

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1987-1

IN RE:)
)
PROTEST BY PALMETTO COMPUTER)
SERVICES, 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 Multi-Agency Contract for mini computers that was awarded by the Division of General Services to Burroughs Corporation, Inc. (Burroughs). The protest was filed by Palmetto Computer Services, Inc. (PCS), the unsuccessful vendor, with the Chief Procurement Officer (CPO). The CPO, after a hearing, determined that PCS' bid was nonresponsive and that PCS' protest, insofar as it related to the specifications contained in the Invitation for Bids (I.F.B.), was untimely. PCS timely filed a protest of the CPO's decision.

At the suggestion of PCS and with the consent of all parties, the Panel held a hearing on January 22, 1987, which was beyond the time period provided in Section 11-35-4410(6). PCS, the protestant, was present at the hearing and was represented by counsel, Mr. Stanford E. Lacy and Mr. L. Michael

Mills. Burroughs was present and was represented by Mr. Robert T. Bockman and Ms. Christine Klapman, Burroughs' corporate counsel. The Division of General Services was present and was represented by Mr. David Eckstrom and Ms. Helen Zeigler. Recognizing that a quorum of the Panel was not present when the hearing opened, the Chairman asked the parties if they objected to proceeding without a quorum. No objection was noted. A quorum was present when Senator Setzler arrived soon after the testimony began.

At the outset of the hearing Mr Lacy stated that one of the partners in his firm had represented Panel member, Mr. Luther L. Taylor, in a matter unrelated to the protest before the Panel. All parties were given an opportunity to object to Mr. Taylor's participation in the hearing. No objection was heard.

FINDINGS OF FACT

1. On August 27, 1986, the Information Technology Management Office (IMTO) issued an I.F.B. to solicit bids to acquire mini computers for over twenty state agencies and departments. These agencies were, for the most part, if not exclusively, using Burroughs hardware and software.
2. The I.F.B. stated, under the heading, "ADDITIONAL GENERAL PROVISIONS," and the subheading, "AWARD OF CONTRACT", "Software used to meet the State Standards must be bid in vendors (sic) proposal." [Record, p.22].

3. The I.F.B. further stated, under "III. SOFTWARE", "...the vendor must provide and support all of the following software indicated below." [Record, p. 30].
4. The CPO's decision reveals, and PCS through its counsel at the Panel hearing admitted, that PCS received a copy of the I.F.B. on or about September 2, 1986. Mr. Bliss, President PCS, also admitted in testimony that he understood and knew that he would have to supply all items required to be supplied in the I.F.B. on September 2, 1986.
5. On September 18, 1986, Leonard J. Bliss, wrote a letter to Richard Kustrin, Materials Management Officer, who was listed as the contact person for inquiries on the I.F.B. [Record, p. 65]. In this letter Mr. Bliss stated that, "[w]e wish to take issue on the following items" The letter raised three points, one of which was the requirement to supply software in order to bid hardware.
6. On October 1, 1986, PCS' counsel, Mr. Lacy, "formally protest[ed] the award of the contract" in a letter to Mr. Harold A. Stewart of IMTO. [Record, p. 59]. The first two matters raised in Mr. Bliss' letter of September 18, 1986, were not included in Mr. Lacy's letter.
7. PCS did not include software in the I.F.B. it submitted.

8. Mr. Bliss admitted that he learned that Burroughs declined to license the BTOS operating system software on September 17, 1986 (see also, Record, p. 64).

DISCUSSION AND CONCLUSIONS OF LAW

Determinations as to the timeliness of the various matters under protest are crucial in resolving the issues before the Panel.

Section 11-35-4210(1) of the S. C. Code sets forth the right to protest. In pertinent part, it reads: "The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstances after thirty days of notification of award of contract." (emphasis added). A protestant may protest the "solicitation or award of a contract" to the appropriate chief procurement officer. [Section 11-35-4210(1)]. This Code section is indicative of one of the seminal policies underlying the Consolidated Procurement Code: the efficient resolution of protests.

