

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1986-9

IN RE:)
)
PROTEST BY DAVIS AND GECK, INC.)

O R D E R

INTRODUCTION

This matter is before the South Carolina Procurement Review Panel (Panel) for administrative review pursuant to South Carolina Code of Laws, Sections 11-35-4210 and 11-35-4410, 1976, as amended. It is a protest of the award of a suture contract at the Medical University of South Carolina (MUSC). Ethicon, Inc. (EI) was awarded the contract and Davis and Geck, Inc. (DG) filed a protest with the Chief Procurement Officer (CPO). After a hearing, the CPO determined that EI was properly awarded the contract. DG requested a review before the Panel.

A hearing was held by the Panel on October 28, 1986. Davis and Geck was present but was not represented by counsel. Mr. Randy Hawley, Southern Area Director of Davis and Geck, presented their protest. Ethicon was present and represented by counsel, Mr. Fred Gertz. MUSC was present and represented by Judy Finuf, General Counsel MUSC. The Division of General Services was present but their counsel, David Eckstrom, did not participate.

STATEMENT OF FACTS

The invitation for bids (IFB) in this protest was a request for bids for sutures for a three-year period for the Medical University of South Carolina (MUSC). The IFB was 133 pages, listing various kinds of sutures. The list was developed in consultation with the operating room staff and the suppliers of sutures. The list finally appearing in the IFB is the list of sutures for which there are at least two manufacturers. However, each manufacturer of sutures does not make every suture listed. There are two major suture manufacturers: Ethicon, a division of Johnson and Johnson, and Davis and Geck, a division of American Cyanamid. The other manufacturers of sutures do not make a wide range of suture material but specialize in a particular type of suture material. Alcon, for example, makes sutures used in ophthalmic surgery.

MUSC began this process of preparing an IFB for sutures by going to its operating room supply shelves and simply cataloging what was used. Then, from this list, in consultation with its suppliers and the manufacturers, it culled from the list those types of suture for which there was only one manufacturer. Those were to be sole sourced of necessity. The remainder were to go out for bid and MUSC did so in this bid.

The bid was protested on the following grounds:

1. That Davis and Geck was at a competitive disadvantage because it did not manufacture as many of the sutures listed as did Ethicon;
2. That "labyrinth" packaging is a patented Ethicon type of packaging;
3. That Davis and Geck products were rejected without clinical testing, as was required in the IFB;
4. That Davis and Geck was the lowest responsive and responsible bidder.

FINDINGS OF FACT

1. MUSC developed specifications for its requirements in conjunction with known suppliers prior to the issuance of an Invitation for Bids. Both DG and EI were provided working copies of these specifications for the purpose of eliminating items for which there was only a single manufacturer and to ensure understanding of MUSC's requirements.
2. MUSC solicited competitive bids for its suture requirements on April 4, 1986, in accordance with State Procurement Regulation 19-445.2030. MUSC forwarded bid invitations to manufacturers and distributors listed on its bid list and used a "Brand Name or Equal" specification as defined in State Procurement Regulation 19-445.2140, Subsection (A)(2).

3. MUSC referenced manufacturer product numbers and a brief narrative of the product required and stated or equal. Additionally, MUSC used the patented packaging "labyrinth" where the product then in use was the Ethicon product of that type.
4. MUSC used this form of specification to describe the standard of quality, performance and other characteristics needed to meet its requirement, and provided the opportunity for submission of equivalent products.
5. Opportunities for questions for the purpose of clarification and understanding were made available to bidders prior to bid opening and three (3) amendments were issued by MUSC as a result of such opportunities.
6. MUSC evaluated all bids submitted by first determining if the products submitted met the specification and once so determined, by extending the bid prices, discounts and secondary pricing to determine total cost for each lot.
7. A responsive bidder means a person who has submitted a bid which conforms in all material aspects to the invitation for bids. DG submitted a bid which, in part, was responsive to various lot categories and was determined not equal or non-responsive to other lot categories. Its bid was then extended by subtracting the non-responsive items and adding the secondary pricing of other vendors to their bid.

8. The award of this contract was made to EI in accordance with MUSC's determination that EI best met the specifications and submitted the lowest bid prices.

9. Evaluations for equivalency were conducted by MUSC personnel in accordance with product evaluation charts that provided product by product comparisons and determinations for equivalency, and by inquiry to the users of these products. However, no product not then in use was given a clinical trial.

