

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1994-1

In re:)
)
Protest of Andersen Consulting,) **ORDER**
Appeal by Andersen Consulting)
)

This case came before the South Carolina Procurement Review Panel (Panel) for hearing on February 15 and 16, 1994, on the appeal by Andersen Consulting (Andersen) of a decision by the Chief Procurement Officer (CPO) denying Andersen's protest.

Present and participating in the hearing before the Panel were Andersen Consulting, represented by John Schmidt, III, Esq., and Daniel Brailsford, Esq.; Health and Human Services Finance Commission represented by Craig Davis, Esq.; Unisys Corporation represented by Elizabeth Crum, Esq., and Elizabeth Holderman, Esq.; and General Services represented by James Rion, Esq.

FINDINGS OF FACT

This case involves procurement of the South Carolina Child Support Enforcement System (CSES). The State originally solicited the CSES in February of 1993. Prior to evaluation of proposals, Andersen's proposal was found to be nonresponsive, a decision which was upheld by the Panel in Case No. 1993-18. After evaluation of the proposals, award of the CSES was made to Unisys Corporation (Unisys), which was then protested. In Case No. 1993-22, Unisys was found to be nonresponsive and the Panel determined the proper remedy was the resolicitation of the procurement of the CSES.

The State issued a Request for Qualifications (RFQ) on September 24, 1993. (Record p. 31) The RFQ was advertised in SC Business Opportunities on September 30, 1993, and responses to the RFQ were opened on October 4,

1993. The Request for Proposals was then issued on October 11, 1993.

(Record p. 136) The RFP states its purpose is:

to secure the services of a contractor to comply with the standards of the Family Support Act of 1988 which require the State to have a Level II certified operational automated child support data processing and information retrieval system in effect by October 1, 1995. The automated turnkey system shall be called the South Carolina Child Support Enforcement System (CSES). (Record p. 152).

Federal law sets the date for federal certification at October 1, 1995. The RFP, under "Tasks and Schedule" provides that "the timing for these tasks may change. However, the completion date for Federal Level II certification on October 1, 1995, cannot under any circumstances be extended." (Record p. 253) If the CSES is not certifiable by the federally mandated date, several million dollars of federal funds may be forfeited by the State. The RFP also contains provisions for consequential and liquidated damages. Therefore, all parties are concerned that the deadline be met. The time exigencies are not disputed.

On October 14, 1993, a preproposal conference was held, and Amendment #001, with questions and answers from the preproposal conference, was issued on October 21, 1993. (Record p. 39) Amendment #002 was issued on October 27, 1993, with clarification to answers given in Amendment #001. (Record p. 101) The opening date was changed to November 3, 1993 in Amendment #003, issued on October 28, 1993. (Record p. 113) On October 29, 1993, Amendment #004 was issued which makes changes to the RFP. (Record p. 115) Amendment #005 was issued on November 11, 1993, to suspend the opening date until further notice. (Record p. 125) On November 5, 1993, Amendment #006 was issued to set the opening date for November 9, 1993, and

make corrections and additions to previous amendments. (Record p. 127) The proposals were opened on November 11, 1993.

The proposals were evaluated and Andersen was ranked highest by the evaluation committee. Unisys was the second highest ranked offeror. On December 15, 1993, the State initiated negotiations with Andersen pursuant to Code Section 11-35-1530(11)¹. Code Section 11-35-1530(11) provides in pertinent part:

Where price was an initial evaluation factor the procuring agency through the appropriate procurement official may, in its sole discretion and not subject to challenge through a protest filed under Section 11-35-4210, proceed in any of the manners indicated below:

...(2) negotiate with the highest ranking offeror on matters affecting the scope of the contract so long as the overall nature and intent of the contract is not changed. If a satisfactory contract cannot be negotiated with the highest ranking offeror negotiations may be conducted in the sole discretion of the procuring agency with the second, and then the third, and so on, ranked offerors to such level of ranking as determined by the procuring agency in its sole discretion; or

(3) change the scope of the request for proposals and give all responsive offerors an opportunity to submit best and final offers.

