

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1989-8

IN RE:)
)
PROTEST OF SYSTEMS & METHODS, INC.)
)
)
)

O R D E R

This case came before the South Carolina Procurement Review Panel (the "Panel") for hearing on July 19, 1989, on the appeal by Systems & Methods, Inc. ("SMI") of a decision by the Chief Procurement Officer ("CPO") to reaward to Cost Containment, Inc., ("CCI") a contract for direct mail services of food stamps for the Department of Social Services ("DSS").

Present at the hearing before the Panel were Systems & Methods, Inc., represented by Robert D. Coble, Esq.; Cost Containment, Inc., represented by W. Thomas Lavender, Jr., Esq., and Craig K. Davis, Esq.; and the Division of General Services, represented by Helen T. Zeigler, Esquire. Also present but not participating as a party was the Department of Social Services, represented by N. Bruce Holland, Esq., its General Counsel.

FACTS

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

1. On March 21, 1989, an RFP [Request for Proposals] was issued by the State Procurement Office (hereinafter "SPO") to provide direct mail

issuance of food stamps for DSS. This is a very important contract to the State of South Carolina and performance is critical. The ability of either vendor to perform is not at issue in this proceeding.

2. The RFP contained five criteria with points assigned to be used in the evaluation of the proposals submitted:

- A. Soundness of Approach - 30 points
- B. Organization and Previous Experience in Related Projects of Comparable Scope -25 points
- C. Cost - 20 points
- D. Organization and Management Plan - 15 points
- E. Financial Aspects - 10 points

3. The cost criteria provided in the RFP read as follows:

Cost - 20 points

Prior to final ranking, cost estimates will be opened and introduced as a final variable in the selection of the successful offeror.

4. Proposals were submitted on April 20, 1989, by the following vendors:

- 1. CCI
- 2. Palmetto Express
- 3. Sandlapper Diversified Services
- 4. Systems & Methods, Inc. (hereinafter "SMI")

5. A five member evaluation committee composed of DSS and SPO staff independently rated each of the proposals on the stated criteria with the

following points resulting for the two highest scoring vendors:

1. CCI - 416
2. SMI - 415.5

6. A comparison of scores before the 20 point cost factor was applied shows the following:

1. SMI - 355
2. CCI - 316

7. The score assigned for cost was provided by the chairman of the evaluation committee to each evaluator after initial scoring of the other four criteria. The cost factor was derived from the standard formula used by SPO in determining points to be awarded for this criteria. The cost proposed by SMI was \$44,501 per month as compared to CCI's offer of \$26,845 per month and was submitted in separate sealed envelopes as required by VI of Paragraph V of the RFP.

8. No discussion of the need for oral presentation occurred prior to the cost variable being applied. The evaluation committee unanimously agreed after adding the cost variable and realizing the closeness of the total scores that CCI and SMI should be asked to make oral presentations to "clarify" questions that arose during the evaluation process on various aspects of their proposals.

9. The RFP provides the following under the section labeled Special Instructions:

7. ORAL PRESENTATION

7.1 The top scoring offerors may be requested to make oral presentations of their proposals to the State of South Carolina following initial scoring.

10. Doug Horton, Procurement Specialist for the State Procurement Office, testified that as a matter of practice the State of South Carolina allows evaluators during oral presentations to ask questions and change scores.

11. The RFP also provides under SCOPE OF PROPOSAL as follows:

"All proposals should be complete and carefully worded and must convey all of the information requested in order to be considered responsive. If the proposal fails to conform to the essential requirements of the RFP, the State and the State alone will be the judge as to whether that variance is significant enough to consider the RFP non-responsive and therefore not considered for award. Only the information provided with the offeror's proposal will be used in the evaluation process in determining the best offer to the State. The State will not accept nor request additional information of an offeror in order to determine responsiveness (Ref Part IX, Item 3, Special Instructions)."

