STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1992-14

IN RE:
PROTEST OF WIN LABORATORIES, LTD.
APPEAL BY WIN LABORATORIES, LTD.

O R D E R

APPEALED

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on September 9, 1992, on the appeal by WIN Laboratories, Ltd. ("WIN") from two decisions by the Chief Procurement Officer ("CPO") dismissing WIN's protest of the award to The Computer Group, Inc. ("The Computer Group") of a statewide contract for personal computers.

Present and participating in the hearing before the Panel were WIN, represented by James B. Richardson, Jr., Esq.; The Computer Group, represented by Dwight F. Drake, Esq., and John E. Schmidt, III, Esq.; and the Division of General Services, represented by James W. Rion, Esquire.

FINDINGS OF FACT

On March 25, 1992, the State issued an Invitation for Bids ("IFB") to establish a statewide source of supply for personal computers.

Upon reading the announcement of the bid solicitation published in South Carolina Business Opportunities, WIN contacted State Procurement and asked for a copy of the IFB. The information received by WIN indicated that a prebid conference was scheduled for April 9, 1992. When the WIN representative arrived on that date, he was informed that the conference had been rescheduled for April 13 by Amendment

#001 to the IFB mailed out several days earlier. WIN did not receive the amendment.

At the prebid conference on April 13, WIN expressed concern to State Procurement that it had never received Amendment #001 and State Procurement promised to add WIN to the bid mailing list.

As a result of the prebid conference, WIN realized that another amendment to the IFB would be issued. When WIN received no such amendment, it once again contacted State Procurement. State Procurement agreed to send WIN Amendment #002 and to see that WIN was added to the mailing list. WIN eventually received Amendment #002 but all it did was delay the opening date. WIN realized that the State would have to issue another amendment in order to make the anticipated changes to the specifications.

On April 23, 1992, WIN again contacted State Procurement and inquired about the status of Amendment #003. On April 24, State Procurement advised WIN that Amendment #003 had been mailed that day.

On April 28, WIN called State Procurement and indicated that WIN had still not received a copy of Amendment #003. WIN learned that Amendment #003 had been mailed and that WIN was still not on the bid mail list. State Procurement agreed to send a copy of Amendment #003 to WIN by Federal Express at WIN's expense.

WIN hand-delivered its bid to State Procurement on May 5, 1992, and attended the bid opening. The State opened the

bids and published most of the bid prices on all the various lots at the opening. The State was unable to publish several of the bids because some bidders neglected to total their prices.

On May 8, 1992, WIN called State Procurement and asked when notice of award would be made. The State advised that the award statement would be mailed "soon." In fact, the notice of award was issued and mailed on May 8. The Computer Group was listed as the winner on Lots B and C. (Record, p. 123).

On May 15 and 18, WIN called State Procurement to follow up but did not reach anyone with information about the solicitation. On May 19, WIN called again and was advised that the notice of intent to award was mailed May 8. WIN asked State Procurement to send WIN copies of the notice and of the winning bid on Lots B and C by Federal Express. The State agreed only to send the information by regular mail.

On Friday, May 22, after 3:00 p.m., WIN received a copy of the award statement, the bid tabulation, a complete copy of The Computer Group's bid on Lots B and C, and copies of the winning bids on Lots A and D, although WIN did not request the latter information.

The Computer Group's bid on Lots B and C did not have any product literature or other product information attached. At least some of the winning bids on Lots A and D did have such product information attached.

On May 26, WIN Laboratories protested the award to The Computer Group on Lots B and C, raising five grounds of protest as follows: (1) The Computer Group grossly underbid the 1.3 and 2.0GB DAT drives, (2) The Computer Group's bid on Configuration 4B lacked a 64K SCSI controller, (3) The Computer Group's bid lacked device drivers necessary to render the SCSI controllers compatible with OS/2 and Novell software, (4) the 160MB hard drive bid by The Computer Group does not exist, and (5) The Computer Group failed to bid a video controller for VGA black and white monitors. (Record, pp. 32-35).

At the hearing before the CPO on June 2, 1992, WIN submitted in writing five additional grounds of protest: (6) The Computer Group cannot responsibily supply video controllers and monitors at the same price as monitors with the video functions integrated, (7) The Computer Group's bid was not responsive to the requirement that vendors show a cost for SCSI controllers on Configurations 1-C and 2-C even if video functions are intergrated on the motherboard, (8) The Computer Group did not bid 32 bit SCSI controllers for PC configurations 1-B and 2-B, (9) The Computer Group did not bid 32 bit IDE controllers for PC configurations 1-B, 2-B, 3-B, and 4-B and offered the same model number product for both ISA and EISA configurations, and (10) The Computer Group failed to provide any technical descriptive literature with its bid. (Record, pp. 134-138 and 140-141, 150-160).