If the agency chooses any of these options, and is still unable to award a contract, it may repeat any of the procedures outlined herein until a proposed contract is successfully achieved. [Emphasis added]

Negotiations were also conducted pursuant to the RFP, which provides in part:

¹ Code Section 11-35-1530(10), titled Award, provides in part: "Award must be made to the responsive offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors set forth in the request for proposals unless the procuring agency determines to utilize one of the options provided in Section 11-35-1530(11)." [Emphasis added]

...the State may enter into discussions to aid in the mutual understanding of the parties. Following evaluations, negotiations may thereafter be conducted with one or more OFFERORS. If negotiations result in a change in the scope of the RFP (i.e. a material alteration, and such alteration has a cost consequence that may change the ranking of the price upon which the evaluation occurred) then all OFFERORS will be afforded a chance to submit best and final offers. (Record p. 165)

On December 15, 1993 the State, represented by Craig Davis, Esq., began negotiations with Andersen. At the beginning of negotiations, the State established that the purpose of the negotiations was to clarify and not change the terms and conditions of the proposed contract. The State established the guideline that there could be no changes to the terms and conditions of the RFP and also set a deadline to finish negotiations by 5:00 p.m. on December 17, 1993. Andersen was given a written document from which to make proposed changes. The State refused some of Andersen's requests and Andersen did not pursue those items further. By December 17, 1993, the State and Andersen had clarified a few items, but did not agree on the important issue of liability. Andersen wished to define liability. The State took the position that Andersen's request would violate Regulation 19-445.2070 and could not be granted under Code Section 11-35-1530(11). Regulation 19.445.2070 (D) provides in part:

Ordinarily a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the State, since to allow the bidder to impose such conditions would be prejudicial to other bidders.²

The State indicated its intention to move to the next highest ranked offeror if a compromise could not be reached with Andersen. The State offered Andersen a contract with the negotiated terms or a contract consisting of the

² Reg. 19-445.2095(E) makes Regulation 19-445.2070 applicable to competitive sealed proposals, as opposed to competitive sealed bids.

RFP and Andersen's proposal. Andersen requested and was granted an extension of the deadline, to Monday, December 20, 1993. On Monday, December 20, 1993, Andersen brought in new counsel to negotiate and the State included Jim Rion, Esq. in the negotiations, in an attempt to come to some compromise. Andersen offered a sixty-six (66) million dollar performance bond in exchange for release from all possible damages beyond that amount. The State refused to limit the liability to that amount. The State did offer to consider a bond for 100 million dollars, as that amount was generally agreed upon in prior hearings as the potential loss to the State if the State does not comply with the Family Support Act of 1988. Andersen believed the 66 million figure, which was twice its proposed contract price, was reasonable. The State offered to discuss "little" items in an effort to offer a bundle of small compromises in the place of the large issue of liability that Andersen was concerned about. Andersen believed themselves precluded from negotiating most other items of interest, such as the date and terms of completion, so did not pursue that offer. An agreement could not be reached. Andersen testified it continued to pursue the possibility of reaching agreement. Andersen attempted to obtain an insurance liability policy for 100 million dollars. However, Andersen never informed the State of such efforts. Also, Andersen sent Jim Rion a letter by facsimile on December 22, 1993, indicating "...Andersen Consulting has determined that it cannot enter into a contract for this project unless a reasonable definition of the damages, generally described in the RFP, can be negotiated."

The State contacted Unisys, the second highest ranked offeror, and indicated its intention to begin negotiations. The State contacted local counsel for Unisys on December 22, 1993, and negotiations began on December 23, 1993. The State established the same guideline that only clarifications could be made and no terms and conditions could be changed. The State further stated

that items denied the initial offeror in negotiations, would not be negotiated with Unisys. Mr. Blaske, Unisys' representative, testified that when the State refused a request, he would continue to make suggestions or give options about the item of interest to find the parameters of the State's negative response. The State and Unisys resumed negotiations on December 28, 1993, and reached an agreement on December 30, 1993.

The Intent to Award to Unisys was posted on December 30, 1993. Andersen filed its protest of the Intent to Award on January 12, 1994. On January 18, 1993, pursuant to Code Section 11-35-4210(7), HHSFC's Director requested a CPO determination that the State's best interest would be served by proceeding with the Unisys contract despite the pending protest. The CPO made the determination that it was in the State's best interest to proceed with the contract with Unisys. On January 20, 1994, the CPO held an administrative review of Andersen's protest, and the CPO decision was posted on January 26, 1994.

