

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1987-4

IN RE:)
)
PROTEST BY HARRIS-LANIER, INC.) O R D E R
_____)

This matter is before the South Carolina Procurement Review Panel (Panel) for administrative review pursuant to §§11-35-4210 and 11-35-4410 of the South Carolina Code of Laws, 1976, as amended. It is protest of the award of a contract for dictation equipment for use at the Medical University of South Carolina (MUSC). The protest was filed by Harris Lanier, Inc. (HL) based upon the contention that the bid of Dictaphone Corporation was not responsive to the Invitation for Bid (IFB) and that, consequently, HL should be awarded the contract as the next lowest responsive and responsible bidder. Alternatively, in lieu of a re-award, HL seeks to have the contract rebid.

The Chief Procurement Officer (CPO), Harold Stewart, determined that the statutes and regulations governing this solicitation had been complied with, and that the award of the contract to Dictaphone was proper. From this determination, HL requested a further review by the Panel.

An administrative hearing was held by the Panel on June 30, 1987. A quorum of the Panel was present. HL was present

and represented by counsel, Messrs. Dwight Drake and Thomas Mullikin. Dictaphone Corporation was notified of the hearing and was represented by an employee, Mr. Frank McCarthy, who made a brief unsworn statement but did not otherwise actively participate in the hearing. The Division of General Services (GS) was present and represented by counsel, Mr. Craig Davis. Finally, MUSC was present and represented by counsel, Mr. Michael Hughes.

After counsel for HL indicated in the opening statement that HL sought to rely on the testimony before the CPO and not call witnesses, GS moved to dismiss the protest because that testimony was unsworn which would prevent the record before the Panel from being certifiable to the circuit court. The Chairman denied the motion to dismiss when HL indicated it was willing and able to present witnesses. The protestant has the burden of going forward as well as the burden of proof on the issues raised.

STATEMENT OF FACTS

1. The IFB states that:

"The following equipment will be located in the main hospital complex. 2 ea. digital recorders...."

(Record, p.130)

2. Under the heading, "GENERAL TECHNICAL AND FUNCTIONAL REQUIREMENTS", the IFB stated:

"1. Each digital recorder must have a minimum of 20 hours of recording time with redundancy." (Record, p. 130)

The Panel finds, and the uncontroverted testimony revealed, that this effectively required the recording system to be capable of providing forty hours of recording time with redundancy, or 80 hours total.

3. The Panel finds, and the uncontroverted testimony and evidence revealed, that Dictaphone bid one, rather than two, recorders. The Panel further finds that the Dictaphone recorder met the specification concerning taping capacity.

4. In conformity with Regulation 19-445.2140, the IFB provided:

"The information listed [in the specification] is for identification and is not to be considered restrictive as to manufacturer. Items offered must be equal in quality and performance to the items described." (Record, p. 136)

5. HL alleged that had it known one recorder was acceptable, rather than two, it could have bid a single recorder system that cost less than the Dictaphone single recorder. The Panel finds that, based on the conflicting testimony of HL's witnesses, it failed to establish that this was the case.

6. HL further alleged, in its protest letter requesting a review by the Panel, that Dictaphone's bid was nonresponsive concerning the software portion of the specifications. The Panel finds that HL failed to establish that the software portion of Dictaphone's bid was nonresponsive.

7. Ms. Aileen Black, Director of Physician Support Services, MUSC, made the initial request for new digital dictation equipment. (Defendant-GS exhibit #2) Ms. Black testified that her objective was to obtain equipment that would assure that dictating services were available on a twenty-four hour, 365 day, basis. The Panel finds that a two recorder system provides this type of back-up coverage should one recorder malfunction.

8. Ms. Rosalind Giddens, Procurement Manager, MUSC, testified that the information she received from Ms. Black did not indicate that a two recorder system was needed for the purpose of providing back-up capability. She further testified that the question whether two systems were needed for back-up purposes did not arise until after the bids were submitted, during the evaluation process. Her testimony was corroborated by Mr. Fred Woodham, Director of Procurement, MUSC.

9. The Panel finds, and the testimony revealed, that during the evaluation it was determined by MUSC and GS that the forty-hour taping requirement, with redundancy, set the level of function and performance for the equipment solicited. Thus, the key to the responsiveness issue, as determined by MUSC and GS, was the taping capacity rather than the ability to provide back-up service, if one recorder malfunctioned.

10. Ms. Judy Heward, Regional Systems Manager for Dictaphone, testified, and the Panel finds, that the Dictaphone system is very reliable but it could malfunction as any machine can, and cause MUSC to be without dictating service.

11. The Panel finds that Dictaphone never sought a written clarification of the specifications or sought to have an addendum issued by ITMO in order to determine whether bidding a one-recorder system would be responsive to the IFB.

DISCUSSION AND CONCLUSIONS OF LAW

The remaining portion of HL's protest alleges that Dictaphone was not responsive to the solicitation due to their failure to bid a dictation system with two recorders as called for in the IFB. This is not a conventional 'brandname or equal' protest where the Panel must determine if one piece of equipment is equal in function and performance to another piece of equipment. Whether a dictation system with one recorder is equal in function and performance to a two-recorder system, as specified in the IFB, is dependent upon the essential requirements for the use of the equipment solicited. In other words, if the primary objective was to acquire equipment that would provide a back-up system, then only HL would be responsive to this solicitation. On the other hand, if the primary concern was that of taping capacity, which was met by both Dictaphone and HL, Dictaphone would have properly been awarded the contract as the low-dollar bidder.

The uncontroverted testimony revealed, and the Panel found (See Statement of Facts #8 and #9), that the determination of the most important feature of this equipment was made after the bid was submitted. This sort of after-the-fact determination does not further the purposes and policies

of the Procurement Code, as outlined in §11-35-20 of the 1976 Code. [See specifically, subitems (d), (e), (g), and (m)]

The Panel concludes that MUSC was remiss in putting together specifications that would not indicate to vendors which type of equipment was best for their needs, i.e., back-up capability or taping capacity. Further, the Panel concludes that GS was remiss in not performing any real oversight in the handling of this solicitation. This duty is codified in §11-35-1580(b) and (d) of the 1976 Code. [See also §11-35-20(k)(m)] In short, GS should not wait until a problem arises before taking a critical look at solicitations for this type of procurement. If the Code had not contemplated an oversight responsibility on the part of GS, agencies like MUSC would have been given the authority to make these procurement independent of GS.

Due to the uncertainty surrounding MUSC's needs and Dictaphone's failure to seek written clarification through an addendum, the Panel refuses to concur with the CPO in his determination that bidding a one-recorder system was responsive. Consequently, for the foregoing reasons, the intent to award the contract for IFB#2-600-1200500-02/10/87-P, as suspended by GS, is revoked and the contract is to be rebid. Further, the Panel orders and directs MUSC to clearly set forth whether its needs would be met with a recording system that provides a back-up capability or whether a single recording system with a certain taping capacity is sufficient.

IT IS SO ORDERED.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Luther L. Taylor, Jr.', written in a cursive style.

Luther L. Taylor, Jr.
Vice Chairman, South Carolina
Procurement Review Panel

Columbia, South Carolina

July 30, 1987