

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
 )  
In re: )  
Protest of Helena Chemical Company )  
 )  
Appeal by Helena Chemical Company )  
 )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL

CASE NO. 2001-5

ORDER

---

This case came before the South Carolina Procurement Review Panel (Panel) for a hearing on July 24, 2001 on appeal by Helena Chemical Company (Helena) of a decision by the Chief Procurement Officer (CPO). Present and participating in the hearing before the Panel were Helena, represented by Robert Jordan, Esquire, and Thornwell Sowell, III, Esquire, UAP Timberland (UAP), represented by John Schmidt, III, Esquire, the Department of Transportation (DOT), represented by Glennith Johnson, Esquire, and the Office of General Services of the Budget and Control Board (General Services), represented by Keith McCook, Esquire.

**FINDINGS OF FACT**

On February 20, 2001, the Materials Management Office (MMO) issued an invitation for bids (IFB) to procure a statewide term contract for herbicides. The IFB asked prospective bidders to offer prices for twenty different herbicides which would be awarded as one lot to the responsive and responsible bidder with the lowest aggregate price for all twenty herbicides combined. On March 13, 2001, MMO opened the bids received. On March 15, 2001, Helena's bid was determined to be nonresponsive for altering line item No. 16, from gallons to pints. On March 19, 2001, MMO posted its notice of intent to award to UAP. On March 27, 2001, the CPO received Helena's protest. On May 25, 2001, the CPO posted the decision dismissing Helena's protest. On June 4, 2001, Helena appealed the CPO's decision to the Panel.

## CONCLUSIONS OF LAW

### ISSUE: DID THE CPO ERR IN FINDING HELENA'S BID NONRESPONSIVE AND BY FAILING TO CANCEL THE AWARD PURSUANT TO REGULATION 19-44.2085

South Carolina Consolidated Procurement Code (S. C. Code) § 11-35-1520(13) provides in part the following:

**A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing.**

Helena argues that the CPO erred in affirming the decision to reject Helena's bid for failing to conform to the delivery schedule under Regulation 19-445.2070(C)<sup>1</sup> [Record p. 47] and that changing the unit of measure from gallons to pints in their bid should have been deemed a minor informality or irregularity.

In *Protest of CNC Company*, Case No. 1988-5, the Panel stated the following: "...the Panel cannot find that the failure to list installation charges was such a minor irregularity that it had no effect on price or on the standing of the bidders ... **There is nothing in CNC's bid to indicate that it included installation charges in its total unit prices.**" In *Protest of Coca-Cola Bottling Company Consolidated*, Case No. 1996-13, the Panel stated the following: "**MMO cannot assume information** ... not providing a single commission offer, however it is arrived at, does not have a trivial effect on the price requirements of the RFP. Not providing a single commission percentage in this case is not an immaterial variation which can be corrected or waived."

---

<sup>1</sup> The Panel will address Regulation 19-445.2070(C) of the State Budget and Control Board later on in this Order.

Helena's appeal states that Helena stands by its unit price of \$13.25 per pint or \$106.00 per gallon. However, there is no mention of unit price per gallon for item #16 in the bid submitted by Helena, in fact gallon is marked out as the unit of measure and pint is written in. [Record p. 92] Accordingly, the Panel finds that Helena's changing the unit of measure from gallons to pints in their bid is not a minor informality because it was not some immaterial variation from the exact requirements of the invitation for bids, but it directly effected bid price, quantity and it would be prejudicial to the standing of bidders. Along the lines of the finding in *Protest of Coca-Cola Bottling Company Consolidated*, the Panel finds that the State cannot assume information. Therefore, DOT would not be allowed to assume that the unit price per gallon could be calculated by using the unit price per pint.

Helena argues that because quantities provided in bid solicitations are only estimates, the Standard Solicitation guidelines establish that unit price shall govern over extended price. This argument may very well be correct, however, there is nothing in Helena's bid which indicates what the unit price per gallon would be. On the face of Helena's bid in regards to Item #16, the state can only determine that Helena's bid offers some 350 pints less than what was asked for in the IFB. Had Helena also marked through the quantity and changed 50 to 400, the State could have made the computation from pints to gallons that Helena is now suggesting. Unfortunately, that is not the case. Further, it seems clear from Helena's protest that the basis for their taking issue with the IFB as written was the container size, but they made no adjustments to the container size in the bid they submitted to the State. The Panel finds Helena's bid nonresponsive to Item #16 (Herbicide, Hi-Lite Red Oil Base).<sup>2</sup>

---

<sup>2</sup> The Panel notes that it could end its legal analysis at this point. However, in the interest of responding to some important regulations raised in Helena's appeal, the Panel will address those regulations in this Order.

Regulation 19-445.2065 of the State Budget and Control Board provides in part the following:

- A. Unless there is a compelling reason to reject one or more bids, award will be made to the lowest responsible and responsive bidder. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modification or cancellation, thereby permitting bidders to change their bids and preventing the unnecessary exposure of bid prices.
- B. Cancellation of Bids Prior to Award. When it is determined prior to award, but after opening, that the requirements relating to the availability and identification of specifications have not been met, the invitation for bids shall be cancelled.

Helena argues that they followed the no substitutions rule set forth in the Standard Solicitation guidelines and submitted the lowest overall bid. Helena asserts that Regulation 19-445.2065(A) places an affirmative duty upon the MMO to make every effort to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders and further argues that the CPO erred in placing this burden on Helena by blaming Helena for not seeking clarification. The Panel is not convinced by Helena's arguments based on the above regulation. First, Regulation 19-445.2065(A) is premised on making an award to the lowest responsive and responsible bidder and Helena was clearly a nonresponsive bidder. Second, Regulation 19-445.2065(A) does place an affirmative duty on the State to make every effort to anticipate changes in a requirement prior to the date of opening, but in this case the State did not anticipate a change in a requirement prior to the date of opening. The Panel finds that the duty the CPO placed on Helena was to seek clarification prior to submitting their bid because Helena identified what they believed to be a mistake in the solicitation and had not received any notification from the State of modification prior to bid opening. Further, the Panel finds that Helena's remedy at that point is clearly set out in S. C. Code § 11-35-4210 (1) as follows:

Right to Protest; Exclusive Remedy. Any prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer ... within fifteen days of the date of issuance of the Invitation For Bids.

