

STATE OF SOUTH CAROLINA ) BEFORE THE SOUTH CAROLINA  
 ) PROCUREMENT REVIEW PANEL  
COUNTY OF RICHLAND ) CASE NO. 1989-17

IN RE: )  
PROTEST OF GREGORY ELECTRIC COMPANY, INC.) O R D E R  
\_\_\_\_\_) APPEALED

This case came before the South Carolina Procurement Review Panel (the "Panel") for hearing on December 7, 1989, on the appeal by Gregory Electric Company, Inc. ("Gregory") of a decision by the Chief Procurement Officer ("CPO") to award to Brock Electric Technology, Inc. ("Brock") a contract for the installation of an uninterruptible power supply system for the Department of Health and Environmental Control ("DHEC").

Present at the hearing before the Panel were Gregory, represented by M. Elizabeth Crum, Esq., and Elizabeth Holderman, Esq., Brock represented by Daniel T. Brailsford, Esq., and the Division of General Services, represented by Helen T. Zeigler, Esquire.

FACTS

Prior to the hearing, the parties entered into an agreement entitled "Stipulated Facts", which sets forth some of the facts of this case as follows:

1. The South Carolina Budget & Control Board/South Carolina Department of Health & Environmental Control (DHEC) issued an Invitation for Construction Bids on August 23, 1989, for the installation of an Uninterrupted Power System (UPS) for the Sims/Aycock Complex at DHEC. Buford Goff & Associates was hired by DHEC as the project engineer and it

assisted in the preparation of the Invitations to Bid and the evaluation of the bids.

2. Bids were solicited in accordance with 11-35-3020 of the Procurement Code. Bids were received and opened from three bidders on September 19, 1989, as follows:

1. Carolina Electric Company, Inc.
2. Gregory Electric Company, Inc.
3. Brock Electric Technology, Inc.

3. The low bid was submitted by Brock Electric Technology, Inc. and the second low bid was submitted by Gregory Electric Company, Inc.

4. The "Instructions to Bidders" was issued on standard AIA Document A701, 1987 Edition, with Supplementary Instructions. Article 6 of the AIA Document A701, Instructions to Bidders, provides in pertinent part:

Article 6  
POST-BID INFORMATION

6.1 Contractor's Qualification Information

6.1.1 Bidders to whom award of a contract is under consideration shall submit to the Architect, upon request, a properly executed AIA Document A305, Contractor's Qualification Statement, unless such a Statement has been previously required and submitted as a prerequisite to the issuance of Bidding Documents.

5. Subparagraph 9.1.10 of the Supplementary Instructions amended Subparagraph 6.1.1 as follows:

9.1.10 Subparagraph 6.1.1, delete in its entirety and substitute therefor new subparagraph 6.1.1 as follows:

"6.1.1 - Each General Contractor submitting a Bid must, upon request,

submit Form SE-350- Questionnaire for General Contractor."

6. A copy of the Instructions to Bidders, including Article 9, "Supplementary Instructions," and Article 10, "Additional Instructions" is attached hereto as Exhibit 1.

7. DHEC, the State agency who will use the UPS, requested that Article 10 be included as part of the Instructions to Bidders. DHEC expressly requested that the Bidder Qualifications be submitted with the bid.

8. Section 10.1 of the Invitation for Bids required in part as follows:

10.1 BIDDERS' QUALIFICATIONS:  
Consideration will be given only to the Contractors who can provide conclusive evidence that they can meet the following requirements:

10.1.1 The Contractor shall have a minimum of 5 years experience in the installation and maintenance of the same make/maker equipment specified to be installed and shall have completed a minimum of 5 projects of similar scope (complexity and cost) to the project with the same make or equipment bid.

10.1.2 The Contractor must submit the following as part of his/her bid package:

10.1.2.1 A record of all previous UPS and generator systems installation experience by his or her contracting firm (or subcontracted firm if prime bidder is not the electrical contractor).

10.2.1.2 The names of 5 clients with phone numbers and addresses where equipment of the make specified in the bid for DHEC has been installed and is operational. Projects shall be of comparable scope of the projects bid for DHEC.

10.1.2.3 These records must be submitted with the bid but in a separately enclosed envelope. Contractor experience will weight [sic] heavily in the selection of a successful bidder. Selection will not be based solely on the low bidder.

