

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1989-25

IN RE:)
PROTEST OF CARTER GOBLE ASSOCIATES, INC.) O R D E R
_____)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on February 1, 1990, on the application of Carter Goble Associates, Inc. ("CGA") for relief, including reaward of a contract to provide research and marketing services to the South Carolina Department of Highways & Public Transportation ("Highway Department").

Present at the hearing before the Panel were CGA, represented by Daniel T. Brailsford, Esq.; the Highway Department, represented by its General Counsel, Victor Evans, Esq.; and the Division of General Services, represented by Helen T. Zeigler, Esquire. ATE Management and Service Company ("ATE") was present and represented by Maxine A. Marshall, its senior Vice-president.

FINDINGS OF FACT

This case comes to the Panel on the application by CGA for relief pursuant to S.C. Code Ann. §11-35-4210(7)(1976) based on the December 14, 1989, decision of the Chief Procurement Officer ("CPO") that ATE, the intended recipient of a contract to perform services for the Highway Department, is not responsive to the Request for Proposals. CGA does not appeal the merits of the decision but asks only that the Panel determine whether the State will incur any liability if the ATE contract is cancelled, and, if not, to

reaward the contract to CGA. If the Panel determines there is liability, CGA asks that the contract be rebid and that CGA be awarded costs and attorneys' fees. ATE has not appealed any aspect of the decision of the CPO.

Because no party has appealed the merits of the December 14, 1989, decision of the CPO, the Panel will accept the facts and conclusions contained therein with one exception to be discussed below. See In Re: Protest of Kodak and Xerox Corporation, Case No. 1988-15, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 559. As an aid to understanding this order, the Panel sets forth a brief summary of the facts as found by the CPO. For a complete statement of the facts and issues, the reader is referred to the December 14th decision of the CPO.

On August 11, 1989, the State Procurement Office issued a Request for Proposals (RFP) for development of a profile of public transportation ridership and a marketing strategy for promoting public transportation for the Highway Department. (Record, pp. 24-26). The following limitation applied to the RFP:

Maximum budget allocated to this project is \$100,000. The design component of the project shall not exceed \$80,000. Not more than \$20,000 of this amount is to be spent on the research and ridership profile tasks.

(Emphasis in original)(Record, p. 28). The RFP also contained a provision that "top scoring offerors may be requested to make oral presentations of their proposals to

the State of South Carolina following initial scoring."
(Record, p. 34).

Proposals were submitted on September 18, 1989, and reviewed by the evaluation committee. ATE received the highest score and an intent to award was issued on October 13th. According to the Intent to Award, award became effective on November 1.

On October 24th, the State provided CGA the names of the evaluation committee and on November 15th, CGA protested to the CPO on the grounds that three of the evaluation panel members lacked the needed background to understand transportation issues, the selection process was defective because the State did not interview a short list of candidates, and ATE exceed the budget limitation of no more than \$20,000 for research/ridership tasks.

The CPO held that the first ground was not timely because CGA knew the names of the evaluation committee members on October 25th and should have filed its protest on their qualifications within ten days thereafter. The CPO also found that the second ground was untimely inasmuch as CGA knew or should have known that the State was not going to utilize the oral presentation process on October 23rd when it received the intent to award. The CPO did not discuss the timeliness of the third ground but by implication found this ground timely and decided this issue of whether ATE exceeded budget limitations on the merits.

On the merits, the CPO found that ATE violated the budgetary limits of the RFP by charging \$24,352 for Task 2, which the CPO determined involved research and ridership. The CPO found that, although ATE attempted to distinguish between "research" and "management, monitoring and analysis", such distinction was not valid because the RFP included "analysis" in the research/ridership portion of the contract. The CPO further concluded that "management and monitoring" was basically ATE's overhead and profit and had to be included in the cost proposed for the research/ridership portion of the contract. Under the CPO's reasoning, the total cost of ATE's research/ ridership tasks exceeded the \$20,000 limit of the RFP. The CPO concluded that, even though ATE's proposal was not responsive to the RFP, he did not have the authority to give any relief because the award to ATE went into effect on November 1, 1989, fourteen days prior to CGA's protest.

At the hearing before the Panel, the Highway Department sought to raise the issue whether CGA's third ground was timely. The Highway Department argued that, because the Intent to Award was dated October 13th and CGA's protest was submitted November 15, CGA's protest was not timely under the thirty-day limit for filing protests set forth in §11-35-4210(1). Because timeliness is jurisdictional, the Panel received evidence on this issue.

Mr. Bruce Breedlove, the state procurement specialist in charge of this contract, testified that, even though the

Notice of Intent to Award is dated October 13, 1989, which was a Friday, it was not mailed until Monday, October 16th. Mr. Donald Tudor, a Senior Associate of CGA, testified that he did not know when CGA received the Notice because CGA does not use a time stamp. Mr. Tudor stated that he personally got the Notice on October 23rd. Based on this testimony, the Panel found that CGA's protest was within the thirty-day filing limit set forth in the Procurement Code.