10. Products which failed to comply to the specifications in terms of product composition, dispensing methodology, or material changes to the specification were rejected as not equal.

11. Products which were not bid by the bidder were costed out using secondary pricing to determine the total cost to the State for each lot.

12. MUSC rejected certain of DG's bid items because these were not single strand delivery packaging. This method for dispensing products reflects current MUSC operating room procedures and was either specified in the IFB as single strand or as "labyrinth."

13. "Labyrinth" is a patented form of packaging for suture material. The patent is held by Ethicon. This form of packaging generally denotes single strand delivery but because the IFB sometimes designated "single strand" and sometimes stated "labyrinth", the IFB was ambiguous. No vendor but Ethicon could bid "labyrinth."

14. DG bid its single strand delivery system "Unispence" where single strand delivery was specified but where "labyrinth" was specified it bid non-single strand in some instances. The non-single strand is cheaper.

15. EI won the majority of the contract awarded after being determined the lowest responsible and responsive bidder whose bid met the requirements and criteria set forth in the invitation for bids.

CONCLUSIONS OF LAW

1. The first listed ground of protest is untimely under the authority of In Re: Request for Proposals for Communication Services for the State of South Carolina (No. 7-725-1107200-07/11/83-41) - Request of American Telephone and Telegraph Co., for Review of the 1983-12 Decision of the Chief Procurement Officer. It is essentially a protest of the specifications.

2. MUSC issued a bid using a "Brand Name or Equal" specification. A "Brand Name or Equal" specification is a specification which uses one or more manufacturers' names or catalog numbers to describe the standard of quality, performance, and other characteristics needed to meet the State's requirements and which provides for the submission of equivalent products, in accordance with State Procurement Regulation 19-445.2140, Subsection A, Item 2. When this

purchase specification is used, bidders must be given the opportunity to offer products other than those specifically referenced if those other products will meet the needs of the State in essentially the same manner as those referenced. A "Brand Name or Equal" specification is intended to be descriptive, not restrictive, and is to indicate the quality and characteristics of the products that will be satisfactory and acceptable.

3. Portions of the Davis and Geck bid rejected as non-responsive because of failure to comply with length specifications, color specifications, needle type, suture material specifications are upheld. The specialization of the uses of this suture material is such that these variations are material.

4. Portions of the Davis and Geck bid rejected as non-responsive because not "labyrinth" packaging or without clinical trials are not upheld. The procurement office of MUSC clearly knew that "labyrinth" was a patented term and in many instances placed the phrase "single strand delivery" in the IFB. The two are not interchangeable since "labyrinth" is patented. Where single strand was required, it should have been specified.

5. MUSC reserved the right in its specifications to award this contract "either on the basis of the individual items or on the basis of all items included in the IFB, unless otherwise

expressly provided in Section III (Special Conditions)." IFB, p.3 of 133.

6. MUSC performed certain calculations on the bids of vendors as submitted in response to the IFB to determine cost to MUSC for a three-year period. In performing these calculations MUSC determined that the lowest price for a three-year period could be achieved by placing all orders with Ethicon, except for the suture materials on which Ethicon was deemed non-responsive.

7. The calculations submitted to support this conclusion, that purchasing as much suture material as was responsive to the IFB from a single manufacturer, is unconvincing to the Panel. The lowest responsive bid in each category of suture material is ipso facto the lowest price to the State. "Unit prices will prevail." IFB, p.7 of 133.

8. Further, the contract is with local supply houses, not the manufacturer. Southeastern Hospital Supply is providing Davis & Geck sutures, while Geer Health Services is providing Ethicon sutures. Thus, restriction to the products of a single manufacturer where the supply house will have comparable inventory of another manufacturer at a lower cost cannot be the most cost-effective procedure for the State.

Therefore, the Panel orders that this contract be re-awarded within 30 days in compliance with the IFB, unit prices prevailing as to manufacturer deemed to be the lowest responsive and responsible bidder. If re-award based on the findings and conclusions of this order is unacceptable to the

parties to this proceeding: MUSC, Ethicon and Davis and Geck,
then the contract is to be re-bid.

IT IS SO ORDERED.



Hugh K. Leatherman, Sr.
Chairman, S. C. Procurement
Review Panel

Columbia, South Carolina

November 24th, 1986