10.1.2.4 Bids that do not include this information will be considered nonresponsive.

9. The bid submitted by Brock Electric Technology, Inc., did not contain a separately enclosed envelope containing the information required by subparagraph 10.1.2. Representatives of Brock and Gregory attended the bid opening on September 19, 1989. After the bids were opened, the Gregory representative called to DGS's attention that fact that Brock had not submitted its qualification package with its bid as required by Article 10.

10. Brock Electric Technology, Inc. submitted the information required by subparagraph 10.1.2 to the engineer, Buford Goff & Associates, on the afternoon of September 19, 1989, after the opening of bids.

11. Gregory Electric Company, Inc. complied with the provisions of subparagraph 10.1.2 and submitted its qualification package with its bid.

12. The engineer for the project, Buford Goff & Associates, in a letter dated September 29, 1989, recommended that the contract be awarded to Brock Electric Technology, Inc., based upon it having submitted the low bid, but also pointed out the failure of Brock Electric

Technology, Inc., to provide with its bid the information required by subparagraph 10.1.2.

13. An intent to award was issued to Brock Electric Technology, Inc., on October 6, 1989.

14. Brock Electric Technology, Inc.'s bid was in an amount of \$263,000 and Gregory Electric Company, Inc.'s bid was \$266,087.

15. Both Brock and Gregory are qualified to perform the work required pursuant to the Invitation for Bids.

In addition to the stipulated facts, the Panel received the testimony of Robert T. Boland, Assistant Director of the Bureau of Business Management for DHEC. Mr. Boland testified that, as a representative of DHEC, he was personally involved in the development of the bid documents in this case and that DHEC requested that the bidders' qualifications be submitted with the bid rather than later in order to save time in the evaluation process. According to Mr. Boland, in the case of sophisticated equipment DHEC routinely requires a bidder to submit its qualifications with its bid so that DHEC can begin calling references and checking the experience of the apparent low bidder without delay. Mr. Boland admitted that Brock's failure to submit qualifications with its bid had no effect on price, quality, quantity or delivery in this case.<sup>1</sup>

---

<sup>1</sup>Mr. Boland testified that a failure to timely submit  
(Footnote Continued)

### CONCLUSIONS OF LAW

The question presented to the Panel is whether the failure of Brock to submit a qualifications package with its bid is a minor irregularity which may be waived under Reg. 19-445.2080, which provides:

A minor informality or irregularity is one which is merely a matter of form or some immaterial variation from exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to bidders. The procurement officer shall either give the bidder the opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency where it is to the advantage of the State. Such communication or determination shall be in writing.

This section provides an exception to §11-35-3020(2)(b), which provides that bids be accepted unconditionally without alteration unless otherwise allowed by the Procurement Code. Under the above regulation, a failure to meet exact bid requirements may be waived or cured if the omission has no, or merely a negligible, effect on price, quality, quantity,

---

(Footnote Continued)  
qualifications could potentially affect delivery but did not in this case.

or delivery of the required performance and if correction of the omission does not prejudice other bidders.<sup>2</sup>

Gregory argues that the failure of Brock to submit its qualifications at bid opening is not a minor irregularity because the Instructions to Bidders provides that, "Bids that do not include this information will be considered nonresponsive." (Section 10.1.2.4). Gregory contends that DHEC's request that the solicitation documents be amended to change the usual time of submission of qualifications is evidence that the requirement is not minor in this case.

Brock and the Division of General Services argue that Brock's omission is a minor irregularity because, as supported by DHEC's own testimony, it had no effect on the price, quality, quantity, or delivery of the uninterruptible power supply system. They point to the State's usual practice of accepting a bidder's qualifications after bid opening and §11-35-1810, which requires the procurement officer to determine the ability of a bidder to perform a contract before the contract can be awarded to that bidder as evidence that submission of bidder qualifications after the bid opening does not affect the substance of the procurement.

---

<sup>2</sup>See, In re: Protest of General Sales Company, Case No. 1989-20 (failure to acknowledge an amendment was not a minor technicality) and the cases cited therein.