It also came out in testimony that, on October 24th, Mr. Tudor came to the offices of State Procurement and reviewed the score sheets produced by the evaluation panel for all offerors, including ATE. Mr. Breedlove testified that at that time Mr. Tudor had the opportunity to review the actual proposal of ATE but did not. Mr. Breedlove did not remember whether he advised Mr. Tudor of that right. He did recall telling Mr. Tudor the proper way to obtain a copy of ATE's proposal through the Freedom of Information Act. Mr. Tudor testified that he was under the impression that he could not review ATE's proposal on October 24th and that the only way to do so was through the Freedom of Information Act. Mr. Tudor admitted that he never asked to review the proposal on the 24th.

CGA made the Freedom of Information Act request on October 26th, received a copy of ATE's proposal on November 14th, and filed its protest on November 15th.

The Highway Department argued that CGA should have known on October 24th that ATE was over budget because it

had access to ATE's proposal on that date. If so, CGA should have filed its protest within ten days of that date and was untimely because it did not.

The Panel found that CGA's protest was timely because CGA could not be charged with the knowledge that it could inspect ATE's proposal on October 24. Mr. Breedlove testified that he did not remember telling Mr. Tudor of his right to inspect ATE's proposal and Mr. Tudor testified that he did not know that he could and did not ask because he assumed he could not. The Panel found this assumption reasonable in light of the procedure utilized by the State in this and other cases to safeguard proprietary information contained in proposals. In this case, Mr. Tudor was not allowed to receive a copy of ATE's proposal until ATE had been given the opportunity to object to the release of all the information it considered proprietary. Given that ATE's permission was needed before CGA could obtain a copy of information contained in its proposal, it was reasonable for Mr. Tudor to assume that he could not circumvent the procedure and obtain the same information by merely asking to see the proposal in person.

Having found CGA's third ground timely, the Panel accepted the CPO's findings and conclusions on that issue and proceeded to receive evidence on whether CGA should be reawarded the contract.

On the issue of whether the State would incur any liability if this contract were reawarded to CGA, Ms. Maxine

A. Marshall, Senior Vice President of ATE, testified that, although the contract became effective November 1, ATE had offered no performance and incurred no costs in execution of the contract in compliance with a November 17th letter from the State. Mr. Jerome Noble, Director of Public Transportation for the Highway Department, and Ms. Karen Grant, Planning Manager, both testified that there was no contract between ATE and the State and that any such contract could not take effect until the Highway Commission approved it.

CONCLUSIONS OF LAW

The only issue to be decided by the Panel is, given that ATE is not responsive to the Request for Proposals, what is the proper remedy in this case. CGA argues that it is entitled to award of the contract because it was the second high scorer and because the evidence indicates that the State would incur no liability to ATE in awarding to CGA. The Division of General Services agrees that the proper remedy in this case is award to CGA, arguing that rebid would not^{be} cost efficient because bid prices have already been exposed and the proposals have already been graded by (presumably) the most qualified personnel the Highway Department can offer. ATE believes that it is entitled to the contract and argues against rebid because of the exposure of its bid price and other information it considers prejudicial.

The Panel holds that resolicitation is the appropriate remedy in this case. There appears to be disagreement between ATE and the Highway Department whether there is a contract in effect. Even if a contract exists, it is doubtful that the State would suffer any substantial liability from cancelling it. ATE testified that it had incurred no costs in execution of the contract and ATE would probably not be entitled to recover lost profits in light of the termination without cause on thirty day's notice provision contained in the RFP (Record, pp. 31-32).

Although the Panel finds that cancellation of the contract with ATE is warranted, it does not believe that CGA is automatically entitled to reaward. It is true that CGA received the second highest point score among the offerors on this project. However, in an RFP situation, award is made to the responsive offeror whose proposal is most advantageous to the State, taking into consideration price and the evaluation factors set forth in the RFP. Offerors must necessarily be evaluated in relation to each other and ranked on each criteria including cost. Simply deleting ATE's scores from the process at this stage does not accurately reflect the result as it would have been if ATE had never been included. If ATE's proposal is removed, all evaluations in this case are invalid. Therefore, despite the problem of prior exposure of bid prices, the Panel believes that the fairest remedy in this case and the only

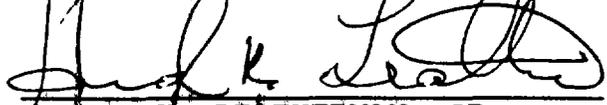
way to insure the State gets the most advantageous proposal is to resolicit the contract in question here.

CGA has asked that if in the event the Panel decides that reaward of the contract to CGA is not appropriate, the Panel award CGA attorneys' fees and costs instead. Because CGA was not entitled to the contract in this case and because it will be allowed to participate in the resolicitation with the opportunity to obtain the contract, the Panel finds that CGA should not be awarded its attorneys' fees and costs.

For the reasons stated above, the Panel orders that the contract in question be resolicited and award made to the responsive offeror whose proposal is most advantageous to the State, taking into consideration price and the evaluation factors set forth in the RFP. The Highway Department and State Procurement may make such changes to the current Request for Proposals as they feel are necessary. Carter Goble's request for costs and attorneys' fees is denied.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



HUGH K. LEATHERMAN, SR.
CHAIRMAN

2-7, 1990
Columbia, South Carolina