The CPO determined Mr. Bliss' letter of September 18, 1986, [Record, p. 65] not to be a protest of the specifications, i.e., the solicitation. [Record p. 9 and 10]

Indeed, Mr. Lacy's letter to Mr. Stewart on October 1, 1986, [Record, p. 59] did not refer to or mention the earlier letter. Additionally, Mr. Bliss' letter was addressed to

Richard Kustrin and not Harold Stewart, the appropriate CPO as required by §11-35-4210(1). Whether Mr. Bliss' letter was, in fact, a protest is not determinative of the issue of whether the protest relating to the specifications requiring the bidding of both hardware and software was timely. Upon receiving the I.F.B., PCS knew or should have known of the items in FINDINGS OF FACT #'s 2 and 3. These matters should have been evident from even a cursory reading of the I.F.B.

From this time, September 2, 1986, PCS had ten days in which to protest the specifications relating to bidding software and hardware contained in the solicitation. Even if Mr. Bliss' letter of September 18th was a protest, it was written more than ten days after the receipt of the I.F.B. Thus, it was not timely as provided in Section 11-35-4210 and the Panel so concludes. Consequently, those items of PCS protest letter to the Panel dated December 11, 1986, [Record, p. 2] relating to the specifications that required the bidding of software and hardware together are untimely and the Panel so determines: specifically, Items 5 and 6 in PCS' protest to the Panel. [Record, p. 3]

The second issue, which is closely related to the supplying of the software but one that is separate and distinct, is whether the I.F.B. was so restrictive as to give Burroughs an unfair advantage "effectively eliminat[ing] the competitive bidding process required by ... §11-35-1510 and related statutes." [Record, p. 2, Protest ground 2] The question of the restrictiveness of the I.F.B. was first raised in PCS's letter of protest to Mr. Stewart dated October 1, 1986.

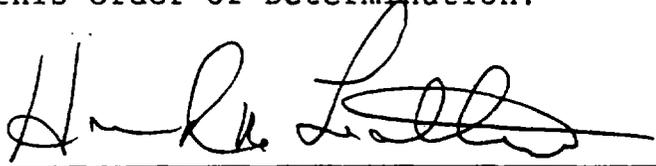
To be timely, this aspect of the protest must meet the timeframe cited earlier from §11-35-4210. Although there is some evidence that Mr. Bliss thought Mr. William D. Meetze, Branch Manager of Burroughs in Columbia, did not have the authority to decline his licensing request, this evades the issues which are: 'at what point did PCS know or should have known that the I.F.B. was too restrictive,' and, 'was the protest filed within ten days of this time?' The record before the Panel and the uncontroverted testimony revealed that Mr. Bliss knew or should have known no later than September 18, 1986, that the specifications relating to software may have been restrictive. This is not to say, and the Panel declines to rule, that the I.F.B. was, in fact, not too restrictive since the Panel concludes that the issue was not timely raised per §11-35-4210(1). Consequently, Items 2 and 3 of PCS' protest letter dated December 11, 1986, are overruled and the Panel so concludes.

Having found these aspects of the protest untimely and thus in agreement with the CPO, the Panel rules that Item 4 [Record, p. 2] is without merit.

PCS' contention that it was the lowest responsive and responsible bidder and that it should have been awarded the contract is clearly without merit and the Panel so rules. Although PCS submitted the low bid on lots B & C, the failure to bid software is a material deviation from the specifications and compels a determination by the Panel that the bid is nonresponsive. See FINDINGS OF FACT #'s 2 and 3.

The Panel concludes that Burroughs is the lowest responsive and responsible bidder and that it was properly awarded the multi-agency contract for mini computers, Bid #8-205-09/18-86-42-P. The Panel further upholds the Decision of the CPO and incorporates his findings as its own to the extent not in conflict with this Order of Determination.

IT IS SO ORDERED.



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

Columbia, South Carolina

February 20th, 1987