCLUSIONS OF LAW

### I. MOTION TO DISMISS FOR LACK OF JURISDICTION

The State argues that the Panel lacks jurisdiction over the matters alleged in System's protest, as the protest was unsigned, and therefore, does not meet the signature filing requirements of the Consolidated Procurement Code. Sections 11-35-4210(6) and 11-35-4330(1), read together, require a protestant's signature on its protest letter. However, nothing disallows a protestant's signature to be added to its letter prior to the hearing for the protest. The Panel allowed Systems to sign its protest letter to the Panel, and thus, cure its omission.

The State further argues that the Panel lacks jurisdiction over the subject matter of the protest, in that the protest matters alleged do not "aggrieve" Systems as required by the Code Sections conferring jurisdiction on the Panel. The State also argues that the request for review "fails to allege facts constituting a basis or claim for the relief requested and the Panel lacks jurisdiction to grant said relief." The Panel does not agree. The Panel finds that the protest matters alleged in Systems' protest letter to the Chief Procurement Officer, which establishes the issues of protest, clearly allege matters which aggrieve Systems, and confers jurisdiction under Code Section 11-35-4210. Systems established jurisdiction for the CPO to conduct a hearing on the merits, and such jurisdiction extends to the Panel, through the timely request for review.

The Panel holds that if the CPO has subject matter jurisdiction over the issues raised by the protestant, then, if proper request for review is filed under Code Section 11-35-4210(6), the Panel also has subject matter jurisdiction over the issues raised by the protestant in its protest letter to the CPO.

In its protest letter, Systems raises issues which may entitle it to relief. While the protestant is required to state its requested relief in its protest letter, the Panel is not limited to granting the relief requested. The Panel may grant a remedy in accordance with Code Section 11-35-4310. Therefore, the Panel has jurisdiction to determine what relief is proper, if any, for the issues raised.

#### MOTION FOR SUMMARY JUDGMENT

The State moves for summary judgment "on the grounds there are no material issues of fact, and it is entitled to judgment as a matter of law." The State argues that the CPO decision gives Systems all of the relief it is entitled to receive. The Panel agrees that, as a matter of law, the resolicitation of a contract is the legal remedy for a solicitation that is not conducted properly.

Systems' first protest issue contends that the evaluation committee was partial to Digital, which if proven, would require the resolicitation of the procurement. Giving the contract to the aggrieved party would not be fair to other offerors who did not cause the problems with the process.

The second and third issues raised by Systems deal with the weighting of the criteria in the solicitation, which is not timely protested, as problems with the information in the RFP must be protested fifteen (15) days from when the RFP is issued. However, even if these issues were timely filed and then proven, the remedy would be to re-issue the RFP with appropriate changes, not to award the contract to the aggrieved party.

Systems' fourth and fifth issues deal with the cost criteria. Because this solicitation is an RFP rather than an Invitation For Bids, cost is only one of the

criteria considered. As outlined in the RFP, cost is worth 25% and other factors are worth 75% in determining the most qualified offeror. The non-cost criteria worth 75% is evaluated by the evaluation committee. Digital received 67.5 points from the evaluation committee. Systems received 39.5 points, which, added to a perfect score of 25 points for cost, gives Systems a total score of 64.5 points. Systems' score on the two non-cost criteria, worth 75%, is so low the cost criteria could not make up the difference in points. This possible conclusion should be clear from the weightings given in the RFP. The Procurement Code allows for an RFP to use criteria other than cost, and even not include cost as a criteria at all. So, the weighting of the criteria, in a way that diminishes the effect of price, is contemplated and allowed by the Code. If the weightings or criteria is somehow individually discriminatory to an offeror, the specification including the weightings should be protested within 15 days from when the RFP is issued. If such allegations are then proven, the remedy would be the resolicitation of the RFP, not the award of the contract.

Systems' sixth issue deals with the "process" being unfair and noncompetitive. If a fairness or competitive problem exists with a specific procurement process or solicitation, as discussed above, the correct remedy is to resolicit the procurement with the appropriate changes.

Even if Systems proves all of the allegations of its protest letter, it has not raised issues which would result in the contract being awarded to it under the Procurement Code. All of Systems' allegations point to problems in the process of this solicitation. If problems in the solicitation process exist, then the remedy is not to award the contract to one offeror or another, but to address the problems with the solicitation, and resolicit.

Systems requests two additional remedies in its request for review. Systems' request for damages would only be valid if Systems had no other

remedy. The resolicitation provides Systems with a remedy, in that it has an opportunity to compete for the contract. Systems' request for Digital to be barred from competing is not a remedy allowed by the Procurement Code. The only remedy appropriate to the issues raised by Systems is the resolicitation of the RFP.

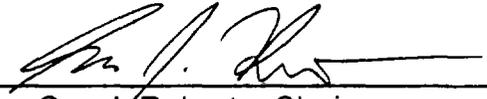
**CONCLUSION**

For the forgoing reasons, the Panel denies the Motion to Dismiss and grants the Motion for Summary Judgment. The Panel affirms the CPO's decision to cancel the award to Digital and the Panel finds that the solicitation should be re-issued with any changes the State determines to be appropriate, and a different team of evaluators should be appointed to evaluate the responsive proposals.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY:

  
Gus J. Roberts, Chairman

Columbia, SC  
April 15, 1994