12. The top two vendors were contacted by mail and given one hour and fifteen minutes in which to make an oral presentation. Forty-five minutes was allotted for the "presentation" and thirty minutes given for questions from the selection panel. Attached to the letter was a list of nine "questions" which the two vendors were asked to

address at the oral presentation. The questions were as follows:

1. Discuss in more detail your sequencing and sorting procedures and your data processing capabilities relating to that area.
 2. Discuss in more detail your proposed security procedures for transportation of coupons.
 3. Discuss in more detail your understanding of those USPS security mail procedures which will be used for both first of the month and daily issuances.
 4. Expand on your proposed site in South Carolina. Address accessibility of USPS for same-day or emergency issuances.
 5. Specify previous experience or other qualifications of staff not identified by name in your proposal.
 6. Discuss the counties' telephone access to you. Address the number of lines into your operation, hours calls will be received, and personnel assigned to take calls.
 7. Justify your cost.
 8. Discuss your method of verifying the content of deliverables prior to mailing.
 9. Discuss your ability to comply with SCDSS alternate mail procedures.
13. Following the oral presentation each member of the evaluation panel rescored the two proposals on all noncost evaluation criteria with the following result:
1. SMI - 434.5
 2. CCI - 430
14. Two of the evaluators increased the scores given for SMI as a result of the oral presentation

and three of the evaluators increased the scores given for CCI as a result of the evaluations. None of the evaluators reduced the scores given either of the vendors as a result of the oral presentations.

15. Based upon the scoring resulting from the oral presentation an Intent to Award was issued to SMI on May 11, 1989, which was rescinded on May 30, 1989, pending a resolution of the protest.

In addition to the above facts which were stipulated, SMI presented the testimony of Mr. Dick Pickering, its Vice President, that all of the questions asked by the evaluators in the oral presentation stage were related to the original five criteria (excluding cost).

CONCLUSIONS OF LAW

The issue before the Panel is whether use of the oral presentation which resulted in a change in vendor status was proper in this case.

SMI takes the position that use of the oral presentation as a means of further evaluating the offerors was proper because it is not prohibited by the Procurement Code and is specifically allowed by section 7 of the Special Instructions to the RFP. SMI points to the language of that section ("The top scoring offerors may be requested to make oral presentations of their proposals to the State of South Carolina following initial scoring") as contemplating an

"initial" scoring and ranking process to be followed by a possible final scoring and ranking after oral presentation. SMI claims that the CPO's conclusion that oral presentation could only be used for clarification or a meeting of the minds is contradicted by the requirement that the "top offerors" be included in the oral presentation process.

CCI and General Services on the other hand contend that use of the oral presentation violated both the Procurement Code and the RFP. They claim that § 11-35-1530(7), which forbids the use of any evaluation factors not set forth in the RFP, and Part II of the RFP entitled "Scope of Proposal" prohibit use of an oral presentation as a further evaluation method. Part II states in part, "Only the information provided with the offeror's proposal will be used in the evaluation process in determining the best offer to the State. The State will not accept nor request additional information of an offeror in order to determine responsiveness"

CCI urges that the only way to construe the RFP so that its terms are consistent is to interpret section 7 to allow oral presentation only before cost has been figured into the evaluation process. CCI references Part VII, Section C of the RFP which provides, "Prior to final ranking, cost estimates will be opened and introduced as a final variable in the selection of the successful offeror." (Record, p. 64). CCI contends that "initial" scoring, as used in the

oral presentation section, must mean scoring prior to the introduction of cost since cost must be the final variable.

The Panel agrees with CCI and General Services that use of the oral presentation in this case violated both the RFP and the Procurement Code. The RFP set forth five criteria to be used in evaluating the proposals and assigns a point value to each. In order to give proper weight to the cost factor, the RFP required each offeror to submit its cost figure in a separate sealed envelope. Cost was to be the final factor figured into the evaluation scores.

