

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
Case No. 1990-10

IN RE:

PROTEST OF INJURY REDUCTION
TECHNOLOGY, INC.

O R D E R

This case came before the South Carolina Procurement Review Panel for hearing on November 19, 1990, on the appeal by Injury Reduction Technology, Inc. ("INRTEK") of a decision by the Chief Procurement Officer ("CPO") upholding the award to Baxter Healthcare Corporation ("Baxter") of a contract to provide injury reduction testing to the Department of Mental Health.

Present at the hearing were INRTEK, represented by Ron Tryon, Esq., Baxter, represented by William Hubbard, Esq., the Department of Mental Health, represented by its General Counsel, Kennerly McLendon, Esq., and the Division of General Services, represented by Helen Zeigler, Esquire.

FINDING OF FACTS

On February 14, 1990, State Procurement issued a Request for Proposals ("RFP") to implement an injury reduction testing program for current and prospective employees of the Department of Mental Health. (Record, p. 80). Sometime prior to the issuance of the RFP, INRTEK approached the Department of Mental Health and recommended that the Department implement an injury reduction program among certain personnel who suffer a significant number of repetitive motion disorders resulting in lost time and

workers' compensation claims. INRTEK helped the Department design the requirements for an injury reduction program, including Part VI of the RFP.

Part VI of the RFP requires in part:

So that the State can consider your proposal, submit as a minimum the following information, and in the listed format:

A. A summary of offeror's experience in conducting injury reduction strength testing programs, including:

1. A description of offeror's database (historical data) which will be used to validate and verify test results.

2. A summary of any available studies which indicate that pre-employment testing programs similar to offeror's program, reduce job related injury.

(Emphasis in original)(Record, p. 85). The ability to verify test results is important because prospective employees might not be hired if they are considered an injury risk.

The award criteria in order of importance were:

A. Proposed total cost of the project;

B. Probable effectiveness of offeror's plan for providing the required services, including staffing and equipment to be utilized; and

C. Offeror's experience in providing injury reduction strength testing services, including size and appropriateness of database and verifiable quality of program results.

(Record, p. 86).

Two offerors responded to the RFP - Baxter and INRTEK. After evaluation, Baxter was determined to be the offeror whose proposal is most advantageous to the State. No evaluation score sheets were introduced into evidence, however, Baxter's proposal cost, the most important criteria, at \$58,000 was about half of INRTEK's proposed cost of \$105,000.

An Intent to Award to Baxter was mailed to both vendors on June 25, 1990. (Record, p. 97). On June 26, INRTEK protested the award to Baxter, alleging that Baxter's proposal was not responsive to Part VI of the RFP because Baxter has no historical database to justify its testing results. (Record, p. 16). On July 10, INRTEK sent a follow up letter to the CPO, alleging that INRTEK's database of over 5000 tests has never been challenged in court and that INRTEK clients experience an injury rate reduction in the 60 - 80% range. (Record, pp. 19-20).

After hearing, the CPO determined that INRTEK had failed to produce sufficient evidence to support its allegation that Baxter does not have a historical database. The CPO also found that INRTEK's July 10 letter raised essentially the same issue as its first protest letter and that, to the extent other issues were raised, they were untimely.

On August 16, 1990, INRTEK appealed the decision of the CPO to the Panel alleging that Baxter is not responsive. INRTEK asks that the contract be resolicited.

At the hearing before the Panel, Mr. Donald Russell, Chairman of the Board and Chief Executive Officer of INRTEK, testified that, as recently as August 1990, INRTEK and Baxter were negotiating for the sale of INRTEK's database to Baxter. Mr. Russell also stated that, after INRTEK filed its protest, he talked with a representative of Baxter, Mr. Zimmerman, who stated that Baxter obviously did not have a database because it had been trying to buy INRTEK's for the past two years.

Dr. Thomas Gilliam, INRTEK's Vice-President and Technical Director, testified that a historical database is significant in meeting Equal Employment Opportunity Commission ("EEOC") guidelines and avoiding discrimination claims. Dr. Gilliam stated that certain types of testing equipment, namely isotonic and isometric, are not as reliable in avoiding discrimination claims as the type used by INRTEK, that is, isokinetic equipment. Dr. Gilliam did not believe that any company in the United States had a historical database as reliable and extensive as INRTEK's.

The RFP does not require use of isokinetic equipment for testing. Further, as Defendant's Exhibit #1 demonstrates, Baxter did summarize in its proposal database information on eight isokinetic testing exercises. In addition, Defendant's Exhibit #1 lists five other exercises on which data is available. Baxter also states that it will ensure compliance with EEOC and National Institute on Occupational Safety and Health ("NIOSH") guidelines.

CONCLUSIONS OF LAW

The issue before the Panel is whether Baxter's proposal is responsive to the requirement of the RFP that each offeror provide a description of its historical database which will be used to validate and verify test results. (Record, p. 85). Considering all of the evidence presented, the Panel finds that Baxter did provide a description of the historical database which it proposed to use to verify test results. (Defendant's Exhibit #1). The Panel, therefore, concludes that Baxter is responsive to the RFP.

INRTEK's claim that its database is larger and more reliable than Baxter's and that its testing procedures are less discriminatory, even if true, does not go to the responsiveness of Baxter's proposal. The "size and appropriateness of database" and "verifiable quality of program results" were only two factors to be considered in scoring the proposals. There is no evidence that INRTEK was not given high marks for the quality of its database versus Baxter's. However, price was the first criteria in order of importance and Baxter's price was half what INRTEK proposed.

For the reasons stated above, the Panel upholds the award of the contract in question to Baxter and hereby dismisses the protest of Injury Reduction Technology.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Hugh K. Leatherman, Sr.