

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND) CASE NO. 1990-7

IN RE:)
) O R D E R
PROTEST OF FISHER SCIENTIFIC COMPANY)
)

) APPEALED

This case came before the South Carolina Procurement Review Panel for hearing on August 16, 1990 on the appeal by Fisher Scientific Company ("Fisher") of a decision by the Chief Procurement Officer ("CPO") dismissing Fisher's protest as untimely.¹

Present at the hearing were Fisher, represented by Julius W. McKay, Esq., and Stephen F. McKinney, Esq.; Curtin Matheson Scientific, represented by Jeffrey Silver, Esq.; and the Division of General Services, represented by Pat Hudson, Esq., of the South Carolina Attorney General's Office. Also present but not participating as parties were Baxter Scientific, Inc., and Infolab, Inc.

FINDING OF FACTS

On March 20, 1990, State Procurement issued an Invitation for Bids ("IFB") on a five-year contract to provide laboratory supplies to all state agencies, school districts, municipalities and other governmental entities.

¹This case is related to South Carolina Procurement Review Panel Case No. 1990-8, In Re: Protest of Infolab, Inc. and reference is made to that case for background information.

Award was to be made in three lots based on a selection of items frequently used by the State.

To select the items used to evaluate bids, State Procurement consulted the three incumbent vendors - Curtin Matheson, Baxter and Fisher - and by letter of March 19 asked each of them to list for each lot 100 items frequently used by the State from the thousands available in the catalogues. (Record, p. 95). Mr. Eric Patterson, a sales representative for Fisher, testified that Fisher never received the letter of March 19 and believed that the list was to contain items sold in common by the major suppliers rather than items frequently used by the State. (Mr. Patterson admitted that Fisher knew that the list was to contain frequently used items as of April 11, the date of bid opening). Fisher submitted its proposed shopping lists on March 27. (Record, pp. 85 - 91).

According to Mr. Horace Sharpe, the procurement officer in charge of this solicitation, the State took the lists submitted by the incumbent vendors, randomly selected items from each list, and compiled a final representative list of approximately 100 items for each of the three lots. The State did not consult with the using agencies on the final lists and did not attempt to verify that items listed by the vendors were indeed those frequently used by the State.

The Invitation for Bids instructed each bidder to bid discounts for groups of items in their catalogue without

advising the bidders which specific items would appear on the final shopping list. The IFB also stated:

Discounts will be evaluated by applying the discount offered to the price lists for a significant number of items (major brands) frequently used by the state. Bidders will be required to assist in developing and pricing the list of items used to determine awards.

(Emphasis in original) (Record, p. 40).

On April 11, bids were opened and each bidder was given a shopping list for each lot with instructions to calculate prices, by unit, based on the discounts quoted by the bidder in its bid. The cover letter accompanying the lists stated:

Items selected are standard items which are believed to be available from all bidders; but where an item may not be available or if considered unequal, State Procurement will determine whether to delete that item from the list. The number of deletions will not substantially reduce the total number of items on the list, however.

(Record, p. 81). According to Mr. Patterson, Fisher believed that the above statement indicated the State's willingness to change the list on suggestions from the vendors.

Mr. Sharpe, the procurement officer, did, in fact, meet with each bidder to check the price extensions and make corrections to the shopping lists and bids. According to Mr. Patterson, Fisher brought requested changes to Mr. Sharpe's attention on May 7 and May 9. Fisher representatives called Mr. Sharpe on May 11, requesting a meeting on May 14 to discuss this procurement. Mr. Sharpe agreed to

the meeting and, as he testified, held the award of this contract in abeyance until after the meeting in case Fisher raised significant problems.

At the May 14 meeting, Mr. Sharpe made several changes to the lists at Fisher's request. On May 15, Fisher called Mr. Sharpe asking that several items be deleted from the lists. At that time Mr. Sharpe indicated that the shopping lists were in final form and would not be changed. The Intent to Award was issued on May 15 and received by Fisher on May 17.

According to Mr. Patterson, the State made 110 changes to the shopping lists between the time the lists were distributed on April 11 and May 14. Mr. Sharpe testified that he made changes to the lists after April 11 and that he expected the vendors to bring errors to the State's attention. According to Mr. Sharpe, the market basket list did not become final until May 14.

On May 21, Fisher filed a protest with the Chief Procurement Officer alleging that the shopping lists prepared by the State were produced in an arbitrary fashion, without regard to the actual purchasing history of the using agencies and, as a result, the lists contain a substantial number of items which are infrequently or never used by the State. According to Fisher, the arbitrary list resulted in the bid evaluation, comparison and award process itself being arbitrary and ineffective in meeting the State's

actual needs in the most inexpensive fashion. (Record, p. 25).

