

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
 PROCUREMENT REVIEW PANEL
 CASE NO. 1994-20

In re:)
)
 Protest of Compusult, Inc.;) **ORDER**
 Appeal by Compusult, Inc.)
 _____)

FINDINGS OF FACT

The Information Technology Management Office of General Services (ITMO) negotiated a licensing agreement between the State of South Carolina and Microsoft Corporation, which provides substantial savings to the State. As a part of the agreement, called the Microsoft Select Master Agreement (Master Agreement), the State must select a Large Account Reseller (LAR) authorized by Microsoft to distribute Select License Paks. The LAR is designated in the Microsoft Select Enrollment Agreement (Enrollment Agreement). Since more than one company is capable of being designated a LAR and administering the licensing and reporting functions required by Microsoft, the State issued a solicitation to locate the vendor(s) the State would identify as its Large Account Reseller(s).

On August 25, 1994, ITMO issued an Invitation for Bids (IFB) for a "Microsoft MVLP [Microsoft Variable License Pack] Service Contract." (Record p. 24). The IFB includes standard solicitation provisions to claim South Carolina resident and end-product preferences. (Record p. 25). The IFB was advertised in the September 1, 1994, edition of the South Carolina Business Opportunities publication. (Record p. 45). On September 7, 1994, Amendment No. 1 to the IFB was issued, which divides the bid into two (2) lots, educational agencies and non-educational agencies. (Record p. 22). The bids were opened on September 16, 1994. CompUsult, Inc. (Compusult) located in Charleston, South Carolina,

submitted a bid on both lots, as did many vendors. Compusult's bid was the lowest bid on the educational lot. The State did not apply the SC/ US product preference to the solicitation, but did apply the resident vendor preference. (Record p. 133).

On September 29, 1994, ITMO wrote a letter to Compusult asking for information concerning Compusult's ability to perform the contract. (Record p. 106). Compusult was not one of the possible dealers identified by Microsoft in a list supplied to the State. (Record p. 112). Compusult replied to ITMO's inquiry by letter dated October 10, 1994, stating it's ability to fulfill all obligations under the IFB. (Record p. 107). Compusult wrote a second letter on October 21, 1994, requesting to be informed of the status of the bid and stating it's belief that any problems with Compusult's bid were resolved. Compusult also asked to be contacted if its initial response was not satisfactory. (Record p. 108). ITMO responded by letter dated October 25, 1994, informing Compusult of ITMO's determination of nonresponsibility as to Compusult's inability to administer the contract since Compusult "does not appear on the list of select dealers provided by Microsoft." (Record p. 46).

The Intent to Award was issued on October 27, 1994, awarding lot #1 to ASAP Software, and lot #2 to Wareforce, Inc. (Record p. 47). The intent to award was stayed on November 14, 1994, pending the outcome of a protest filed by Compusult. (Record p. 48). Compusult protested the intent to award by letter dated November 14, 1994. (Record p. 4).

ITMO made further inquiries into Compusult's status as an authorized LAR, which the state understood to be the only entities which could be named in the Enrollment Agreement. On November 28, 1994, ITMO received a letter from John Kristoff, an employee of Microsoft, stating that Compusult was not an

authorized Large Account Reseller and Microsoft had informed Compusult it would not authorize Compusult as a LAR. (Record p. 126).

The CPO conducted a hearing on December 5, 1994, and issued a decision on December 14, 1994. (Record p. 8). Compusult appeals the CPO decision by letter dated December 21, 1995. (Record p. 1).

At the Panel's hearing, Compusult presented the video deposition of Annie Olszewski, Marketing Manager for the "Channel Policies" division of Microsoft, who is responsible for distributors' and resellers' contracts, as well as policies related to purchasing distribution of Microsoft products. Ms. Olszewski testified that the MVLP is a component of the Microsoft Select Licensing Program, which is a volume purchasing agreement that utilizes LARs, which are resellers authorized by Microsoft to fulfill the terms of a Select Agreement by providing billing and collection on behalf of Microsoft. Ms. Olszewski further testified that Microsoft recognizes four Aggregators in the Select Program. An Aggregator is a type of Reseller that purchases product and distributes it to outlets. MicroAge Computer Centers, Inc. (Microage) is one of the four authorized aggregators. The aggregators are also LARs, but not all LARs are aggregators. The Select Program requires at least two agreements: the Master Agreement between Microsoft and the Select Customer (the State in this case) and the Enrollment Agreement, between Microsoft, the Customer and the LAR. More than one Enrollment Agreement may exist under one Master Agreement. The Enrollment agreement is the purchasing terms between the LAR and the Customer. The Enrollment Agreement allows a Secondary Address for LAR to be designated, which is the address of the company which will actually be fulfilling the terms of the Enrollment Agreement.

At the Panel's hearing, Compusult presented a copy of a signed agreement with MicroAge Computer Centers, Inc. (Microage), a LAR authorized

by Microsoft, which allows Compusult to purchase and resell products. (Appellant Exhibit # 3).