The issues raised in this case have not been previously addressed by the Panel, as the 1993 changes to the Consolidated Procurement Code significantly changed the competitive sealed proposal process.

CONCLUSIONS OF LAW

I. MOTIONS

Three Motions were made at the beginning of the hearing, but the Panel took the motions under advisement, in order to proceed on the merits of the case. The Panel's decision on each motion is discussed below.

A. Motion for Summary Judgment

A motion for summary judgment was made and is hereby denied, as issues of material fact exist concerning the negotiations in this solicitation. The facts, when viewed in a light most favorable to the nonmoving party, raise the

issue that the state may have changed the nature and intent of the contract with Unisys and the State may not have acted in good faith. When viewed most favorably towards Andersen, facts exist that raise the issues contested. The Panel denies the summary judgment motion.

B. Motion To Dismiss For Lack Of Standing

This motion claims Andersen lacks standing to protest, because it is no longer an offeror or prospective offeror. HHSFC contends that Andersen withdrew its offer in its letter of December 22, 1993 and by its failure to sign a contract when offered by the State. If Andersen withdrew its proposal, Andersen is no longer an offeror or prospective offeror. However, Andersen did not withdraw its proposal, but refused to negotiate further except for the issue of liability. The State therefore chose to move to the second ranked vendor. Code Section 11-35-1530(11) provides that "if the agency chooses any of these options, and is still unable to award a contract, it may repeat any of the procedures outlined herein...." Under Code Section 11-35-1530(11), the State could have returned to negotiate with Andersen, so Andersen retained Offeror status.

HHSFC also made a motion to dismiss based on the argument that once the State enters into negotiations under Section 11-35-1530(11), its actions are not subject to protest. However, after the hearing, HHSFC withdrew this aspect of its motion to dismiss.

C. Motion To Dismiss Certain Grounds For Vagueness

HHSFC argues in the alternative, if Andersen is found to have standing, that Andersen has not stated its grievance in its original protest letter with enough particularity to now invoke Code Section 11-35-30 and 11-35-20(f). Andersen's protest letter states one of its grievance as "the State has not negotiated in compliance with the Code." (Record p. 23) The protest letter

further states "...Sec. 11-35-1530 authorizing the State to negotiate proposals require that the State negotiate equally with each offeror..." and "the proposed contract therefore was negotiated in violation of Sec. 11-35-1530 and cannot be awarded." (Record p. 26) The protest letter discusses failure to comply with Code Section 11-35-1530. No mention is made of Code Section 11-35-30 or 11-35-20(f). Neither does the letter mention key terms from those Code Sections, such as good faith or fair dealing. The Panel finds Andersen's protest letter is too vague to give rise to claims concerning Code Section 11-35-20 and 11-35-30. However, the Panel rules on the merits for the reasons discussed below.

Because of the State's need for the system being procured, and the possibility of losing millions of federal funds if this procurement is not implemented by a specific federally mandated time, the Panel did proceed to hear and decide the merits of this issue, to avoid any time delays in a possible appeal and remand of motions.

II. ISSUES

A. "The scope of the RFP has been changed affecting the overall nature and intent of the contract"

Section 11-35-1530(11)(2) prohibits the State from changing "the overall nature and intent of the contract."³ Andersen's protest letter claims that the State, in the course of negotiations with Unisys, made changes to the terms and conditions of the contract, which are material modifications that change the overall nature and intent of the contract. Andersen offered testimony about three key changes it characterizes as the redefinition of the completion date, deferred components, and payment delivery. Andersen contends that it should

³ Technically, there is not a contract at the time of negotiations. However, the controlling document is clearly the RFP so "RFP" is what is meant by the term "contract" at the negotiation stage of the procurement process.

be given the opportunity to accept the changed contract offered to Unisys, or in the alternative, to present its best and final offer on the changed contract, under Section 11-35-1530(11)(3).

The State and Unisys argue that the overall nature and intent of the contract was not changed in the negotiations between the State and Unisys. In defining the overall nature and intent of the contract, one must look to the RFP for the purpose and intent of the procurement. The RFP states the purpose of the procurement is to obtain an automated turnkey system to meet federal government requirements to be certified by the federally mandated deadline. The procurement also involves many components that are not required for federal certification, but are required for the implementation of the type of distributed system necessary to the State. The overall nature and intent of the contract is to provide a distributed system that meets both the federal and state requirements, as presented in the solicitation.