Helena did not protest the solicitation within fifteen days of the date of issuance of the IFB which is a duty that is placed on bidders. The IFB was issued on February 20, 2001 and the bids were opened on March 13, 2001. There clearly was more than fifteen days between the issuance of the IFB and the date of bid opening, but Helena did not exercise their right to protest the solicitation itself.

Regulation 19-445.2065(B) requires the cancellation of a bid when it is determined prior to award, but after opening, that the requirements relating to the availability and identification of specifications have not been met. In the present case, DOT asserted that requirements relating to the availability and identification of specifications were met by the other bidders in this case. The packaging of Item #16 does not change the quantity of what was being asked for and whether or not State receives the quantity in pint containers or gallon containers is beside the point based on the way Helena approached their protest rights.

Regulation 19-445.2070 of the State Budget and Control Board provides in part the following:

- A. Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.
- C. Any bid which fails to conform to the delivery schedule, to permissible alternates thereto stated in the invitation for bids, or to other material requirements of the solicitation may be rejected as nonresponsive.

The Panel finds that Helena's failure to submit even close to the quantity (400 rather than 50 pints would have conformed to the 50 gallons) of Item #16 asked for in the IFB is an essential requirement which Helena failed to conform to.

The Panel also finds that Rodney Hick's, a procurement manager of MMO, was correct in deeming Helena's bid nonresponsive because 50 pints did not conform to the material requirements of this solicitation. [Record p. 38]

Regulation 19-445.2085 of the State Budget and Control Board provides in part the following:

- B. To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake in the judgment of the procurement officer is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.
  
- C. Cancellation Of Award Prior To Performance. When it is determined after an award has been issued but before performance has begun that the State's requirements for the goods or services have changed or have not been met, the award or contract may be canceled and either reawarded or a new solicitation issued, if the Chief Procurement Officer determines in writing that:
  - 1. Inadequate or ambiguous specifications were cited in the invitation;
  - 2. Specifications have been revised;
  - 3. The supplies or services being procured are no longer required;
  - 4. The invitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidder's plants;
  - 5. Bids received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;
  - 6. The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;
  - 7. Administrative error of the procuring agency discovered prior to performance, or
  - 8. For other reasons, cancellation is clearly in the best interest of the State.

Helena argues that their mistake, originating from the DOT's mistake in requesting the wrong quantity, is clearly evident from its bid and should be corrected.<sup>3</sup>

---

<sup>3</sup> This argument by Helena is premised on a State herbicide contract procured in 1996. At the hearing before the Panel, an objection by General Services that information pertaining to a prior procurement was irrelevant to this case was sustained. The Panel finds justification for this ruling in *Protest of Two State Construction Company*, Case No. 1996-2 where this Panel stated, "the Panel cannot consider a prior procurement that was not protested to the Panel." However, the Panel made a ruling that Helena would be allowed to submit offers of proof in regards to this information.

There was no testimony that the procurement officer in this case could determine Helena's mistake from the face of the bid. The Panel finds that the mistake alleged by Helena, in the judgment of the procurement officer, is not clearly evident from examining the bid document.

Helena further argues that their unit price should be extended out to award the contract to the lowest bidder. However, the extended price for \$13.25 per pint is \$662.50 for 50 pints and there is no mathematical error presented here. The Panel finds that the CPO did not err in its application of Regulation 19-445.2085(B) to Helena.

Helena also argues that Regulation 19-445.2085(C) (1), (7) and (8) are applicable to this case. The Panel finds that Helena failed to meet their burden of proof that the current IFB cited inadequate or ambiguous specifications. The Panel also finds that what is in the best interest of the State can only be determined by the State, and in this case the State found no reason to cancel the award. Mr. Huley Shumpert, DOT's State Maintenance Engineer, testified before the Panel that knowing what he knows now he believes the unit of measure in the IFB should have been pints. This is evidence that an administrative error of the procuring agency was discovered prior to performance. However, the Panel finds that cancellation under this regulation is not mandatory because the language states "the award or contract may be cancelled."

The Panel takes this opportunity to point out that the State did acknowledge that a mistake was made in the preparation of this IFB as to Item #16, but this mistake did not effect the competitive process or the outcome of this case. In *Protest of Coca-Cola Bottling Company Consolidated*, cited above, this Panel stated, "The Panel's findings do not negate the mistakes made by the State in this case, but neither do the State's mistakes negate the fact that Coke's offer is nonresponsive."

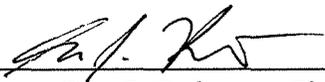
Accordingly, the Panel's findings in this case recognize DOT's mistake, but DOT's mistake does not negate the fact that Helena's bid as to Item #16 was nonresponsive.<sup>4</sup>

**CONCLUSION**

For the foregoing reasons, the decision of the CPO is upheld and the appeal by Helena is dismissed.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL**

BY: \_\_\_\_\_  
Gus J. Roberts, Chairman

Columbia, SC  
August 23, 2001

---

<sup>4</sup> Helena also raised Regulation 19-445.2095(E) in their appeal letter. However, this regulation was not included in their protest nor was it addressed by the CPO. Further, had this regulation been properly raised before the Panel it would have been irrelevant because it refers to Competitive Sealed Proposals.