In this case, the evaluation committee independently evaluated the written proposals using all the criteria except cost. SMI came out in first place, some thirty-nine points ahead of CCI. According to the stipulated facts, there was no discussion of the need for oral presentations to clarify questions at this time. It was only after the cost factor raised CCI to first place, just a half point ahead of SMI, that the committee decided to hear oral presentations. After oral presentations, SMI was once again in first place.

Such use of oral presentations as a "tie-breaker" after cost was introduced changed the value assigned the cost criterion because it allowed the evaluators, consciously or unconsciously, to dilute the effect of cost by adjusting the scores on the other criteria. This plainly violates §11-35-1530(5) and (7) of the Procurement Code and Part VII, Section C of the RFP.

Because use of oral presentations was improper, the Panel must determine an appropriate remedy. SMI argues that the correct remedy is to rebid the contract because it would be unfair to the State and to the offerors to award a contract based only on the first scoring of the written proposals when the evaluators had further questions and considered the process incomplete. CCI and General Services argue that the proper remedy is to award the contract to CCI since it was determined to have the offer most advantageous to the State in that portion of the process which was admittedly error-free.

The Panel does not believe that the evaluation process was incomplete before the oral presentations. As stated earlier, the evaluators properly evaluated the written proposals. They had no questions concerning the proposals until after the cost factor placed CCI and SMI within a half point of each other. Further, as noted by the CPO in his decision, no evaluator decreased his scores after oral presentation. The Panel finds that the proper remedy in this case is to award the contract to CCI as the offeror whose proposal is most advantageous to the State.

Finally, both CCI and SMI ask to be awarded costs and attorneys' fees pursuant to §11-35-4210(5). That section provides that the Panel may award bid preparation costs and attorneys' fees to a vendor who claims it should have been awarded the contract but was not. The award of such costs and legal fees is discretionary with the Panel. Since both

parties were inconvenienced by the State's initial error and since the State rectified its error prior to reaching the Panel at the Chief Procurement Officer level, the Panel finds that it is equitable that each party be responsible for its own costs and fees in appearing before the Panel.

By way of instruction the Panel notes that in some instances it may be desirable for the State to use oral presentations to assist in evaluating offerors in the RFP process.¹ Such presentations should be scheduled after independent evaluation of the written proposals and, in all cases, before introduction of the cost factor. Any scoring as a result of oral presentations should also be independently done by each evaluator.

Ideally, all offerors should be given the opportunity to participate in oral presentations if there is a possibility that scores will be changed or supplemented or if final ranking may be affected.² Additionally, if the

¹Negotiation or clarification after bids are submitted is prohibited in the competitive bidding process, except in narrow instances. S. C. Code Ann. §§11-35-1520(7), (8) (1976). See, In re: Protest of Xerox Corporation, Case No. 1988-19 and cases cited therein.

²Section 11-35-1530(6) (1988 Cum. Supp.) states, " As provided in the request for proposals, negotiations may be conducted with any offerors submitting a proposal, which appears to be eligible for contract award pursuant to the selection criteria set forth in the request for proposals. All apparently eligible offerors must be accorded the opportunity to submit best and final proposals if negotiations with any other offeror result in a material alteration to the RFP and such alteration has a cost
(Footnote Continued)

oral presentation process is to be used to further evaluate offerors, the RFP should plainly state this and should set forth the oral presentation procedure in detail.

In no case should a vendor's performance (eg., organization, speaking ability, persuasiveness, creative use of props) at an oral presentation be graded or scored and the oral presentation itself should never be given weight as a criteria. See In re: Architectural Services Contract For Replacement of Central Correctional Institute - Lee Correctional Institute Project. The oral presentation must be used only as a means of obtaining and applying information related to the criteria originally set forth in the RFP. Other than cost, those criteria should all concern an offeror's methods and ability to perform the contract.

For the reasons stated above, the Panel affirms the decision of the Chief Procurement Officer and directs that the contract be awarded to Cost Containment, Inc.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 
Hugh K. Leatherman, Sr.

Columbia, South Carolina

July 28, 1989

(Footnote Continued)
consequence that may alter the order of offeror's price quotations contained in the initial proposals."