The Panel believes that the outcome in this case is controlled by its recent decision in In re:Protest of National Computer Systems, Inc., Case No. 1989-13, in which the Panel held that the failure to include xerox copies of student tests in a proposal was a minor technicality because it did not affect price, quantity, quality or delivery of performance of contract. In the National Computer case, the Panel found that the requirement could be waived even though it was mandatory. The Panel stated the applicable law as follows:

In order to be responsive, a proposal need not conform to all of the requirements of the RFP; it must simply conform to all of the essential requirements of the RFP.

[B]ecause the Code requires rejection of a proposal when it fails to meet an essential requirement but allows waiver of an immaterial variation from exact requirements, a requirement is not "essential" if variation from it has no, or merely a trivial or negligible, effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured. Waiver or correction of a variance from such a requirement is appropriate under the Code when relative standing or other rights of the bidders are not prejudiced.

NCS and the CPO focus on the mandatory nature of the copying requirement of Section 2.06.03 as evidence that it is essential. However, a requirement is not "essential" simply because it is mandatory. The RFP in question states that sixteen copies of a proposal "must" be submitted (Record, p. 95). However, Reg. 19-445.2080 specifically lists the failure to do this as a minor

informality. Completion of the affidavit of noncollusion in the American Sterilizer case . . . [Case No. 1983-2] was mandatory. Nevertheless, the Panel held that the bidder's failure to include a completed affidavit of noncollusion was a minor technicality because it had no effect on price, quality, quantity, or delivery of the required performance.

The qualifications requirement in the present case is mandatory and the Instructions to Bidders states that the failure to meet it results in rejection. However, as with the copying requirement in National Computer, the failure to meet the qualifications requirement in this case had no effect on price, quality, quantity or delivery.<sup>3</sup> Mr. Boland, the DHEC official responsible for this contract, so testified and examination of the requirement supports this testimony.<sup>4</sup>

In addition, DHEC and General Services should have been aware immediately upon submission of Brock's bid that Brock had not complied with the requirement that qualifications be

---

<sup>3</sup>As noted by the Panel in National Computer, a procuring agency cannot alter substantive provisions of the Procurement Code by placing conflicting provisions in the bid solicitation documents. See, National Computer, cited above, at note 6. The Procurement Code gives the State the right to determine and waive a minor irregularity if certain conditions are met. In this case, the Panel has determined that Brock's failure to submit qualifications meets those conditions and the Instructions to Bidders is void insofar as it requires rejection of Brock's bid.

<sup>4</sup>Delivery was not affected because Brock supplied the missing information within several hours of the time required and because the contract specified a delivery date.

turned in with the bid in a separate envelope. DHEC's conduct in accepting Brock's late submission of qualifications rather than rejecting Brock's bid is contrary to Gregory's assertion that DHEC actually considered the requirement nonwaivable.

The Panel finds that Brock's failure to submit its qualifications package with its bid was a minor irregularity the correction of which did not prejudice other bidders and that the State was justified in allowing Brock to cure its deficiency and in thereafter accepting Brock's bid.

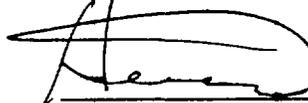
Gregory contends that waiver of a mandatory bid requirement is contrary to the policies underlying the Procurement Code to increase public confidence in the procurement process and to insure fair and equitable treatment of all persons who transact business with the State. The Panel recognizes these policies and does not believe that its decision today undermines them. As noted in National Computer, the Procurement Code strikes a delicate balance between the need for procuring products and services at the lowest possible price and the need for competition and fair and equitable treatment of all vendors. The waiver and correction of certain minor bid irregularities is one tool employed by the State to maintain the balance.

Because of the recent rise in the number of cases dealing with this issue, however, the Panel cautions the State's procuring agencies to review solicitation documents

carefully (in consultation with using agencies or parties, if necessary) to insure that only essential requirements are stated in absolute or mandatory terms so as not to dilute the effect of such language upon the bidders.

For the reasons stated above, the November 13, 1989, decision of the Chief Procurement Officer awarding the contract to Brock Electric Technology is affirmed and the appeal of Gregory Electric Company, Inc. is dismissed.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL



Hugh K. Leatherman, Sr.  
Chairman

1-2-90, 1989  
Columbia, South Carolina