

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL

ORDER

IN RE: )  
 )  
Protest of Corey Media, Inc. )  
Appeal of Corey Media, Inc. )

Case No. 2006-4

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This matter came before the South Carolina Procurement Review Panel for a hearing on May 16, 2006. The Panel heard an appeal of the March 30, 2006, decision of the Chief Procurement Officer (CPO) by Corey Media, Inc. (Corey). The CPO issued a decision upholding an award to South Carolina Logos in which the State sought to procure administration services for the Logo Sign Program for the South Carolina Department of Transportation. Corey Media sought further administrative review before the Panel contending that South Carolina Logos was non-responsive to the RFP.

At the hearing Corey Media was represented by Stephen P. Bates, Esquire, and Paul M. Koch, Esquire. SC Logos was represented by John E. Schmidt, III, Esquire. SC DOT was represented by Natalie J. Moore, Esquire. The CPO was represented by Keith C. McCook, Esquire.

**Findings of Fact**

On December 7, 2005, the Materials Management Office of the South Carolina Budget and Control Board on behalf of the SC DOT issued a Request for Proposals (RFP). The RFP sought proposals from companies to administer the Logo Sign Program for the SC DOT. These signs provide travelers with information concerning business identification and directions to the

businesses. For example, these signs appear on roads throughout South Carolina and may show that XYZ Store will be at the next exit. As motorists exit the highway, there may be another sign showing that XYZ Store will be ½ mile after turning right at the end of the exit ramp. The awardee of the administration contract makes a profit from the businesses paying to have the signs displayed. The RFP set the fees for participation by the businesses and called for a portion of the money paid to go to the SC DOT through a guaranteed annual payment. The RFP said,

On the Guaranteed Annual Payments Form, the proposer shall specify:

1. A minimum annual payment it proposes to make to the SC DOT, and
2. A proposed percentage (%) of gross program revenue.

The guaranteed annual payment to the SC DOT shall be equal to the greater of either the minimum annual payment or the amount calculated by multiplying the proposed percentage times the annual gross program revenue.

Four companies sent proposals for the award. After the evaluations, SC Logos was ranked first with Corey Media ranked second. Thirty percent of the total score was based on the amount of the Guaranteed Annual Payment. The score given was determined only by what the proposer stated was the minimum annual payment in #1. The score did not consider the proposed percentage of gross program revenue in #2. There were no possible points for the alternative payment of the percentage of gross revenue. Corey, as well as all of the parties, knew this because in its questions concerning the RFP, Corey submitted a hypothetical situation in which Corey set out a “quantifiable” Guaranteed Annual Payment and asked how it would be scored. The answer was based on Corey’s example of proposed guaranteed annual payments and then the answer gave what score each would receive.

Corey Media offered the highest minimum annual payment and received 30 points. SC Logos offered a minimum annual payment that was .8925 of Corey's. Therefore, SC Logos received 26.77 points which is .8925 of 30.

In the proposal of SC Logos, they inserted the following language:

**NOTE: South Carolina Logos considers only the annual rental payments made by participants for mainline, ramp, and trailblazer business signs as "Gross Revenue" generated by the Program. Fees collected for business sign installation, replacement, removal, or fabrication of the business signs are not included in the Gross Revenue projection in the guaranteed annual payment, or in the percentage of Gross Revenue payment to the Department.**

Corey contends this language did not conform to the material requirements of the RFP and that it sought to impose a condition of the proposal and therefore rendered the proposal non-responsive.

Both Kenneth Rickerts testifying on behalf of Corey Media and Everett Stewart testifying on behalf of SC Logos discussed the projected amount of gross revenue they believed these fees would generate. The RFP did not define gross revenue. Andy Leaphart, the department liaison for the Logo Sign Program, testified that the SC DOT had never collected those fees which SC Logos excluded. He testified he never expected these fees to be in gross program revenue.

#### **Conclusions of Law**

Pursuant to S.C. Code Ann. §11-35-1530(9) an award must be made to the responsive offeror whose proposal is determined in writing to be the most advantageous to the State. Further, S.C. Code Ann. § 11-35-1410 (7) provides that a responsive offeror is a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals. Therefore, the pivotal question is whether SC Logos conformed in all material aspects to the RFP. We find that the RFP of SC Logos was materially responsive.

The Panel heard much discussion from Rickerts and Stewart concerning how much money these installation, replacement, removal, and fabrication fees would generate and whether such fees were “material.” We understand that the parties spent much time explaining their estimates primarily because the CPO found that the probability that this percentage of gross program revenue would overtake the minimum annual payment was slight and therefore immaterial. In In Re: Appeal by Anderson Consulting, Panel Case No. 1993-18, we declined to find an issue immaterial simply because it was a small cost compared to the whole contract.

However, we do not think the materiality of the estimates or projected fees to be generated by this portion of the program has to be reached to find that the exclusion of the fees by South Carolina Logos was immaterial. Pursuant to S.C. Code of Laws, §11-35-4410, the Panel hears cases *de novo* and we do not find it necessary to follow the CPO’s discussion about whether the likelihood of the percentage of gross program revenue overtaking the minimum annual payment in deciding whether SC Logos conformed in all material aspects. There was nothing that required these replacement, installation, removal and fabrication fees to be included in gross revenue. The RFP said the awardee may charge these fees and set out a fee schedule in case they were charged. SC DOT apparently did not even expect these fees to be included in gross program revenue and expressly testified that these fees were not expected to be included in the gross program revenue. These fees had never been paid previously to the department. The percentage of gross program revenue stated by proposers was not scored. It is illogical to think that these fees were material to the RFP regardless of the amount of money they generated.

Alternatively, Corey appeared to argue that the disclaimer in the RFP of SC Logos constituted an impermissible condition. S.C. Code of Regulations, §19-445-2070(D) provides that a proposal should be rejected when the offeror attempts to impose conditions which would

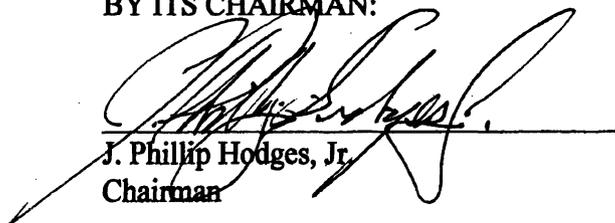
modify the requirements of the RFP. This regulation lists six different examples in which a bid can constitute an impermissible condition. While these examples were not meant to be exhaustive, the language cited in the proposal of SC Logos does not rise to the level needed to impose a condition that should cause a bid to be rejected. In this case, and under these facts, we do not believe this language sought to impose an impermissible condition. SC Logos testified it was simply trying to make clear an issue that was not adequately addressed in the RFP -- what constituted or what was excepted from gross program revenue. The SC DOT completely agreed with this interpretation of the RFP and did not consider the language to impose an impermissible condition.<sup>1</sup> There was no evidence presented of collusion between the agency and the company on this point. Also, there was nothing in Corey's RFP that suggested that had a different interpretation in its RFP or at the time that it designed and proposed its RFP.

#### ORDER

For the reasons stated above, we uphold the award to SC Logos finding that they conformed in all material aspects to the RFP.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL  
BY ITS CHAIRMAN:



J. Phillip Hodges, Jr.  
Chairman

This 30<sup>th</sup> day of May, 2006

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<sup>1</sup> Why the DOT took this position was not altogether clear. We take this opportunity to exhort the DOT to provide more clarity in the future RFPs; in this instance, it could have better described what it meant by gross revenue, especially when it could mean additional revenue coming to the DOT and the citizens of South Carolina.