

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 95-CP-40-2120

Beckman Instruments, Inc.,)
)
) Petitioner
vs.)
)
The South Carolina Procurement)
Review Panel, Johnson and Johnson)
Health Care Systems, Inc. and)
Medical University of South Carolina,)
South Carolina Budget and Control)
Board, Division of General Services,)
)
) Respondents.)

ORDER
(In re: Protest of
Beckman Instruments
Inc.)

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BARBARA A. SCOTT
C.C.C. & G.S.

This matter came before the court pursuant to the Administrative Procedures Act (APA) S.C. Code Ann. § 1-23-310, et. seq. (1986) on appeal by Beckman Instruments, Inc. from a decision of the South Carolina Procurement Review Panel. A non-jury hearing was held on August 25, 1997.

FACTUAL AND PROCEDURAL BACKGROUND

Beckman Industries (Beckman) appeals the order of the South Carolina Procurement Review Panel (Panel) denying Beckman's protest of the intended sole source procurement of chemistry analyzers by the Medical University of South Carolina (MUSC). The Panel is charged with the duty of providing a final administrative review of disputes arising between vendors and the State over purchasing matters governed by the South Carolina Consolidated Procurement Code (Procurement Code).



In 1994, MUSC began the implementation of new management strategies to increase efficiency and lower costs. MUSC considered the standardization of its lab equipment as part of this plan and began gathering information on different types of chemical analyzers. In July of 1994, MUSC formed a committee, or "management team" to investigate the different types of chemical analyzers available and to determine which type would best serve MUSC's goals of cost saving and efficiency. The committee was composed of six hospital officials from various disciplines. The committee had no purchasing authority but was formed only to gather information and make a recommendation. From approximately July to December of 1994, the committee assessed different chemical analyzers available from all known manufacturers, including Beckman. MUSC was contacted by five vendors wishing to supply MUSC with their analyzers. MUSC allowed each of the vendors to come to the lab and demonstrate their product. The committee determined that MUSC should convert to "dry system" chemical analyzers for all its labs and submitted this recommendation to MUSC's Director of Procurement. "Dry system" chemical analyzers are analyzers that require no external or internal water supply to operate. This decision was based, in part, on the fact that MUSC had experienced problems in the past with analyzers requiring water. At this time Johnson and Johnson (Johnson) was the only manufacturer of totally "dry system" analyzers. MUSC therefore decided the purchase would need to be a sole source procurement. A sole source procurement is used when it is



determined that there is only one source for the supply required by the purchasing agency.

Beckman filed a protest to the intended sole source procurement with the Chief Procurement Officer (CPO) who held a hearing on the matter. The CPO found that MUSC's decision was justified and not in violation of the Procurement Code. Beckman then appealed to the Procurement Review Panel on the grounds that the procurement was determined to be a sole source for improper and invalid reasons and that the procurement failed to comply with the sole source requirements of the statute and regulations. After hearing the appeal in a de novo proceeding, the Panel determined that MUSC's decision was supported by the evidence and that the procedure used by MUSC was in compliance with the requirements of a sole source procurement under the Procurement Code.

DISCUSSION

The South Carolina Consolidated Procurement Code governs all purchases made by the State and provides for sole source procurements in SC Code Ann. §11-35-1560 as follows:

A contract may be awarded for a supply, service, or construction item without competition when, under regulations promulgated by the board, the chief procurement officer, the head of a purchasing agency, or a designee of either officer, above the level of the procurement officer, determines in writing that there is only one source for the required supply, service, or construction item.

...Any decision by a governmental body that a procurement be restricted to one potential vendor must be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.



