

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	CASE NO. 2001-1
In re:)	
Protest of Centerline Industries, Inc.)	
)	ORDER
)	
Appeal by Centerline Industries, Inc.)	
)	

This case came before the South Carolina Procurement Review Panel (Panel) for a hearing on April 3, 2001 on appeal by Centerline Industries, Inc. (Centerline) of a decision by the Chief Procurement Officer (CPO). Present and participating in the hearing before the Panel were Centerline, represented by Kimila L. Wooten, Esquire and Franklin L. Elmore, Esquire, Ennis Paint, Inc. (Ennis), represented John E. Schmidt, III, Esquire, South Carolina Department of Transportation (SCDOT), represented by Glennith Johnson, Esquire as well as the Office of General Services of the Budget and Control Board (General Services), represented by Keith McCook, Esquire.

FINDINGS OF FACT

On November 20, 2000, the Materials Management Office (MMO) issued an invitation for bids (IFB) to procure traffic paint for the Department of Transportation (DOT). The IFB contains two line items, one for yellow paint and the other for white paint. The items were bid separately, but arranged into a single lot for award. On December 6, 2000, MMO opened the two bids received. Centerline was the low bidder for the lot, but MMO rejected their bid on the basis of the DOT Research and Material Laboratory's test results on Centerline's yellow paint sample.

On December 29, 2000, MMO posted a notice of intent to award the lot to Ennis Paint. On January 2, 2001, Centerline submitted a protest to the Chief Procurement Officer (CPO). On February 7, 2001, the CPO issued a decision denying Centerline's protest. On February 15, 2001, Centerline appealed the decision of the CPO to the Panel.

CONCLUSIONS OF LAW

MOTION TO DISMISS

SCDOT, joined by General Services and Ennis, submitted a motion to dismiss Centerline's appeal on the basis that the protest letter did not state any grounds for protest with enough particularity to give notice to all parties of the issues to be decided. SCDOT also moved for all other issues presented before the CPO and contained in Centerline's letter of appeal to be dismissed on the basis that they were not timely raised. The Panel finds that the protest letter did address Centerline's appeal issues 1 (Centerline contests the CPO's finding that Centerline's yellow paint samples did not meet the minimum viscosity requirements of the specifications) and 2 (Centerline contests the CPO's finding that Centerline did not consider variations in production and between testing laboratories when setting manufacturer tolerances for its samples) with enough particularity to give notice to all parties of the issued to be decided. Centerline's appeal issues 1 and 2 were addressed by the CPO and those issues addressed by the CPO extend to the Panel through the timely request for review under S.C. Code Ann. § 11-35-4210 (6).¹ The motion to dismiss Centerline's appeal in its entirety is hereby denied.

¹ See Protest of Love Chevrolet Company, Case No. 1999-7 (finding the Panel has jurisdiction over issues addressed by the CPO).

The Panel finds that Centerline's appeal issue 5 (Centerline contests the CPO's finding that the sample submission process was proper) was not timely raised in the protest letter and was not addressed by the CPO. The motion to dismiss Centerline's appeal issue 5 is hereby granted.

Centerline, General Services, SCDOT and Ennis entered into a stipulation on the record that Centerline's issue 4 (Centerline contests the CPO's finding that its failure to submit required information on its resin type and non-volatile vehicle constituted a deficiency which could be considered in rejecting Centerline's bid) should be waived as a minor informality and that issue was withdrawn.

Ennis made a motion to dismiss to Centerline's issue 3 (Centerline contests the CPO's interpretation of the language of the project specifications) as vague. The project specifications covered more than six pages. [Record pp. 18 - 24] The Panel finds that Centerline's issue 3 does not state with enough particularity what language from the project specifications was interpreted by the CPO. The motion to dismiss Centerline's issue 3 as vague is granted.

