

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1983-2

IN RE:)

PROTEST BY AMERICAN STERILIZER)
COMPANY)
_____)

O R D E R

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), South Carolina Code of Laws (1976), as amended, as a result of a Bid Protest filed under Section 11-35-4210(1), South Carolina Code of Laws (1976), as amended, and a Request for Review of the Determination issued by the Chief Procurement Officer for Construction from that Protest pursuant to his authority granted by Section 11-35-4210(2) and Section 11-35-4210(3).

FINDINGS OF FACT

On or about November, 1982, the Medical University of South Carolina issued an Invitation for Bids (IFB) for the construction of a proposed children's hospital addition to that facility. This project is to be constructed under the multiple contract method of construction. There are approximately twenty (20) multiple prime contracts offered in the Invitation for Bids. The Bid from which this appeal arises is for the modular casework contract.

In February of 1983, the Protestant, AMSCO, submitted a Bid Proposal for Bid Package No. 2, the modular casework contract. The Bid was submitted on the fourteen (14) page "Form of Proposal" which was a part of the Bid Invitation. A Bid Bond from St. Paul Fire and Marine Insurance Company was attached.

On February 15, 1983, at the scheduled Bid opening, the Bid of the Protestant,

AMSCO, was opened. Several deficiencies were noted in the Bid. The Bid contained an Affidavit of Non-Collusion so incomplete as to be ineffective. In addition, the Bid contained several other defects: On Page FP-13 of the Form of Proposal, the date of the Bid, the contractor's license number and the bidder's license number were omitted by the Bidder.

The State Engineer, acting as contracting officer for the Medical University at the time of Bid opening, rejected the Bid as nonresponsive. AMSCO thereafter secured legal counsel and filed a Protest pursuant to Section 11-35-4210(1), South Carolina Code of Laws (1976), as amended, with the Chief Procurement Officer for Construction. Following a review of the facts, the Chief Procurement Officer for Construction issued a written Decision dated February 23, 1983, pursuant to Section 11-35-4210(3), South Carolina Code of Laws (1976), as amended. This Decision rejected and denied the Protest of AMSCO. The Decision waived as minor deficiencies the omissions in the Bid Documents of the date of the Bid and contractor's and bidder's license numbers. The Chief Procurement Officer ruled that the failure to complete the Affidavit of Non-Collusion by AMSCO was a material failure to conform to the essential requirements of the IFB requiring rejection under Budget and Control Board Regulation 19-445.2070, Section A. The Chief Procurement Officer additionally ruled that rejection was required under Budget and Control Board Regulation 19-445.2070, Subsection D, holding that the failure to complete the Affidavit of Non-Collusion was an attempt to alter the liability of the Bidder to the State in that while the individual signing the Bid might be held liable in the event of Bid collusion, the corporate Bidder would ostensibly not be bound by the Affidavit. By letter dated March 2, 1983, the Protestant sought an administrative review of the Chief Procurement Officer's Decision and requested a hearing before the Procurement Review Panel as provided under Section 11-35-4210(5), South Carolina Code of Laws (1976), as amended.

The deficiencies, other than the unenforceable Affidavit of Non-Collusion, were properly waived by the Chief Procurement Officer and are not before the Panel

on this appeal. The sole issue on this appeal is whether the Bidder's failure to include an enforceable Affidavit of Non-Collusion renders its Bid nonresponsive or whether under pertinent Regulations the failure to include an enforceable Affidavit may be waived or cured.

The Affidavit of Non-Collusion was required by the IFB, which stated at Page IB-7 of Volume 0, Paragraph 23, that:

"An affidavit of non-collusion shall be attached to and be part of the Contractor's bid. Any bid submitted without this affidavit will be incomplete and may be rejected."

The Affidavit itself, in the instructions, clearly states:

"Each contractor submitting a bid must complete this form as an affidavit of non-collusion. This sworn statement will be considered part of the Contractor's bid. Any bid submitted without this information will be incomplete."

The Affidavit submitted with the Bid of AMSCO, although signed by R. B. Yeager and notarized, failed to state the project name for which the Affidavit was submitted, the Bid Document's date, the Bid opening date, a statement of venue, or the required designation of the signer's name and his membership in the firm bidding for the contract for which the Affidavit was being submitted. The effect of these omissions is sufficient to render the Affidavit unenforceable against the Bidder. While the incomplete Affidavit may be enforceable against the person signing that Affidavit, it was not the purpose of the IFB requirement to bind an out-of-state corporate officer. The purpose was to bind the corporate Bidder. The Affidavit submitted by AMSCO is tantamount to no Affidavit at all as far as the corporate Bidder is concerned.

