

The only two bids received by MMO were from Ross and Mead. Ross was the low bidder but the contract was awarded to Mead after a determination that Ross' bid was non-responsive to the IFB. In the first paragraph of Ross' bid cover letter, Ross agreed to comply with all the bid specifications but in subsequent paragraphs raised three issues that the MMO determined were attempts to qualify the bid and which rendered the bid non-responsive.

On December 17, 1996, the CPO received a letter of protest from Ross requesting a hearing on the non-responsiveness of its bid. The CPO conducted a hearing on this issue on January 28, 1997, and ruled that Ross' bid was non-responsive.

ISSUES

- I. Were Ross' comments in its cover letter deviations from the bid requirements that attempted to qualify its bid thus rendering it non-responsive to the IFB.

- II. If the comments were deviations from the IFB requirements, do they qualify as minor informalities or irregularities that should be waived or allowed to be cured by Ross.

Conclusions of Law

Ross argues that it is a responsive bidder who did not seek to qualify the IFB. Ross contends that it agreed to comply with all bid specifications in the first paragraph of its cover letter and that MMO should have accepted the assurance unconditionally. In the alternative, Ross argues that the items at issue are minor informalities or irregularities that MMO should have waived or asked Ross to

cure the issues. The three issues on which the bid was determined to be non-responsive are discussed below.

The first issue deals with the delivery schedule for infant formula to be delivered to local clinics. The bid provides that "The contractor shall supply samples of the contracted formula free of charge to the Department's local agency clinics for use as needed." [Record p. 127]. Ross' bid states that "Ross Products will supply samples of contracted formula free of charge to the Department's local agency clinics on a quarterly basis with a minimum order for each clinic of ten cases assorted among Ross Products." [Record p. 133]. Ross argues that the bid did not require delivery on any set schedule, but that the formula be available in the clinics to use as needed. At the hearing Mr. Dale Beck, the representative from Ross, testified that the quarterly delivery phrase in Ross' bid was merely a suggested delivery schedule. The bid specifically states that the formula is to be supplied to the clinics for use as needed. SC Code Ann. Regulation 19-445.2070(A) provides that "any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected." Ross' statement that it will deliver the formula on a quarterly basis with a minimum order for each clinic of ten cases clearly seeks to qualify the requirements of the bid and renders Ross' bid non-responsive on this issue.

The second issue deals with the contract termination clause in the IFB. The IFB gives the State the right to terminate the contract with 30 days written notice in the following provision: "Subject to the conditions below, the contract may be terminated for any reason by the Materials Management Section

provided a 30 day advance notice in writing is given to the contractor." [Record p. 190]. Ross' bid states, "Ross requests mutual contract termination rights upon 90 days written notice." [Record p. 133]. Ross argues that it merely asked for a 90 day mutual termination clause but did not demand it. Because Ross wrote its request expressly in the bid, the MMO was compelled to interpret its meaning. The Panel had ruled repeatedly that State procurement officials cannot contact a bidder for clarification. In Case No. 1996-2, In re: Protest of Two State Construction Company, the Panel held that "[t]he procuring agency may not seek clarification before making a determination of responsiveness, but must find a bid nonresponsive if it feels clarification of the bid is needed." In Case No. 1988-5, In re: Protest of CNC Company, the Panel held that General Services...could not contact CNC after the bids were opened for clarification. To do so would have been patently unfair to the other bidders...." The Panel finds that MMO could not contact Ross to clarify the 90 day termination language and that the bid was therefore non-responsive on this issue.

The third issue deals with the contractor's access to client records. The IFB states "The contractor shall have access to only those records that are directly related to the monthly billings. In no case will the contractor have access to records that contain patient information." [Record p. 125]. In its bid, Ross states, "Ross confirms its right, upon reasonable notice, to review the Department's records in support of WIC rebate invoices with the exception that portions of records identifying specific WIC participants by name should not be open to review by Ross. Such names shall be blackened out." [Record p. 133].

Ross argues it did not seek a right to review "clients records" but merely confirmed its right to review DHEC records in support of WIC rebate invoices. There was testimony at the hearing as to the difference between "records directly related to" and "records in support of." The representative from DHEC who is in charge of administering the WIC Program testified that the language "directly related to" was used in the bid because some records "in support of" WIC rebate invoices contain patient information such as medical information, etc. Once again, MMO was put in the position of having to interpret Ross' statements in its bid and the Panel finds MMO was left with no alternative but to find Ross non-responsive on this issue.

Ross argues that even if its bid was non-responsive on the three issues discussed above, that these items are minor informalities or irregularities that MMO should have waived or allowed Ross to cure. SC Code Ann. §11-35-1520(13) provides that minor informalities or irregularities in the bid response may be waived under certain circumstances and defines these minor irregularities as follows:

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidders.

While it is true that the State has the authority to waive minor irregularities in bids, the Panel does not find that the issues presented here have no effect or only a trivial effect on price, quality, quantity, or delivery of the supplies of the

contract. The bid specified that formula was to be delivered to local agency clinics on an as needed basis and Ross stated that it would deliver formula on a quarterly basis with a ten case minimum order. This deviation from the bid requirements clearly affects delivery of the supplies of the contract and would allow Ross to perform the contract at a lower price than a bidder who complied with the specifications and delivered the formula as needed. As to the 30 day termination clause, the 30 day right to cancel is a mechanism to protect the State and is an essential requirement of the IFB. Giving Ross 90 day mutual termination rights could clearly affect the price of the contract and be prejudicial to the State. As to Ross' right to access client records, the Panel finds that the language "in support of" used by Ross could have been classified as a minor irregularity, but this issue is moot after the determination that the first two items are not minor irregularities and that they render the bid non-responsive.

At the conclusion of Ross' case, Mead moved to dismiss the protest on the basis that Ross had failed to meet its burden of proof. The Office of General Services joined in this motion. The Panel grants the motion to dismiss Ross' protest based on the findings and conclusions contained in this order.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, South Carolina

April 30, 1997