

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1984-7

IN RE:)

PROTEST BY ROYAL BUSINESS)
MACHINES)
_____)

O R D E R

APPEALED

This matter is before the South Carolina Procurement Review Panel (hereinafter "the Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), S.C. Code Ann. (1976 and Cum. Supp.) as a result of a Bid Protest filed under Section 11-35-4210(1), S.C. Code Ann. (1976 and Cum. Supp.) and a request for review of the Determination issued by the Chief Procurement Officer for the Materials Management Office.

This request for review has been received from Royal Business Machines (hereinafter Royal), a vendor who participated in the above referenced bids for Plain Paper Copiers. Royal asserts that it was the low bidder on certain numbered lots and should therefore, have been awarded the contract for those lots. Royal has proceeded through the review process participating first in settlement conference and then an interview with the Chief Procurement Officer

(hereinafter CPO) whose decision is now before the Panel for review.

The decision of the CPO finds that Royal's bid is non-responsive and therefore, upholds the action of the Materials Management Office. Specifically the CPO finds:

- 1) that Royal's bid did not conform to the terms of the invitation to bid; and
- 2) that the State could not determine "the true annualized cost" of Royal's bid.

The Panel convened on October 22, 1984, to review the decision of the CPO. Both Royal and the State were represented by counsel. Each presented witnesses for interview. The Panel consisted of the following members: Senator Hugh Leatherman, Chairman, Representative Ron Cobb, Mr. Steve Bilton, Mr. Jules Hesse, Mr. Jeffrey Rosenblum and Mrs. Harriette Shaw.

Royal protests the determination of the Chief Procurement Officer on grounds that his award of lots 1, 2, 3, 4, 5, 6, 17, 18, 25, and 37 to other bidders is in error because Royal's bid was the lowest bid from a responsible and responsive bidder. The Panel finds that Royal is a responsible and responsive bidder and was the lowest bidder on the lots listed above based on the following facts and legal conclusions.

FACTS

On July 19, 1984, the Materials Management office solicited bids for "Plain Paper Copier for period from October 1, 1984, through September 30, 1985," bid number 1-600-08/17/84-P. Bids were to be received until 2 p.m. on August 17, 1984. The specifications were amended on August 8, August 13, August 17 and August 23. The August 17 amendment changed the bid receipt date to 2 p.m. August 23.

There is apparently some ambiguity in the bid instructions and in the measure to be used by the State in evaluating the bids of vendors. In order to clarify any ambiguity in the written bid invitation the State held a pre-bid conference and made Mr. Warren available to answer vendors' questions subsequent to the conference. There was a mandatory pre-bid conference on August 1, 1984. Royal was represented at the conference by Mr. Russell Dixon. The purpose of the conference was to review the bid specifications for vendors and to answer any questions of vendors as to these specifications or the bid forms provided by the State. For any further questions vendors were told at the conference, as well as on the invitation to bid, to contact David Warren a procurement specialist in the Materials Management Office. Mr. Dixon contacted Mr. Warren in the course of filling out his bid forms to inquire whether a certain manner of listing of the costs in his bids would

conform to the State's directions. Mr Dixon stated that Mr. Warren approved his method of listing as conforming to the State's directions. There is no contrary evidence in the record. Mr. Dixon relied on Mr. Warren's representation to him that the method he used to fill out the forms for each lot would conform to the State's requirements. The State asserts that it is unable to understand the term "first included" on Royal's bids. Mr. Dixon says he used the term on the advice of Mr. Warren. There is no evidence to the contrary in the record. In a decision involving Data-Tec, S.C. Dept. of Highways and Public Transportation Bid No. 09563 the panel found as a matter of law "that the signature of an employee of the Department ..., with apparent authority to act for the Department ... was a waiver of [certain] requirements in the contract specifications." Mr. Warren was cloaked with the authority to explain and to approve a method of filling out the bid forms. His authority to do so was explicit on the bid documents. Mr. Dixon inquired of Mr. Warren as to the appropriateness of the method he wished to use to fill out the bid specifications and his method was approved by Mr. Warren.

This invitation to bid was for a one year contract for copy machines in 63 lots, that is, 63 different specifications. The State required in the bid invitations that the vendor's price "shall include all transportation and supplies for start up and installation charges to any authorized location in the State."

The forms used for each lot required the vendor to itemize the cost of supplies necessary to operate the machine for the yield of copies specified in the bid invitation. There were two purposes in this requirement. The State reserved the right to buy these supplies from any vendor and the State wished to project the per copy cost of the machines for their expected five year usefulness. The per copy calculation, a projected five year cost, was used as the determinant of the low bid. Royal was the low bidder based on this calculation on its bid sheets for Lots 1, 2, 3, 4, 5, 6, 17, 18, 25, and 37.

However, the State was not to pay any vendor on a per copy basis, nor was the State bound to a five year contract. In fact multi-year contracts are prohibited by Section 11-35-2030, S.C. Code Ann. (1976 and Cum. Supp.) The State was to pay vendors either a lump sum purchase price or a fixed rental retaining the right to purchase supplies from any vendor who might have compatible supplies at a lower price. The State had rights to renew the contract in subsequent years at stated rates of increase.

All parties agree that the basis of comparison of bids is the figure derived as the "annualized cost per copy," the projected five year cost. The dispute as to whether Royal's bid is lowest centers on whether that figure on Royal's bid was properly derived.

Royal, in preparing its bids, submitted all of the information requested by the State. It submitted a cost for

the term of the contract, a cost for the supplies based on a guaranteed minimum yield, a maintenance cost, and it submitted an annualized per copy cost based on a five year life for the machine. It used a method of submitting this information which had been approved by Mr. Warren in the Materials Management Office.

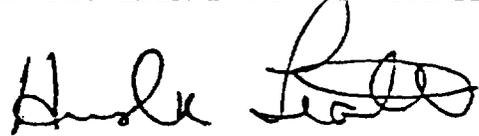
CONCLUSIONS OF LAW

1. The panel finds that the Office of Materials Management solicited bids for a one year contract for plain paper copiers to "include all transportation and supplies for start-up and installation" anywhere in the State.
2. The panel finds that the Office of Materials Management solicited information in the bids to allow projection of the per copy cost over five years for particular copiers.
3. The panel finds that Royal's method of filling out the bid forms was responsive in that it was approved by Mr. Warren, it included "all transportation and supplies for start-up and installation anywhere in the State, and it contained all of the information required by the State to project the per copy cost over five years for particular copiers.
4. The panel finds that the Office of Materials Management used the projected five year cost, "the annualized cost per copy," as the means of determining the lowest bidder.

5. The panel finds that Royal was the lowest bidder by this standard in lots 1, 2, 3, 4, 5, 6, 17, 18, 25 and 37.

IT IS THEREFORE ORDERED that all contracts in Lots 1, 2, 3, 4, 5, 6, 17, 18, 25 and 37 for the contract period October 1, 1984 through September 30, 1985, shall be filled by Royal. Any execution of contracts under these listed lots prior to the date of this order is hereby rescinded and Royal shall be substituted as the contractor.

THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL



Senator Hugh K. Leatherman
CHAIRMAN

October 25th, 1984