In his decision dated June 12, 1992, the CPO found against WIN on the merits of all of its issues of protest except issue 10. The CPO did not consider issue 10 at all.

On June 22, WIN appealed to the Panel raising all of its protest issues except 2, 3, and 7, which issues it abandoned. (Record, pp. 2-17). WIN then renumbered its issues as follows:

> (1) The Computer Group failed to provide any technical descriptive literature with its bid;
>
> (2) The Computer Group did not bid 32 bit SCSI controllers for PC configurations 1-B, 2-B, 3-C, 4-C, 5-C, and 6-C and did not bid 32 bit IDE controllers for PC configurations 1-B, 2-B, 3-B, and 4-B;
>
> (3) The Computer Group failed to bid a video controller for VGA black and white monitors;
>
> (4) The Computer Group cannot responsibily supply video controllers and monitors at the same price as monitors with the video functions integrated;
>
> (5) the 160MB hard drive bid by The Computer Group does not exist;
>
> (6) The Computer Group grossly underbid the 1.3 and 2.0GB DAT drives; and
>
> (7) The Computer Group offered the same model number product for both ISA and EISA configurations.

At the first hearing before the Panel, The Computer Group moved to dismiss WIN's renumbered issue 1 concerning The Computer Group's lack of descriptive literature on the grounds that this issue is not timely under S. C. Code Ann. §11-35-4210(1), which requires a protestant to file a protest in writing in "no circumstance after thirty days of notification of award of contract." In its order dated

October 26, 1992, the Panel held that Issue No. 1 was timely under the thirty-day rule and remanded it to the CPO for a hearing on the merits. WIN's other issues were held in abeyance pending a decision by the CPO on issue 1.

At the hearing before the CPO, The Computer Group moved to dismiss Issue No. 1 as untimely under the ten-day rule. The CPO granted The Computer Group's motion and WIN appeals that decision as part of its case before the Panel today.

CONCLUSIONS OF LAW

Timeliness of Issues 1, 2, 4, and 7

At the start of the hearing before the Panel, The Computer Group moved to dismiss WIN's renumbered issues 1, 2, 4, and 7 on the grounds that they were not timely filed under the ten-day rule set forth in S. C. Code Ann. §11-35-4210(1). That rule requires an aggrieved protestant to submit its protest in writing within ten days of when it knew or should have known of the facts giving rise to the protest.

WIN first raised issues 1, 2, 4, and 7 in writing before the CPO in its "Review of the Bid of The Computer Group, Inc.", submitted to the CPO at the hearing on June 2, 1992. (Record, pp. 139-160). The Computer Group argues that WIN knew or should have known of these issues when it received a copy of The Computer Group's bid on May 22 and

was, therefore, required to file its protest no later than June 1, 1992.[1]

As to issue #1, WIN argues that it did not know when it received the information on May 22 that it had a complete copy of The Computer Group's bid. WIN contends that no cover letter was attached to the information and, given its problems with receiving information from State Procurement, WIN was reasonable in assuming that The Computer Group had attached technical literature but that State Procurement had neglected to send it.

The Panel does not agree. WIN knew when it received the information on May 22 that it had requested a copy of the winning vendor's bid, that no technical literature was attached to the copy of The Computer Group's bid which it received and that such literature was attached to the copies of the winning bids for other lots. WIN should have known at that time that no literature was provided by The Computer Group. If WIN had any doubts about what was contained in The Computer Group's bid, it could have easily confirmed them by asking State Procurement prior to its time for protest running out.

On issues 2, 4, and 7, WIN argues that because it received The Computer Group's bid on Friday afternoon, May

---

[1]Under the Procurement Code, any time period is computed by counting the required number of calendar days excluding the day of the triggering event and excluding Saturday, Sunday or a legal holiday if the final day of the designated period falls on such day. Section 11-35-310(13).

22, and because this is a technical procurement, WIN should be given an extra day in which to review the material and develop its issues. WIN offered testimony that the employee who received the bid on Friday afternoon did not review The Computer Group's bid for technical compliance but rather spent his time looking for price discrepencies and preparing copies of the bid to send to his superiors.

The Panel holds that WIN is not entitled to such extra time. The "knew or should have known" trigger date begins when the first opportunity to know the facts giving rise to a protest issue presents itself. In this case the first opportunity WIN had to discover The Computer Group's alleged nonresponsiveness to the bid requirements was the day it received a copy of The Computer Group's bid. For on that day, May 22, WIN had in its possession all of the information which would form the basis of its protest.

How WIN chose to spend its ten days reviewing The Computer Group's bid was up to it. All the law requires is that WIN file a formal written protest within ten days of its first opportunity to know the facts giving rise to the protest. This WIN did not do.