Budget and Control Board Regulation 19-445.2070, Subsection A, provides: "Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected." An omission, then, must render a Bid unresponsive if the omission goes to an "essential requirement" of the Bid Invitation. To supplement this Regulation, the Regulation 19-445.2080 promulgated by the Budget and Control Board provides a definition of that which may be viewed as non-essential:

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 price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise 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 where it is to the advantage of the State.

Examples given are the failure to correctly define corporate size of an incorrect listing of a Bidder's employers, a failure in certain situations to acknowledge the receipt of an amendment to an IFB, and the failure to sign a Bid if a Bid Bond or some other evidence of an intent to be bound to the requirements of the Bid accompanies the Bid.

The Bidder's failure to include an enforceable Affidavit of Non-Collusion has no effect on the price, quality, quantity, or delivery of the supplies or the performance of the services. Nor would permitting it to be cured after Bid opening be prejudicial to other Bidders. Consequently, this Panel may permit the protesting Bidder to cure the defect and submit a valid enforceable Affidavit after Bid opening pursuant to the above-cited Regulation 19-445.2080.

Thus, it is the finding of the Panel that the omissions occurring in the Affidavit of Non-Collusion do not effect price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction would not in any manner prejudice other Bidders. The Panel further finds that the omissions occurring in the Affidavit of Non-Collusion are not an imposition of conditions which would limit the Protestant's liability to the State. The Panel further finds that allowing the Protestant to cure the omissions occurring in the Affidavit of Non-Collusion is to the advantage of the State. These findings are further substantiated by the permissive language of the IFB and the instructions on the face of the Affidavit, neither of which require rejection of a Bid due to a failure in compliance.

Additionally, the Panel notes and bases its holding upon the finding that

Page FP-13 (Revised) of the Bid Documents submitted by the Protestant contains a statement of non-collusion which is signed by and is binding on the corporate Bidder.

CONCLUSIONS OF LAW

1. Under the requirements of the IFB and the Affidavit of Non-Collusion as before this Panel in the present case, a failure to complete the Affidavit, so as to make it nonenforceable against the corporate Bidder, is not a failure to conform to the essential requirements of the IFB so as to require rejection of the Bid of the Protestant under Budget and Control Board Regulation 19-445.2070(A).

2. Under the requirements of the IFB and the Affidavit of Non-Collusion as before this Panel in the present case, a failure to submit a valid Affidavit is not an imposition of conditions limiting the liability of the Protestant to the State so as to require rejection of the Bid of the Protestant under Budget and Control Board Regulation 19-445.2070(D).

3. Under the requirements of the IFB and the Affidavit of Non-Collusion as before this Panel in the present case, the failure to submit an enforceable Affidavit has no effect on price, quality, quantity, or delivery of supplies, or performance of services being procured and a waiver or correction of these omissions would not affect the standing of or be otherwise prejudicial to Bidders.

4. Under the case as presented to the Panel in the above-cited matter, it is the decision of the Panel that the language of the IFB and the instructions on the face of the Affidavit do not mandate the rejection of the Bid of the Protestant, AMSCO, as nonresponsive.

5. Under the case as presented to the Panel in the above-cited matter, it is the decision of the Panel that Page FP-13 (Revised) of the Bid Documents submitted by the Protestant, AMSCO, contains a statement of non-collusion signed by and binding on the corporate Bidder.

6. Under the case as presented to the Panel in the above-cited matter, it is the decision of the Panel that a waiver or correction of the deficiencies and

omissions occurring on the face of the Affidavit of Non-Collusion before the Panel is to the advantage of the State.

This matter is thus remanded to the Chief Procurement Officer for Construction who shall, upon the request of the Protestant, AMSCO, allow the Protestant to cure those deficiencies occurring on the face of the Protestant's Affidavit of Non-Collusion.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

A handwritten signature in cursive script, appearing to read "Hugh K. Leatherman", written over a horizontal line.

SENATOR HUGH K. LEATHERMAN,
CHAIRMAN

March 30, 1983.