

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL

ORDER

IN RE: )  
 )  
Appeal of Petroleum Traders )

Case No. 2006-6

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This matter came before the South Carolina Procurement Review Panel for a hearing on August 17, 2006. The Panel heard an appeal by Petroleum Traders of the June 30, 2006, decision of the Chief Procurement Officer (CPO). The CPO issued a written determination canceling an award to Petroleum Traders for statewide term contracts for gasoline and diesel fuels.

At the hearing Petroleum Traders was represented by Michael Elvin, Esquire, Hank Wall, Esquire, and Wade Mullins, Esquire. Mr. Elvin is licensed to practice law in the State of Indiana and filed a verified application to the State of South Carolina to participate *pro hac vice* in the hearing of this case. We admitted Mr. Elvin *pro hac vice* for this matter. Keith McCook, appeared as counsel for the Chief Procurement Officer of the SC Budget and Control Board.

**Standard of Review**

This appeal is from the cancellation of a contract solicited under S.C. Code Ann. § 11-35-1520. The standard of review for cancellation under §11-35-1520(7) is different than many of the cases heard by the Panel. The standard of review for cancellations is found at S.C. Code Ann. §11-35-2410. It states, in part, “[T]he determinations required by Section 11-35-1520(7) (Competitive Sealed Bidding: Correction or Withdrawal of Bids; Cancellation of Awards) ... shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary

to law.” Therefore, the only matter before the Panel is whether the CPO’s order canceling the award is clearly erroneous, arbitrary, capricious, or contrary to law.

### **Findings of Fact**

On June 2, 2006, the Materials Management Office of the South Carolina Budget and Control Board issued an Invitation for Bids (IFB) soliciting bids pursuant to S.C. Code Ann. §11-35-1520 of the South Carolina Procurement Code for unleaded gasoline and low sulfur diesel fuel. Petroleum Traders submitted a bid as did two other companies. On June 7, 2006, the bids were opened and on June 9, 2006, the Intent to Award was issued to Petroleum Traders as the lowest responsive and responsible bidder on the bids. On June 23, 2006, Mansfield Oil filed a protest. Mansfield Oil was not one of the three bidders. On June 30, the award to Petroleum Traders was cancelled by written determination of the CPO and ordered re-bid with revised specifications.

The Bid Tabulations show that Petroleum Traders was in fact the low bidder on the two previously-mentioned bids. (Appellant’s Exhibits #23 and #24). Rather than bid on the entire cost for a gallon of fuel which would include fluctuating prices, the bid is based on the mark up of the vendor. The IFB tells the bidder how to figure the other components of the cost.

The testimony showed that a price charged for fuel by a vendor has four components. The bidder has no control over three of the components: the price set by the OPIS weekly average (OPIS Weekly); taxes; and the administrative fee charged by the Materials Management Office. The vendor’s fee is the only component over which the bidder has control.

The OPIS average is the price as issued by the publication of the Oil Price Information Service (“OPIS”) out of Silver Springs, Maryland. This IFB called for use of the OPIS Weekly average, but there is also an OPIS daily average (OPIS Daily). The OPIS Weekly sets a price for

a week. The OPIS Daily sets the price daily. In times when prices in the fuel market are rising, vendors prefer to be able to use the OPIS Daily system. With OPIS Weekly prices can rise so dramatically over the course of the period that they can lose more money than if they were able to change the price daily. Testimony and other evidence showed that at times this can be a significant difference. The Procurement Manager testified that vendors ask about being able to use an OPIS Daily during these times.

One of the reasons the CPO decided to cancel the award was so that the specifications could be changed to allow for OPIS Daily bidding. There was conflicting testimony about whether this would lower the price for the State. Petroleum Traders contends there is no way this would be better in terms of price for the State. Nevertheless, the procurement officers think it would and the CPO states in his order that he hopes for a \$0.02 or \$0.03 savings per gallon.

#### **Conclusions of Law**

S.C. Code Ann. §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. The regulation promulgated by the board regarding this is found at S.C. Reg. 19-445.2085 (C). It states in pertinent part from the CPO's order:

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:

...

(2) specifications have been revised;

...

(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;

...

(7) administrative error of the procuring agency discovered prior to performance;

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

Clearly, the award was cancelled because the CPO on advice of his staff believed it was too costly. The State's need for the product did not change. The State still needed a contract for the same amount and types of fuel. Instead, the State hoped to change the IFB to attract bidders to propose a lower price. Also, Petroleum Traders submitted a bid meeting the requirements the State had put forward in the IFB. The State's requirements for the goods did not change and the requirements were met by the award. Therefore, the CPO's written determination was contrary to law because it does not fall within the opening conditions of the regulation. Therefore, it also does not follow the statute.

The regulation requires that for cancellation after award it must first be determined that the State's requirements for the goods or services have changed or have not been met. Then, the CPO may look to the reasons in subsections (1) – (8) to decide whether to cancel the award. We have already concluded that the initial determination was not met, but even so, we also find the conclusions of the CPO in (1)-(8) were erroneous.

The CPO says that specifications have been revised. At the time of cancellation the specifications had not been revised. There had been discussions about what to do to lower the price. The CPO believed that the specifications should be revised, but they had not yet done so.

The CPO believed that the bids indicated needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited. The 'article' is the same as

that on which the bids were invited. The CPO order concludes that the same article can be obtained by changing the process of how to get there. That is not what the regulation requires.

There was no evidence of an administrative error. The CPO stated that the fact that the procurement officer did not use the provisions of S.C. Reg. 19-445.2065 to reject the bids as unreasonable in price was an administrative error. We heard much evidence concerning the unreasonable price, however, we heard no evidence of administrative error.

He also finds cancellation is in the best interest of the State. It is difficult to argue that a lower cost would not be in the best interest of the state. However, the State must strive above all else to keep the bidding arena fair and impartial and act according to statute and regulation. Since the provisions of the regulation were not met at the outset, a lower cost cannot be used to fulfill 'best interest.'

At times in previous cases we have asked the CPO to use great caution when canceling awards, especially when a protest is pending, to avoid any appearance that the procurement process is being circumvented. Protest of Analytical Automation Specialists, Inc., Case No. 1999-1; Protest of Specialty Underwriters; Appeal of Keenan and Suggs, Case No. 2004-2. The CPO has demonstrated that he does approach cancellation very cautiously. Throughout many years of Panel cases, only a very small fraction have dealt with cancellation of awards. While we do find that the reasons in the CPO's order in this case do not meet the requirements of the regulation, we do think the CPO in good faith believed they did and only sought to get a better price for the State by resolicitation.

Petroleum Traders repeatedly stated during its case presentation that it did not understand why the State did not come after award and try to work out the cost problem. The State countered that it felt like that would have been extremely unfair to other bidders right after making an

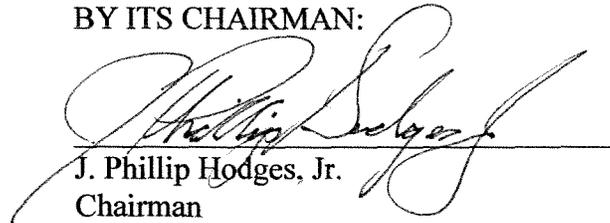
award on submitted bids. Nevertheless, the Panel is concerned that the state agencies will be overburdened by the higher cost. For this reason, it is our sincere hope that Petroleum Traders will work with the State to rectify this problem as much as is feasible.

**ORDER**

For the reasons stated above, we find that the award to Petroleum Traders was cancelled contrary to law and should be reinstated.

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 August, 2006