



On September 28, at the bid opening, Pee Dee's bid was announced as a "no bid."<sup>1</sup> Mr. Paul Michael Rast, President of MAP, testified that, after Pee Dee's bid was announced as a "no bid", he assumed that MAP would receive award of the contract.

Mr. Joe Fraley, State Procurement Specialist, testified that MAP had submitted a Freedom of Information Act request along with its bid requesting copies of competitors' bids. On October 2, Mr. Fraley called Mr. Rast to find out exactly what information MAP needed. Mr. Rast replied that MAP did not need any information because it was low bidder and going to receive the contract. Mr. Fraley advised Mr. Rast that MAP might not get the contract because Pee Dee was low bidder. According to Mr. Rast, Mr. Fraley told him that Pee Dee bid "no charge" as its bid. According to Mr. Fraley, he described Pee Dee's exact bid to Mr. Rast.

Mr. Rast testified that on October 3 he called Mr. Fraley twice and stated that MAP needed a copy of Pee Dee's bid and that the State could not award the contract to Pee Dee because it might be against federal law. According to

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<sup>1</sup>According to Mr. Horace Sharpe, the State Procurement official who presided at this bid opening, it is customary for bidders who wish to stay on the State bidding list but who do not wish to bid on a particular project to return bid documents to the State marked "no bid" or "-0-" or with some indication that the bidder is not submitting an actual bid. In this case Pee Dee's bid had "0" in all categories except "AVERAGE WHOLESale DISCOUNT" for which Pee Dee had filled in "13.5%"

Mr. Rast, he was not sure at that time on which items Pee Dee bid zero and whether a zero bid violated federal law or a policy of the association of consulting pharmacists to which Mr. Rast belongs. Mr. Fraley testified that Mr. Rast was adamant that federal law prohibited zero bids and faxed a copy of the law to him that afternoon. Mr. Rast stated that he faxed a copy of whatever his association's president sent him and that he did not read it carefully.

Mr. Rast testified that he made one call on October 4 and two calls on October 25 checking on the status of the contract and on MAP's request for copies of Pee Dee's bid. Mr. Rast stated that the person he spoke to did not know whether the contract had been awarded or to whom.

Mr. Rast was out of town from November 8 to November 12. On his return on the 13th, he found an invoice from the State for charges for copying Pee Dee's bid. Mr. Rast called Joe Fraley about the status of the contract and was advised that Pee Dee had been awarded the contract on November 9. According to Mr. Rast, on November 14 he placed a check for the charges in the mail and called State Procurement and asked that the information be faxed to him. State Procurement told him that no information could be faxed until the State received payment for copying charges.

On November 17, Mr. Rast called State Procurement and again requested that a copy of Pee Dee's bid be faxed to him. Rast was at first advised that nothing could be faxed until Mr. Fraley returned to the office. However, Jim

Culbreath, Mr. Fraley's superior, subsequently approved faxing the copies and Mr. Rast received them on November 17th at 12:54 p.m. On that same day, Mr. Rast contacted MAP's attorney with the information he had received. MAP hand-delivered its protest to the CPO on November 20.

Mr. Rast testified that, until he received Pee Dee's bid, he did not have facts sufficient to file a protest because he did not know on which items Pee Dee bid zero. Mr. Rast stated that, in his opinion, a bid of zero was acceptable on some items but violated federal law on others.<sup>2</sup>

The CPO found that MAP knew or should have known by at least September 28th that the State was going to accept a zero bid on all items because the bid solicitation indicated that the minimum fees quoted had to be "0". The CPO further found that MAP was charged at that time with knowing the federal laws which zero bids allegedly violate. The CPO therefore concluded that MAP was untimely when it filed its protest on November 20th. MAP appeals this decision to the Panel.

#### CONCLUSIONS OF LAW

The issue before the Panel is when Medical Arts knew or should have known of the facts giving rise to its protest

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<sup>2</sup>MAP bid "0" on item 2 of the bid solicitation. Mr. Rast explained that MAP's cost on item 1 "Consultant Services" already included chart services, which were listed separately on the bid as Item 2.

under S.C. Code Ann. § 11-35-4210(1)(1976), which provides that protests must be filed within ten days of that time.<sup>3</sup>

At the hearing MAP's attorney summarized its grounds of protest as follows:

1. Pee Dee's bid violates Medicare/Medicaid anti-fraud regulations because it makes no charge to the State for over-the-counter medications. Because of federal payments, this is in effect a negative bid prohibited by federal law and the IFB in this case.

2. Pee Dee's bid violates Medicare/Medicaid anti-fraud regulations because there is no charge for consultant services under Item 1 of the IFB.

3. Pee Dee's bid is confusing and should be rejected.

(For complete statement of grounds, See Record pp. 2-4).