Andersen claims three areas negotiated by Unisys change the overall nature and intent of the contract by modifying the liability of the State and the offeror. The first change discussed by Andersen's witnesses is the completion date of October 1, 1995. This date is mandated by the federal Family Support Act of 1988. Testimony was heard concerning whether it is likely that the date will be changed, but everyone agrees that the date is currently set at October 1, 1995, and the date cannot be changed except by an act of Congress. The Unisys contract states "as used in this paragraph and elsewhere in this contract, October 1, 1995 is intended to mean 'or later as allowed by applicable federal law, so long as, and provided that, no such different day in any way reduces the STATE's level of funding for CSES, or any other federal program'." (Record p. 824) Andersen claims the language in the Unisys contract changes the completion date. The Panel disagrees. The completion date is October 1, 1995.

The redefinition of the date to include the possibility of the date being changed by the federal government does not change the date. The language clarifies that the date of completion is intended to be the date set by the federal government for Level II certification. The State does not have control over the federal date for Level II certification, and cannot change that date. The Panel finds that the date for completion has not been changed by the State and the redefinition of the completion date reflects the fact that the State does not control the date set for Level II certification. The redefinition of the completion date does not change the overall nature and intent of the contract.

The second key change Andersen's witnesses testified about involves deferred components. The Unisys contract provides, in part:

If the CONTRACTOR determines that Level II Certification would be placed at risk by adherence to particular, scheduled, interim milestones/deliverables which cannot be adequately addressed through the application of appropriate, available resources, including personnel, the CONTRACTOR shall request an adjustment thereto. (Record p. 824)

Mr. McElwee, Andersen's quality assurance partner, testified that Andersen did not ask the State to defer components, as this moves some obligations under the contract to a date beyond the deadline. The contract language does not allow Unisys to defer components, but only allows the contractor (Unisys) to make a request. It does not allow Unisys to make the decision to defer, nor does it guarantee any deferral of components. The contract further provides that:

the STATE will grant said request(s) unless the State determines that such an adjustment would be arbitrary and capricious, or alter the nature and extent of the project, or affect a material and substantial STATE interest, or lack a legal basis, including, as provided below that, even if the

request(s) for an adjustment is granted:... (Record p. 824)

Twelve subsections follow and further define limitations on the deferral of components. The language does not limit the contractor's liability or duty to provide the CSES. The overall nature and intent of the contract is not changed by the contract language allowing a request to defer components.

The third key change Andersen testified about was delivery of payment. The Unisys contract provides that "in the event that the CONTRACTOR and the STATE agrees that the CONTRACTOR has provided an apparently Level II Certification system, but the Federal Government fails to certify the said CSES system within nine (9) months from the date of application for Level II Certification..." the State will pay the Contractor for Task 17, Federal Certification, and all prior tasks, except Task 16, Maintenance Modification and Warranty. The Contractor is still obligated to get Federal Level II Certification or it must return the payment made. Payment of retainage, which is twelve and one half percent of the total amount billed for each task, is not included in the payment. (Record p. 860) Retainage is paid only after Federal Certification and final acceptance by the State. The contract language takes into consideration the fact that it may take several months for the Federal government to actually certify the CSES after the federally mandated deadline. If the CSES is not certified, any funds paid must be refunded. The State retains the right to the funds. Also, Unisys is still obligated to provide federal certification, and must do so to receive the retainage payment. The overall nature and intent of the contract is not changed by the language of the contract concerning the payment.

The negotiations clarified and "redefined" some terms of the contract, but did not change the overall intent and purpose of the contract. The State is still procuring and the offeror is still promising to provide a distributed system as

presented in the solicitation. The changes in the wording used in the RFP are simply a reflection of the mutual understanding of the parties as to the meaning, or a clarification of the meaning, of certain terms.

