

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

ORDER

IN RE:)
)
Protest of Specialty Underwriters)
Appeal of Keenan & Suggs)

Case No.: 2004-2

This matter came before the South Carolina Procurement Review Panel for a hearing on May 18, 2004. The Panel heard an appeal of the April 1, 2004 decision and written determination of the Chief Procurement Officer (CPO) by Keenan & Suggs (Keenan). At the hearing before the Panel on May 18, Keenan was represented by John Schmidt, Esquire. Specialty Underwriters was represented by Daniel Brailsford, Esquire. Keith McCook, Esquire, represented the Chief Procurement Officer.

FINDINGS OF FACT

On June 10, 2003, the Materials Management Office of the Budget and Control Board issued Request for Proposal #03-S5838 (RFP) in which it sought to procure a statewide term contract for an equipment maintenance program to begin February 2004. On July 2, 2003 an amendment was issued in response to questions submitted. Bids were opened on July 16, 2003.¹

¹ In 2000 a similar RFP was issued. It was limited to equipment owned by Clemson University and the University of South Carolina. The RFP in the current case was modeled from that previous one and is nearly identical in language. Neither witness David Quiat nor Janet Watkins of the Materials Management Office were aware of any problems from the first contract. The current RFP provides, “[o]nce that contract expires, they will have the opportunity to utilize this contract.”

On October 27, 2003, Procurement Manager Janet Watkins issued a determination that the proposal of Specialty Underwriters was non-responsive and therefore it was not considered. Ms. Watkins found Specialty Underwriters to be non-responsive because it “provided two equipment categories and offered different percentage discounts for these categories.” Record, pg. 69. The RFP did not allow for multiple percentages.

Keenan & Suggs only provided one percentage but apparently it was unclear to Ms. Watkins exactly what it covered because in November 2003 she sought clarification from Keenan and Suggs concerning the percentage. After Keenan & Suggs responded to a series of clarifying questions, the Intent to Award was made to Keenan & Suggs on January 21, 2004. The Intent to Award was suspended on February 6, 2004 after the CPO received a protest from Specialty Underwriters.

On April 1, 2004, CPO Voight Shealy issued his order in which he determined that the proposal of Specialty Underwriters was not responsive, but he found that neither was the proposal from Keenan & Suggs. The CPO found that the proposal from Keenan & Suggs did not offer a global fixed price as desired even though they had just offered one percentage. Therefore, he found Ms. Watkins should not have sought clarification from Keenan & Suggs. The CPO determined that the RFP was “inadequate and ambiguous” and that a new solicitation should be issued after the specifications are revised.

CONCLUSIONS OF LAW

S.C. Code Ann. Section 11-35-1520 (7) authorizes a CPO to cancel an award or contract prior to performance, in accordance with regulations promulgated by the board, and requires such a decision to be supported by a written determination of appropriateness.

Procurement Regulations at 23 S.C. Code Ann. Regs. 19-445.2085 (C) states, in pertinent part:

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;
- ...
- (8) For other reasons, cancellation is clearly in the best interest of the State.

After finding that Keenan was also non-responsive, the CPO finds that the problems have resulted from the inadequate and ambiguous specifications of the RFP. It does appear from the written record and the testimony before us that this RFP has caused confusion. Keenan & Suggs was the only bidder found responsive initially and even then clarification had to be sought about just what its cost saving percentage was covering. Keenan & Suggs did provide one number, but then qualified it so that it was not truly one cost savings percentage. We agree that the qualification was necessary because of the ambiguity of the RFP. Also, the question of what would happen in terms of the guaranteed cost savings percentage at the expiration of the current contract involving Clemson University and the University of South Carolina was never adequately answered and is not adequately addressed by this RFP.

Under S.C. Code Ann. Section 11-35-2410, the CPO's decision is "final and conclusive unless clearly erroneous, arbitrary, capricious or contrary to law." Based on the

foregoing, the Panel finds that the decision of the CPO to cancel and resolicit the procurement in this case is not erroneous, arbitrary, capricious, or contrary to law.

Previously, this Panel has commented on its concern about cancellation after award and protest, saying

The Panel takes this opportunity to caution agencies to carefully consider before requesting cancellation and resolicitation, especially when a protest has been filed, as the request may appear to be an attempt to circumvent the procurement process. The Panel encourages the CPOs to continue to cautiously and carefully exercise the authority to cancel and resolicit procurements, especially when a protest has been filed.

In re: Protest of Analytical Automation Specialists, Inc.; Appeal by Analytical Automation Specialists, Inc., Case No. 1999-1.

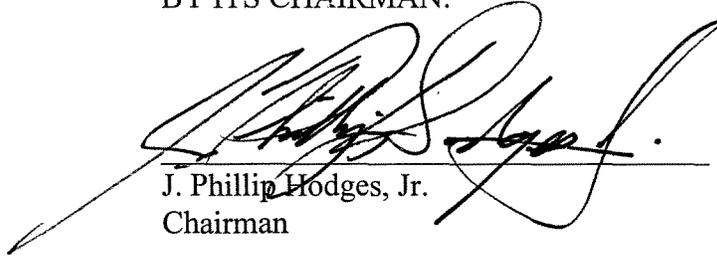
We are concerned, as was Keenan & Suggs, about the cancellation of solicitations after award because at that point the apparent successful offeror has “shown its best hand.” In other words, competitors have seen the winning price which is certain to influence future bids. We understand this concern and have considered its impact. Nevertheless, it appears the CPOs also are concerned about such cancellations and are hesitant to cancel solicitations after award and after protest. In this matter the concerns were overridden by the CPO’s conclusion that Keenan & Suggs was not responsive and that the reason was the confusing language of the RFP.

ORDER

For the reasons stated above, we uphold the written determination of the CPO to cancel the award to Keenan & Suggs and to issue a new RFP after clarification.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL
BY ITS CHAIRMAN:



J. Phillip Hodges, Jr.
Chairman

This 14th day of June, 2004