ISSUES I AND II: WHETHER CENTERLINE'S YELLOW PAINT SAMPLES MET THE MINIMUM VISCOSITY REQUIREMENTS OF THE SPECIFICATIONS AND WHETHER CENTERLINE CONSIDERED VARIATIONS IN PRODUCTION AND BETWEEN TESTING LABORATORIES WHEN SETTING MANUFACTURER TOLERANCES FOR ITS SAMPLES

The specifications for the invitation for bid (IFB) at hand contained the following relevant provisions:

2.4 Testing and Production Variation: When minimum or maximum values are given in these specification, they represent values which are to be reliably obtained from testing. They do not represent acceptable mean production values. It shall be the responsibility of the manufacturer to consider variations in production and between testing laboratories when setting manufacturing tolerances.

3.1 Viscosity: The viscosity shall be 80 to 95 K.U. when tested at 25° C (77° F) in accordance with ASTM D562.

4.3 ... (Note: As noted in Section 2.4, it is the manufacturer's responsibility to consider testing and production variation when selecting mean production values. It is **strongly** recommended that the vehicle solids be one to two percent higher than the minimum values.)

5.1 Qualification Samples: PRIOR TO AWARD, each prospective bidder for supplying paint under these specifications, shall submit the following items for each type and color of paint to be supplied:

- A sample consisting of two 0.95-liter (1-quart) cans of paint which the manufacturer proposes to furnish.
- Manufacturer's testing results for the samples...

The contract award shall not be made until testing indicates that the material proposed to be provided is in conformance with these specifications. [Record pp. 19 - 21]

The samples submitted for this IFB by Centerline (Also known as Lafarge Road Marking) were tested by SCDOT in accordance with 5.1 of the specifications. The testing of the sample for the yellow waterborne traffic paint submitted by Lafarge Road Marking indicated a paint viscosity of 79 K.U. which was found to be below the minimum specification of 80 by Dr. Andrew M. Johnson of the Research and Materials Lab at SCDOT. A re-test of the sample was run and a viscosity of 80 K.U. was measured. Dr. Johnson reported in a memorandum that the re-test confirmed the original value of 79 and recommended that Lafarge not be considered in compliance with the bid specifications. [Record p. 68] At the hearing before the Panel, Dr. Johnson testified that the viscosity minimum of 80 K.U. and maximum of 95 K.U. were set as such because of prior experience with complaints about the paint going up outside this range.

Centerline through testimony from Melissa Grizzle, a chemist, contends that the 79 K.U. is scientifically the same as 80 K.U. and should have been found in compliance with the specifications. Ms. Grizzle further testified that she interpreted the ASTM precision statement to extend the range of 80 to 95 K.U. in the specifications. However, nothing in the specifications nor in the ASTM precision statement support an interpretation that the ASTM D562 could be used to alter the specification minimums and maximums. In fact, 13.1.1 of the precision statement provides that the criteria therein should be used for judging the acceptability of results at the 95% confidence level. [Record p. 87] The Panel does not find this argument by Centerline convincing.

The Panel finds that the specifications on their face called for a minimum viscosity of 80 K.U. and that the 79 K.U. test result on Centerline's yellow paint sample was not in compliance with provision 3.1 of the IFB.

Section 2.4 of the IFB clearly stated that it would be the manufacturers responsibility to consider variations in production and between testing laboratories when setting manufacturer tolerances. The variance of 4% is recognized by ASTM as the potential difference in test results from different labs. The IFB put vendors on notice to account for the 4% variance in production and between testing laboratories. Therefore, the Panel finds that Centerline may have considered the 4% variance in production and between testing laboratories when setting their tolerances, but submitted their sample under the erroneous assumption that samples testing outside the 80 to 95 K.U. range as required by the IFB would be accepted. Centerline was responsible for submitting samples that complied with the IFB.

CONCLUSION

For the foregoing reasons, the appeal by Centerline is dismissed and the decision of the CPO is upheld in as much as it is consistent with the Panel's findings.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
C. Brian McLane, Vice Chairman

Columbia, SC

May 2, 2001