In addition, at the hearing before the CPO on June 20, Fisher attempted to raise issues concerning the responsiveness of Baxter's bid. The information about Baxter's bid was apparently obtained as a result of a Freedom of Information Act request filed on May 25 and answered on June 5.

The CPO found that Fisher was aware of the method being used to develop the shopping list from its earliest stages and willingly participated in the process. The CPO held that Fisher's protest time began to run no later than April 11 when it received a copy of the lists at bid opening. Therefore, the CPO found Fisher's protest filed on May 21 untimely under S. C. Code Ann. § 11-35-4210(1976). The CPO also found Fisher's attempt to protest Baxter's bid at the hearing before him untimely because Fisher had reviewed Baxter's bid at least 15 days prior.

CONCLUSIONS OF LAW

Section 11-35-4210(1) requires a bidder to file its protest in writing within ten days of when it knew or should have known of the facts giving rise to the protest.

In this case, General Services and Curtin Matheson argue that Fisher's protest is not timely because Fisher knew of the facts giving rise to its protest well before it filed with the CPO. They point out that Fisher was involved in the development of the list beginning in January when

Fisher was orally consulted by State Procurement about this solicitation. It is undisputed that, as an incumbent vendor, Fisher submitted sample shopping lists on which the final lists were based. It is also undisputed that Fisher received a copy of the State's lists on April 11, 1990, and participated in the refining of these lists until May 14, all apparently without comment or complaint on the alleged arbitrariness of the list and the method used to develop it.

Fisher acknowledges that it participated in the development of the list but argues that it had no reason to file a formal protest until its informal participation was no longer allowed. Fisher points out that the State solicited comments and suggestions from the bidders, including Fisher, and made changes to the lists based on those comments all through the bid process up until May 15, when the Intent to Award was issued. Fisher argues that its May 21 protest is timely because the shopping list did not become final until May 15. Up until that time, Fisher claims, the list could have been changed to correct the alleged problems Fisher is now protesting.

The Panel agrees with Fisher. The essence of Fisher's complaint is that the final shopping lists contained many items that were not frequently used by the State, which resulted in the evaluation and award process being arbitrary and ineffective in meeting the State's needs. As long as the composition of the lists was in flux, Fisher had no way

of knowing whether the "final" lists contained a substantial number of items not frequently used by the State.

According to the procurement officer in charge of this solicitation, the State was prepared to, and did, make changes to the list up to May 15, when the list became final. Hence, May 15 is the first date on which Fisher could have known that the final lists contained items not frequently used by the State. Mr. Patterson of Fisher testified that Mr. Sharpe told Fisher on May 15 that no more changes would be made to the list and that the Intent to Award would be issued based on the lists as they stood. Six days later on May 21 Fisher filed its protest of the final list. This protest was filed well within the ten-day limit and is, therefore, timely.

At the hearing before the Panel, neither side argued the timeliness of Fisher's protest of Baxter's bid, however, Fisher raises that issue in its appeal letter to the Panel. (Record, p. 3). In its appeal letter, Fisher claims that it had no reason to protest Baxter's bid any sooner than the protest hearing before the CPO because at the time it discovered the alleged deficiencies in Baxter's bid, the hearing was already scheduled.

The Panel finds that Fisher's protest of Baxter's bid is not timely under the Panel's previous holding in In Re: Protest of Sterile Services Corporation, Decisions of the

South Carolina Procurement Review Panel 1982-1988, in which the Panel held:

Sterile argued before the Panel that since its notice was in writing and made all concerned aware that a protest existed, Sterile could validly argue any ground of protest. The Panel disagrees. While the Panel does not intend to require that the specificity of protests be judged by highly technical or formal standards, the Panel concludes that 11-35-4210(1) does require that the protest must in some way alert the parties to the general nature of the grounds for protest. Since the present protest was admittedly devoid of any statement from which it could be reasonably deduced that the OSHA-20 form was intended to be a ground of protest, the Panel must conclude that the initial requirements of 11-35-4210(1) were not met.

(Decisions, p. 100). In Sterile Services, the protestant attempted to raise the OSHA issue before the CPO for the first time at hearing. The CPO concluded that the issue was not submitted "in writing" within ten days and, therefore, was not timely raised.

For the reasons stated above, the Procurement Review Panel holds that the May 21, 1990, protest of Fisher Scientific Company is timely and reverses the July 2, 1990, decision of the Chief Procurement Officer in that regard. The Panel further finds that Fisher's June 20, 1990, protest of Baxter's bid is untimely and affirms the CPO's July 2 decision in that regard.

Because the Panel heard a great deal of background testimony in the course of hearing the timeliness questions, the Panel decides that, rather than remanding this case to the CPO for hearing on the merits, the Panel will hear this matter at such time as is specified in a future notice.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Hugh K. Leatherman, Sr.
Chairman

Columbia, South Carolina
8-30-90, 1990