

STATE OF SOUTH CAROLINA) BEFORE THE PROCUREMENT REVIEW
) PANEL
COUNTY OF RICHLAND) CASE NO. 1988-8

IN RE: PROTEST OF TRYCO, INC.)
OF BID NO. 2-205-1115500-06/02/88) O R D E R
_____)

This case came before the South Carolina Procurement Review Panel (the "Panel") for hearing on July 26, 1988, on the protest of Tryco, Inc. ("Tryco") of the award of a contract to upgrade a computer system belonging to the Legislative Audit Council. Present at the hearing were Mr. Terry R. Yon, President, and Mr. Carl R. Adams, Vice-president and General Manager, for Tryco and Ms. Helen Zeigler, Esquire, representing General Services Division.

The issues presented by the protest are whether Tryco is entitled to damages and, if so, the amount of damages. The parties agreed that the specification in question is ambiguous. Based on the record before it and the evidence presented at the hearing, the Panel finds the facts to be as follows:

FACTS

On May 12, 1988, the Materials Management Office ("MMO") issued a solicitation for bids entitled, "Hercules Graphics Cards, 20 MB Hard Cards and Installation of 3 1/2" Disk Drive for Legislative Audit Council, Columbia, S.C." The bid specifications in pertinent part provided:

SPECIAL PROVISIONS

Furnish and deliver NEW HARD CARDS, GRAPHICS CARD AND INSTALLATION OF 3 1/2" DISK DRIVE complying with the enclosed description and/or

specifications and conditions as applicable to this bid notice.

* * *

SPECIAL CONDITIONS

The successful bidder must furnish, deliver and set in place required equipment with operational instructions given.

* * *

BIDDING SCHEDULE

<u>QTY.</u> <u>& U/M</u>	<u>COMMODITY OR SERVICE</u>	<u>UNIT PRICE</u>	<u>TOTAL PRICE</u>
<u>LOT A</u>			
9ea	20 MB Hard Cards (Must occupy only one[1] slot)	\$ _____	\$ _____
3	Hercules Monochrome Graphics Graphics	\$ _____	\$ _____
1	Removal of 5 1/4" Disk Drive and Installation of 3 1/2" disk drive for IBM 5150	\$ _____	\$ _____

The Protestant Tryco interpreted the above specifications to require the furnishing of the hard cards and the graphics cards but only the removing of the 5 1/4" disk drive and the installing of the 3 1/2" disk drive. Consequently Tryco did not bid the price of the 3 1/2" disk drive but included the cost of labor only. General Services intended for the vendor to furnish the disk drive.

When the bids were opened Tryco was the low dollar bidder at \$2,917.98. The procurement officer, ^{Vinis}~~Venus~~ Manigault, testified that when she looked at the price bid by Tryco for the disk removal and installation she questioned whether Tryco had included the cost of furnishing the 3 1/2" disk drive. Ms. Manigault called Tryco after the

bids were opened and was advised by Tryco that, in its opinion, the specs did not call for furnishing the 3 1/2" disk drive.

At the hearing, Ms. Manigault conceded that the specifications were ambiguous on whether the disk drive had to be furnished. Mr. Robert Bennett of Modern Office Machines testified that his company received the bid in question and it was his recollection that he called MMO to clarify whether the disk drive had to be furnished because it was not clear to him from reading the specification.

Notwithstanding the ambiguity, on June 8, 1988, the procurement officer, on the advice of her supervisor, awarded the contract to Nayco Computer Systems, the next low bidder at \$3836.00. Nayco had advised Ms. Manigault that the cost of furnishing the disk drive was included in its bid.

On June 9, 1988, Tryco protested the award to Nayco. The Chief Procurement Officer found that the specifications were ambiguous and that, pursuant to Reg. 19-445.2065(B)(1), the solicitation should have been cancelled and the contract rebid. The work under the contract had been completed by the time of the protest so rebid was not possible. The CPO affirmed the protest but awarded no relief.

Tryco is before the Panel seeking damages. Tryco originally claimed entitlement to 28% of its quoted price or \$817.03, which represents 13% profit and 15% overhead. At

the request of the Panel, Tryco submitted a statement of its costs and expenses in bidding the contract and pursuing the protest before the CPO and the Panel. At the hearing, Tryco abandoned its request for profit and agreed to accept its costs and expenses.

CONCLUSIONS OF LAW

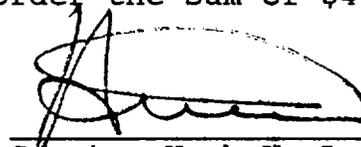
The Panel affirms the CPO's findings that the specification in question is ambiguous and the contract should, therefore, have been rebid. General Services concedes the ambiguity but nevertheless argues that Tryco is not entitled to damages in this case because there is no evidence that Tryco would have been the low bidder if its bid had been responsive and because the ambiguity of the specification was the result of honest mistake rather than deliberate or grossly negligent behavior on state procurement's part.

The Panel agrees that the conduct of state procurement was not deliberate or grossly negligent in this instance. The Panel also recognizes that its authority to "order the computation and award of a reasonable reimbursement amount, including reimbursement of bid preparation costs" is discretionary rather than mandatory. S.C. Code Ann. §11-35-4210 (1976). However, the Panel does not accept General Services contention that Tryco is not entitled to some compensation in this case. Mr. Yon testified, admittedly after the fact, that Tryco could have supplied the disk drive at a cost of \$350.00, which would have made

Tryco the low bidder. In addition, Mr. Von testified that Tryco actively pursues state business and normally reduces its profit margin in an effort to get state contracts. No evidence was offered that cast doubt on Mr. Von's assertion that his company would have been the low bidder if it had not been misled by the ambiguity in the specifications.

Pursuant to its authority under §11-35-4210, the Panel finds that 15% of the original bid amount, which represents Tryco's projected overhead, is a reasonable reimbursement amount. General Services is ordered to pay to Tryco within 30 days of receipt of this Order the sum of \$437.69.

IT IS SO ORDERED.



Senator Hugh K. Leatherman, Sr.
Chairman

Columbia, S.C.

B-1, 1988