

The specifications provided at number 12, "Cost to include cancellation and removal charge of \$9022.00 total for both machines." (Record, p. 36). The bidding schedule provided, "ALL MAINTENANCE COST MUST BE INCLUDED IN RENTAL COST AND CANCELLATION AND REMOVAL CHARGES OF \$9,022.00." (Record, p. 37). The cancellation charge referred to is the cost to cancel the agreement covering the Xerox copiers that were in place at DOE. The removal charge is the cost to remove those machines.

Kodak filled in the cost on its bidding schedule as follows:

Rental price \$ 3000 per month x (36) months
(includes \$9,022 payoff credit)..... = \$ 108,000

(Record, p. 37). Mr. William Holler of Kodak testified that the notation "includes \$9,022 payoff credit" was written by him with the intent of indicating that Kodak had given the State a discount which included a credit in an amount equal to the \$9,022 in cancellation and removal charges. According to Mr. Holler, Kodak policy prevented it from making payment directly to Xerox or any other vendor. The only way Kodak could include the \$9,022 in its bid was to give the State a discount in that amount.²

Bids were opened by MMO on October 6, 1988, and Kodak was determined to have the low bid. The total bid by Kodak

²Because it was the recipient of the \$9,022 removal and cancellation fees, Xerox apparently did not have to consider whether it could pay off another vendor.

was \$245,518. (Record, p. 37). Xerox submitted three bids which totalled \$279,832.00, \$281,576.00 and \$311,732.00.

According to Mr. Holler, sometime after bid opening, MMO corresponded with Kodak to verify that the State would be responsible for paying Xerox. Because it determined Kodak to be the lowest responsive and responsible bidder, on November 3, 1988, MMO issued the Notice of Intent to Award to Kodak for \$254,540.00. (Record, p. 23). This amount reflected the \$245,518 to be paid to Kodak, plus the \$9,022 to be paid to Xerox.

On November 7, Xerox requested copies of MMO's bid tabulation sheet and of Kodak's bid. On November 17, 1988, Xerox protested the award to Kodak, alleging as grounds:

1. Kodak was not a responsive bidder in that it failed to include the removal and cancellation charges in its total price as required.

2. MMO's interpreting Kodak's bid to be a discount to which \$9,022 needed to be added to get the actual price amounted to MMO allowing Kodak to alter its bid after opening in violation of §11-35-1520(8), which prohibits changes in bid prices after opening when the changes are prejudicial to fair competition.

The CPO, in his decision dated December 7, 1988, found that Kodak interpreted the specifications to allow the total price to reflect a discount of \$9,022. The CPO held that because Kodak had always intended the \$9,022 as a credit, MMO had not allowed Kodak to alter its price after opening in violation of §11-35 1520(8). The CPO further found that the instruction "ALL MAINTENANCE COST MUST BE INCLUDED IN

RENTAL COST AND CANCELLATION AND REMOVAL CHARGES OF \$9,022.00" could be interpreted in two ways and was therefore ambiguous.

The CPO ordered that the contract be rebid and that MMO clarify its instructions by including a line for vendor's cost, a line for cost for removal, plus a line for total cost to State.

CONCLUSIONS OF LAW

The Procurement Code requires that in the competitive bidding process the "contract shall be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. . . ." S. C. Code Ann. §11-35-1520(8) (1976) and Reg. 19-445.2090. A bidder, therefore, may not receive a contract unless its bid is responsive to the requirements of the solicitation.³ A responsive bidder is defined as "a person who has submitted a bid which conforms in all material aspects to the invitation for bids". S. C. Code Ann. §11-35-1410(7) (1976).

Xerox argues that Kodak is not a responsive bidder because it did not add the \$9,022 installation and removal

³ Kodak and the Division of General Services argue that Xerox is not prejudiced in this case because even after the addition of \$9,022 to Kodak's bid, it is still the low bidder by several thousands of dollars. Xerox argues that the amount of the bids is immaterial if, as it suggests, Kodak is not responsive. Xerox is correct. The determination of responsiveness is independent of price.

charges to the amount bid. Xerox interprets the instruction "ALL MAINTENANCE COST MUST BE INCLUDED IN RENTAL COST AND CANCELLATION AND REMOVAL CHARGES OF \$9,022.00" to allow only the addition of those charges to the total amount bid. Kodak and General Services argue that Kodak was responsive because by giving the State a \$9,022 discount Kodak "included" the cancellation and removal charges in its rental cost.

The Panel agrees with Kodak and General Service's interpretation of the requirements of the bid solicitation. The general definition of "include" is to "have or take in as a part or member; contain." The American Heritage Dictionary 651 (2d ed. 1982). In calculating its rental cost Kodak considered that the State would have to pay \$9,022 to Xerox before it could install new machines and, in recognition of this fact, incorporated a discount of \$9,022 in its bid. Kodak signalled its intention by noting "includes \$9,022 payoff credit" next to its rental cost calculations.

Kodak's rental cost includes the required removal and cancellation charges and, therefore, meets the specifications. The Panel finds that Kodak is a responsive bidder under §§11-35-1410(7) and -1520(8).

Xerox further argues that Kodak's bid must be rejected because it is unclear on its face whether the total cost to the State is \$245,518 or \$254,540. Xerox cites earlier cases decided by the Panel for the proposition the State may

not assume the intent of a vendor or contact a vendor after bid opening for clarification. In Re: Protest of CNC Company, Case No. 1988-5; In Re: Protest of J & T Technology, Case No. 1983-4. See also, In Re: Protest of Practorcare, Inc., Case No. 1988-17. The Panel recognizes the principle of law cited by Xerox but finds that it does not apply in this case.

When Kodak submitted its bid, the bid bore the notation "includes \$9,022 payoff credit." The Panel agrees with the CPO's finding that "the statement made by Kodak means the cost shown represents the whole (total) cost from which a sum has already been deducted to account for the \$9,022 payoff, or more simply if Kodak was to collect and pay the \$9,022, the monthly cost would have been higher." (12/7/88 Decision of the CPO, Record, p. 9). If Kodak had been silent like the vendor in the CNC Company case and not indicated that its rental cost "includes \$9,022 payoff credit", then Xerox's argument would be persuasive.⁴

⁴In the competitive bidding process, except as allowed by the Procurement Code, the State's contacting the apparent low bidder for clarification prior to award is improper because it usually results in prejudice to the other vendors. Section 11-35-1520(8) which allows correction of bids provides, "After bid opening no changes in bid prices or other provisions of bids prejudicial to the interests of the State or fair competition shall be permitted." In this case no real correction has been made - Kodak still receives only the total amount it bid (\$245,518). The State's attempt to reflect the total cost to it by adding to Kodak's bid the \$9022 that Xerox will receive does not prejudice fair competition. Kodak did not become responsive because
(Footnote Continued)

For the reasons stated above, the Panel orders that the contract in question be awarded to Kodak as the lowest responsive and responsible bidder. The December 7, 1988, Decision of the CPO is reversed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY:



Hugh K. Leatherman, Sr.
Chairman

JANUARY 19, 1989
Columbia, South Carolina

(Footnote Continued)
of the addition nor did it become the low bidder. It simply remained so.