Regulation 19-445.2105 provides that a sole source procurement is prohibited unless there is only one supplier and further provides:

The determination as to whether a procurement shall be made as a sole source shall be made by either the Chief Procurement Officer, the head a governmental body, or designee of either office above the level of the procurement officer. Any delegations of authority by either the Chief Procurement Officer or head of a governmental body, with respect to sole source determinations shall be submitted in writing to the Materials Management Officer. **In cases of reasonable doubt, competition should be solicited.**

At the hearing before the Panel, all parties, including Beckman, agreed that Johnson offers the only totally "dry system" chemical analyzers available in the U.S. today. Though Beckman admits that it does not manufacture a dry system analyzer, it argues that MUSC does not need dry system analyzers and that it should consider other analyzers that have an enclosed water supply but that do not depend on an external water supply. Beckman is not authorized to make this determination for MUSC. The reliability of an external water supply was only one consideration of MUSC. The enclosed systems still have problems with water quality which affects the integrity of results. The record is clear that there is only one supplier of dry system analyzers and that MUSC's determination that there was only one source of a dry system was properly made. The regulation provides that if there is reasonable doubt in the judgment of the procuring official that only one supplier exists, then competition should be solicited. In this case, MUSC, on the recommendation of its committee, correctly determined in its evaluation of the available systems that reasonable doubt did not exist as to whether there was another supplier of dry system analyzers.



Beckman challenges the Panel's decision based on the burden of proof imposed by the Panel at the hearing. Beckman argues for the first time on appeal that the Panel should have applied a "reasonable doubt" standard instead of the preponderance of the evidence standard applied in all civil proceedings. Beckman relies on the language in Regulation 19-445.2105 cited above that states, "[i]n cases of reasonable doubt, competition should be solicited." This is a requirement to be followed by the appropriate procurement official and the statute and regulation merely require the procurement official to solicit competition if reasonable doubt exists as to whether there is another supplier of the product or service needed. The language does not create a "new" standard of review to be used in administrative proceedings. In all civil proceedings, including administrative hearings before the Procurement Review Panel, the burden of proof is that of the preponderance of the evidence. At the hearing before the Panel, Beckman had to prove by a preponderance of the evidence that reasonable doubt existed as to the availability of other dry system analyzers and that MUSC's determination to request a sole source procurement was in error or in violation of the Procurement Code. Even if Beckman had requested and been allowed to proceed improperly under a reasonable doubt standard, Beckman failed to meet this burden as it was established at the hearing and Beckman agreed at the hearing that it did not make a dry system and that Johnson was the only supplier of dry system analyzers. The court finds that the Panel correctly applied the preponderance of the evidence



preponderance of the evidence standard at the hearing and correctly determined that Beckman did not meet its burden of proof.

Under the Administrative Procedures Act, the decision of an administrative agency must be sustained if there is substantial evidence to support it. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E. 2d 304 (1981) (decision of S.C. Industrial Commission in a Worker's Compensation case subject to substantial evidence rule). Substantial evidence is "evidence which, considering the record as a whole would allow reasonable minds to reach the conclusion that the administrative agency reached." Gibson v. Florence Country Club, 282 S.C. 384, 318 S.E. 2d 365 (1984). A court cannot substitute its judgment for that of the [agency] upon a question as to which there is room for a difference of intelligent opinion. Hamm v. American Tel. & Tel. Co., 302 S.C. 210, 394 S.E.2d 842 (1990) (findings of public service Commission could not be overturned upon a question as to which reasonable minds could differ); Chem Leaman Tank Lines v. South Carolina Pub. Serv. Comm'n, 258 S.C. 518, 189 S.E.2d 296 (1972) (order of Public Service Commission would not be set aside absent convincing showing there was no evidence to support it.)

Beckman has not proven convincingly to this court that the Panel's order is unsupported by substantial evidence or that it embodies arbitrary or capricious action as a matter of law. Hamm, supra. "Substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency's finding from being supported by substantial evidence." Hamm v. South Carolina Pub.



Serv. Comm'n and Wild Dunes Util., Inc., 422 S.E. 2d 118 (S.C. 1992), quoting Lark, supra (Public Service Commission's order allowing a resort to recover lost revenues, although unusual, was reasonably supported by evidence and where reasonable minds could differ, judgment could not be set aside). The court finds that the record before it contains substantial evidence to support the decision of the Panel to uphold the MUSC's intended request for a sole source procurement of dry system chemical analyzers.

CONCLUSION

For the foregoing reasons, the Court upholds the order of the Procurement Review Panel and hereby dismisses Beckman's appeal.

IT IS SO ORDERED.



J. Ernest Kinard, Jr.
Circuit Court Judge,
5th Judicial Circuit

Columbia, SC
10/2, 1997