CONCLUSIONS OF LAW

I. Nonresponsibility

The IFB states that ITMO is "soliciting bids from qualified Microsoft Select Program Resellers to administer a Microsoft Select Microsoft Variable License Pak (MVLK) agreement between the State of South Carolina and Microsoft Corp." (Record p. 37). The IFB does not specifically use the term Large Account Reseller or LAR. The IFB then lists eight tasks to be performed by the reseller selected. Compusult argues that it is fully qualified to administer the agreement and perform the required tasks. The State argues that information provided to the State at the time of the determination of nonresponsibility in the fall of 1994, indicates that Compusult is not an authorized reseller which can administer the agreement. The State was given a list of authorized resellers by a Microsoft representative, which does not list Compusult, Inc. (Record p. 112). The State, of necessity, relied on Microsoft to provide all the required information on resellers as Microsoft authorizes the LARs to be designated in the Enrollment Agreement. Microsoft did not provide the State with information about the Aggregator Program that allows designation of an affiliated company as "Secondary Address for LAR" on the Enrollment Agreement.

The State solicited information from Compusult concerning its ability to perform under the contract by letter dated September 29, 1994. Compusult responded by letter dated October 10, 1994, that it was currently administering three such MVLKs. The State found this response to be inadequate to explain Compusult's ability to perform, or to explain how it was authorized by Microsoft to perform. Compusult wrote a second letter stating its assumption that its letter

of October 10, 1994, was sufficient to answer the State's questions of its ability to perform. The State did not respond by stating that Compusult's letter was inadequate to explain its ability to perform, and requesting further information. ITMO should have requested further information from Compusult, at least after Compusult's second letter. Certainly, further investigation of Compusult's status, before a determination of nonresponsibility, was warranted. Instead, by letter dated October 25, 1994, ITMO informed Compusult it was found to be nonresponsible. The State understandably relied on the list of Microsoft authorized resellers, provided by Microsoft. However, through lack of communication, the State was not informed of the Aggregator Program of Microsoft, which allows for companies affiliated with an Aggregator to purchase and resell products as required for an MVLP, and be designated in an Enrollment Agreement as "Secondary Address for LAR". The Panel notes that Compusult contributed to the problem of lack of communication in not providing the State information concerning its application and agreement with Microage, neither in response to the State's inquiry nor at the CPO hearing.

Microage is a LAR and aggregator listed on the Microsoft list of authorized resellers provided to the State. Compusult has a signed agreement with Microage to purchase and resell products. (Appellant Exhibit # 3). Ms. Olszewski testified that the State and Microsoft will sign the Master Agreement, and then the State will designate a LAR authorized by Microsoft to administer the MVLP, in the Enrollment Agreement. Ms. Olszewski also testified that it is possible to designate a "Secondary Address" for the LAR, which is the position Compusult is in. Further, the IFB does not specifically require a bidder to be a LAR, but requires a "qualified Microsoft Select Program Reseller to administer a Microsoft Select Microsoft Variable License Pak (MVLP) agreement."

The Panel finds that Compusult has proven that it is a qualified Microsoft Select Program Reseller, through Microsoft's Aggregator Program. The State can award the contract to Compusult, binding Compusult as the administrator of the MVLP, and name Microage as the LAR with Compusult as the Secondary Address in the Enrollment Agreement. The Panel finds that Compusult has proven that it is legally qualified to administer the Microsoft Select MVLP, and therefore is not nonresponsible. The determination that Compusult is not responsible is reversed.

II. Preference

The parties agree that if the South Carolina end-product preference is applicable to this bid, Compusult's bid on lot two is the low bid. The State argues that the IFB itself states that the solicitation is for service, not a product. The State further argues that Microsoft is the obvious producer of anything considered an end-product, not Compusult, which simply duplicates Microsoft's product.

Compusult contends that it creates an end-product. Compusult presented testimony that Microsoft provides a CD-ROM with information on it. Jeff Osmer, an employee of Compusult testified that Compusult copies the information from the CD-ROM to its computer, decompresses it, copies it to a disk, and then reinstalls it back onto disk duplication equipment. Mr. Osmer also testified about additional encoding of a disk, which is created and provided on disk by Compusult, if requested by the client. Mr. Osmer also discussed customizing information to fit on either three and one-half inch disks or five and a quarter inch disks. Another Compusult employee, Paula White, testified that Compusult creates a package which includes customized disks, which are labeled and

shrink packed, a manual of the client's choice of publisher, as well as a proof of purchase.

Regulation 19-446.1000 which states the procurement preference for South Carolina and United States Products, defines end-product as "the item sought by a governmental body of the State and described in the solicitation including all component parts and in final form and ready for the use intended by the governmental body." The regulation also defines "made: to assemble, fabricate or process component parts into a finished end-product." Compusult copies and decompresses the information from a CD-ROM, includes installation and other encoding on the proper size disk, labels the disks, shrink wraps them and packages them with a corresponding manual of the agency's chose of publisher, creating a package different from what Microsoft provides to Compusult. Clearly, more than simple duplication is required. Without Compusult's contributions, the product in the CD-ROM form can not be used by the agency, thus Compusult creates or fabricates components to make them "ready for the use intended". As in the Panel's decision in Case No. 1990-20, Appeal of Westberry Office Machines, Inc., the bidder purchases a product that it enhances and then resells. As in Westberry, however minimal it may be, Compusult complies with the law. The Panel finds that Compusult creates an end-product which it produces in South Carolina, meeting the requirements of the preference regulation.

CONCLUSION

For the foregoing reasons, the Panel finds that Compusult is the lowest responsive and responsible bidder on lot #1 and lot #2 of the state's solicitation for administration of the Microsoft Select MVLP agreement. The Panel reverses

the decision of the CPO, and orders award of the contract(s) be made to Compusult, as lowest responsive and responsible bidder.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, SC

March 17, 1995.