Andersen's assertion that it, as the first ranked offeror, must first be offered the contract negotiated with Unisys, is not based on the law. Section 11-35-1530(11) does not provide that once a contract is negotiated with the second ranked offeror, then it must be offered to the first ranked offeror. The law does not contain any language that could be construed that way. Neither would it be reasonable nor is it a normal business practice to allow a contract negotiated with one party to be offered first to another party. This would certainly put a chilling effect on any negotiations with the State, as an offeror would not wish to negotiate a favorable contract for a competitor. Code Section 11-35-1530(11)(2) provides for the State to proceed to the second ranked offeror, "negotiate matters effecting the scope of the contract", and enter an agreement if possible. This is the procedure the State followed. When an agreement could not be reached with Andersen, the State began negotiating with Unisys, eventually reached an agreement and executed a contract with Unisys.

The State has a duty to get best and final offers if the State chooses to proceed under Code Section 11-35-1530 (11)(3), which the State did not do in this case.

Andersen has failed to prove that the overall nature and intent of the contract has been changed by the additional terms in the contract negotiated with Unisys.

B. "The State has not negotiated in compliance with the Code"

As stated earlier, the Panel finds that Andersen did not state a grievance with enough particularity to include Code Sections 11-35-30 and 11-35-20(f), but the Panel addresses the merits of this issue to avoid any possibility of a time

delay from a remand of its granting the Motion To Dismiss Certain Grounds. The following findings are based on the alternative that Andersen's protest letter raises the issue of a violation of Section 11-35-20(f) and Section 11-35-30.

Andersen argues that the State violated Section 11-35-20(f), which states one of the purposes of the Code is "to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement." Andersen also alleges the State violated Section 11-35-30, which states "... this code imposes an obligation of good faith in its negotiation, performance or enforcement. 'Good faith' means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing." Andersen believes these sections were violated because the State refused to negotiate the same terms and conditions with Andersen that were negotiated with Unisys. The State contends that some terms and conditions were negotiated with Andersen, but Andersen insisted on limiting liability, which the State is prohibited from doing.

Andersen contends that Section 11-35-1530 requires the State to "negotiate equally with each offerer- ...the State must negotiate the same subjects with each offeror." (Record p. 26) Andersen alleges that terms and conditions were changed for Unisys, which significantly changed the risks and responsibilities of the Offeror and the State, while Andersen was precluded from changing terms and conditions and told the State was prohibited from limiting the Offeror's liability to the State under Reg. 19-445.2070. The State argues that the changed terms and conditions do not limit Unisys' liability, and are therefore not prohibited as was Andersen's demand to limit the dollar amount of liability.

The Panel finds that the State did not refuse to negotiate the same terms and conditions with Andersen that were negotiated with Unisys. The State

negotiated with each party based on the suggested terms and language provided by that party. The State took the suggestions of the negotiating party and either accepted or rejected it. The State's duty is to negotiate clarifications and terms that are favorable to the State. The facts show that Unisys had more suggestions than Andersen during the negotiating process. Different negotiating styles and areas of interest will naturally provide different results. The Panel believes Andersen painted themselves into a corner on the liability issue. Andersen has not proven that the State did not act in good faith in the negotiation process of this procurement.

Andersen was given the opportunity to negotiate a mutual meaning of the terms and conditions of the contract. When the negotiations did not result in an agreement, Andersen was given the opportunity to sign a contract consisting of the RFP and its proposal, which Andersen refused. The State even discussed other options, which resulted in Andersen's letter of December 22, 1993, which stated its position that it could not sign a contract without negotiating a definition of damages. The State broke off negotiations with Andersen when Andersen refused, in writing, to sign a contract. The State allowed Andersen time beyond the set deadline to negotiate a contract, brought in additional counsel to seek a compromise, offered two alternative contracts and warned Andersen the State would begin negotiations with another offeror if they could not get beyond the issue of defining damages. The Panel finds that the State was fair in dealing with Andersen and acted in good faith in its negotiations with Andersen.

If the same subjects are not negotiated with Offerors, Andersen argues that the State must offer the first ranked offeror (Andersen) the opportunity to accept and perform the terms negotiated with the second ranked offeror (Unisys), before awarding the contract to the second ranked offeror. As

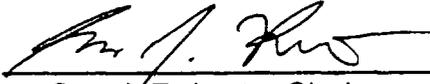
discussed earlier, this contention is not based on the law, nor is it a reasonable business practice.

CONCLUSION

For the foregoing reasons, the Panel finds that the State has negotiated the contract with Unisys in compliance with the Code. The Panel denies Andersen's protest and upholds the January 26, 1994 decision of the CPO.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, SC
March 9, 1994