

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1993-14

In re:)
)
Protest of Drew Industrial Division,) **ORDER**
Appeal by Drew Industrial Division)
_____)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on July 20, 1993, on the appeal of Drew Industrial Division ("Drew") from a decision by the Chief Procurement Officer ("CPO") denying Drew's protest.

Present and participating in the hearing before the Panel were Drew, represented by its District Manager, Mike Croley; Nalco Chemical Company ("Nalco") represented by its Engineer, Tim Clark; and the Division of General Services represented by James W. Rion, Esquire.

FINDINGS OF FACT

A Request For Proposals ("RFP") to provide water treatment chemicals and technical services for the Medical University of South Carolina ("MUSC") was issued on March 15, 1993. The RFP has the following four Award Criteria, listed in order of importance:

- A. Soundness of offeror's recommended water treatment program.
- B. Qualifications, experience and capability of offeror's representatives/ personnel who will be assigned to MUSC to supply complete water chemical treatment and perform professional services.
- C. Total Cost
- D. Qualifications and experience of the company including related experience in similar areas of treatment and service.

The RFP requires the proposal to contain, in pertinent part, the name, qualifications, and experience of the two (2) representatives and one alternate that will be assigned to MUSC. The RFP also requires a brief summary of the company's qualifications, to include a list of three client references.

Amendment #001 to the RFP was issued on April 8, 1993.

The proposals were opened on April 20, 1993, and evaluated by a panel of four MUSC employees. The evaluators worked separately, and evaluated the proposals individually. Nalco received a total score of 361.4, while Drew received a total score of 334. The Intent to Award to Nalco was issued on May 13, 1993 and suspended on May 28, 1993, pending the protest process.

On June 14, 1993, the CPO held a hearing on the issues raised in Drew's protest letter dated May 25, 1993, and issued a written decision.

CONCLUSIONS OF LAW

Drew argues that the MUSC evaluators did not properly evaluate the subjective criteria of the RFP. Drew has the burden of proving the evaluators did not properly evaluate its proposal. Drew argues that MUSC has no prior knowledge of Drew's representative and his qualifications and therefore could not properly evaluate him without speaking to Drew's references. However, the RFP did not request references in relation to the company's representative. The RFP process is set up to allow only evaluation of the information provided in response to the RFP. The Offeror has the opportunity to put information it feels is necessary to respond to the RFP in its proposal.

Drew also argues that the variation in points awarded by the evaluators for Criteria B shows the proposals were not evaluated properly. General Services argues that Drew is actually protesting the subjective nature of the RFP process. The nature of the RFP solicitation, which includes criteria other than

price, makes the subjective evaluation by the evaluators an inherent part of the RFP process. The Panel agrees that the RFP process established by the legislature is inherently subjective.

The Panel finds that Drew has failed to carry its burden of proof. Drew submitted no evidence the evaluators did anything other than independently evaluate the information submitted by Drew based on the criteria outlined in the RFP. The variation of evaluators scores alone, is only proof of the subjective nature of the evaluation aspect of the RFP process.

Drew, in its protest letter, also argues Criteria A was not a necessary award criteria. S C Code Ann. section 11-35-4210(1) requires that a protestant file its grievance with the CPO in writing within ten days of when it knew or should have known of the facts giving rise to the grievance but in no circumstance after thirty days from notification of award of the contract. Drew did not submit a protest of the award criteria within ten days of receipt of the RFP. Therefore, the Panel finds this argument is untimely under S C Code Ann. section 11-35-4210(1). Drew argued that it was unaware of the time requirement, but the Panel has consistently held and again reinforces that ignorance of the law is not a waiver of the law and its effect.

Drew makes a final request that the RFP be resolicited as an invitation for bids based on the savings the state could realize if it contracted with Drew, the lowest bidder. The RFP process is set up to allow factors, other than price, to be considered. To take a RFP and award it to the lowest bidder or recharacterize it as a bid, would ignore the important criteria of the RFP which must be considered. Further, the time to protest that the RFP should be an Invitation For Bids is ten days from receipt of the RFP. The Panel holds that Drew's argument is untimely under S C Code section 11-35-4210(1).

For the reasons stated above, the Procurement Review Panel affirms the June 24, 1993, decision of the Chief Procurement Officer and dismisses Drew's protest.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Gus J. Roberts, Chairman

August 4, 1993