Issue No. 3 - Black and White Monitor Video Controller

WIN contends that The Computer Group is not responsive to the IFB because it failed to bid a video controller with the "VGA Black and White 14 inch monitor" in configuration 3-B. (Record, p. 106). WIN concedes that no line exists on the bid form to separately price a video controller (Resp.

Ex. #2, p. 28) however, WIN argues that without a controller "the end-users will have non-functional systems until such time as they go out and purchase a video controller card separately." (Record, p. 10). WIN contends that the requirement for a video controller is implicit in the IFB.

In support, WIN points to the IFB, Paragraph 1, "Scope" which states that the purpose of the solicitation is to acquire personal computers, defined as "a stand-alone CPU and its peripherals (monitors, keyboards, disk and tape drives, cards, operating systems, cables and connectors) that run MS/DOS" etc.(Record, p. 68)(Emphasis added). WIN also references the IFB statement that "the absence of detail specifications or the omission of detail description shall be recognized as meaning that only the best commercial practices are to prevail and that only first quality materials and workmanship are to be used." (Record, p. 51).

The Panel holds that, under the portions of the IFB, referenced by WIN, The Computer Group is required to provide a working personal computer, i.e., one with a video controller for the monitor. However, the Panel does not agree with WIN that The Computer Group has failed to do this.

The IFB does not require a separate price for the video controller for the fourteen inch black and white monitor and The Computer Group gave none. The IFB does require that all personal computers bid be operational and that any deviations from the specifications be "clearly pointed out"

or all items offered will be considered in strict compliance with the specifications (Record, p. 51).

The President of The Computer Group testified that The Computer understood that the IFB requires a video controller with the fourteen inch black and white monitor and that The Computer Group understands that it is obliged to provide it.

The Panel holds that WIN has failed to demonstrate by the weight of the evidence that The Computer Group's bid fails to provide video controllers as required.

Issue No. 5 - 160 MB Hard Drive

WIN also contends that the 160MB hard drive bid by The Computer Group is not available from any manufacturer. In support of its claim, WIN produced the testimony of an expert who stated that he had called all major manufacturers and no 160MB hard drive was available.

The Computer Group disputes this claim and at the hearing before the Panel produced a commercially available 160 MB hard drive (Respondent's Ex. #4). The Computer Group also presented evidence that it intends to provide the 160 MB hard drives by reformatting a higher megabyte hard drive.

Under the Panel's decision in In re: Protest of Anacomp, Inc., Case No. 1990-5, the burden is on the protestant to demonstrate by a preponderance of the evidence that the challenged bid is not responsive. The Panel holds that WIN has failed to meet this burden. The weight of the evidence favors The Computer Group's position that a 160 MB

hard drive does exist and that The Computer Group can provide one to the State.

Issue No. 6 - Pricing of DAT Drives

WIN argues that the prices bid by The Computer Group for the DAT drives for configurations 3-B, 4-B, and 6-C bear no relation to the actual cost of the drives. WIN contends that the best wholesale price available for quantities of 1000 DAT drives is $900.00, which is three times the price The Computer Group bid for a quantity of one.

WIN contends that The Computer Group underbid the DAT drives to lower its total cost because little demand exists for DAT drives. At the same time, WIN argues, The Computer Group overbid the more popular 250MB tape drive, charging $1950 per drive for a product that usually costs $400 wholesale. Win claims all this makes The Computer Group not a responsible bidder.

The Computer Group presented evidence that it calculated its price for the DAT drives based on its expert opinion that the cost of DAT drives will substantially decrease over the life of the contract. The Computer Group also presented evidence that the 250MB drive offered by it is not the simple $400 drive referenced by WIN but is one that contains sophisticated software that justifies its $1950 price tag.

Both WIN and The Computer Group concede that the State is free to buy the cheaper, more sophisticated DAT drives

over the expensive, arguably less sophisticated 250MB drive when purchasing personal computers.

While S. C. Code Ann. § 11-35-30 prevents a bidder from unfairly or fraudently pricing its product to obtain a bid, the Panel does not believe that WIN has proven that such is the case here. The Panel holds that The Computer Group is within the bounds of fairness and responsibility in bidding $300 on the DAT drives based on its expert prediction of the future market for these drives. Further, the Panel finds no reliable evidence to contradict The Computer Group's assertion that $1950 is a fair price for the type of 250MB drive bid by it. The Panel concludes that The Computer Group is a responsible bidder on these items.

For the reasons stated above, the Panel affirms the decisions of the CPO as noted and hereby dismisses the protest of WIN Laboratories, Ltd.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: /s/
Gus J. Roberts
Chairman

Columbia, S.C.
11-20, 1992