The Panel finds that grounds 1 and 2 of MAP's protest as summarized above are untimely. The gist of those grounds is that Pee Dee's bid violates federal law because it quotes fees of "0" on each item of the bid save one. Pee Dee's bid, however, is plainly in conformity with the Invitation for Bids, which allows "the minimum amount of fees quoted"

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<sup>3</sup>MAP in its appeal to the Panel seeks to call into play the 30-day limit of § 11-35-4210(1), arguing that MAP did not receive the Notice of Intent until November 17, three days before it protested. The Panel has already decided that the thirty-day limit applies only when the protestant learns of facts giving rise to its protest less than ten days before the thirty-day limit expires. In other words, the thirty-day limit shortens rather than extends the time for protesting. In re: Protest of AT&T Co., Case No. 1983-12 (Decisions of the South Carolina Procurement Review Panel 1982-1988, at p. 98). Medical Arts cannot avail itself of the thirty-day limit in this case.

to be zero and which does not limit on which items zero may be bid.

MAP's real complaint is that the State could not accept a zero bid on all items from any bidder because of contrary federal law. MAP knew or should have known when it got the IFB that the State intended to accept bids which contained zeros on any or all items. MAP did not need to wait until a particular bidder actually bid zero to appreciate the potential problem. Even assuming that MAP did not know of the federal law forbidding zero bids until October 3, when Mr. Rast faxed it to State Procurement, MAP should have filed its protest no later than October 13, ten days later. Instead it did not file its protest until November 17. MAP's protest of the State's acceptance of zero bids is untimely.

MAP argues that policy considerations favor having the merits of this case heard. However, even if the time limitations of the Procurement Code were not considered jurisdictional,<sup>4</sup> there are strong policy considerations for strictly applying the time limits in this case. It is important that the State be given the opportunity to correct errors in bid specifications early in the procurement process. A bidder may not see defective specifications and

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<sup>4</sup>See In Re: Protest of Oakland Janitorial Service, Case No. 1988-13 (Decisions of the South Carolina Procurement Review Panel 1982-1988, pp. 533-543).

wait to see whether he has won before complaining. Once bid prices have been exposed, it is difficult for the State to fashion an equitable remedy.

MAP's third ground is that Pee Dee's bid is confusing and should be rejected. (Record, p. 3, para. 6). This ground is timely since MAP would not have known how Pee Dee's bid looked until it actually received a copy. There is abundant evidence that MAP through Mr. Rast diligently pursued obtaining a copy of Pee Dee's bid and acted promptly upon receipt.

At the beginning of the hearing the Panel stated that it would hear and consider evidence relating only to the timeliness issue. Under the Panel's decision today, MAP is entitled to a hearing on the merits of its claim that Pee Dee's bid is confusing. Because a new hearing on the merits is possible, the Panel offers the following comments and words of caution and guidance.

MAP was not given the opportunity to fully develop the third ground but it would appear to be based entirely on Mr. Sharpe's confusion at bid opening in announcing Pee Dee's bid as a "no bid." Based on its review of the original of Pee Dee's bid in evidence (Def.'s Ex. 1), the Panel finds nothing confusing about the bid on its face.

Pee Dee did not write "no bid" anywhere on its bid. It simply wrote "0" on all items except one in compliance with the IFB. If Mr. Sharpe had examined Pee Dee's bid more carefully he would have observed that Pee Dee completed the

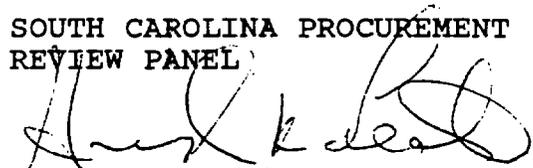
entire first page (including delivery terms and discount period), filled in "20" as the number of days the bid was good on the second page, and filled in 13.5% as the wholesale discount on the fifth page. (Def.'s Ex. 1). Mr. Sharpe may have been unfamiliar with the terms of the IFB which allowed zero bids and, therefore, incorrectly interpreted Pee Dee's bid as a "no bid" without careful examination. Whatever the cause, the State's confusion at bid opening was not justified.

To the extent that MAP has other reasons or ways in which it believes that Pee Dee's bid is confusing, it may fully develop them before the CPO. However, the Panel sees no merit to this charge if the only evidence is the State's initial confusion.

For the reasons stated above, the December 8, 1989, decision of the Chief Procurement Officer that MAP's protest is untimely is affirmed as to all grounds except the ground that Pee Dee Pharmacy's bid is confusing. On the finding that this ground is untimely, the CPO is reversed and this case is remanded to the CPO for hearing on that ground only, if the protestant so desires.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL



Hugh K. Leatherman, Sr.  
Chairman

1-10-90, 1990  
Columbia, South Carolina