

Present at this hearing before the Panel were MAP, represented by John W. Bledsoe, III, Esq., and the Division of General Services, represented by Helen T. Zeigler, Esquire. The Department of Mental Retardation and Pee Dee Pharmacy, Inc. ("Pee Dee") were present but did not participate as parties.

FACTS

A full recitation of the facts of this case is found in the Panel's Order of January 10, 1990. For purposes of determining the limited issue before the Panel today, the facts below are relevant.

On September 6, 1989; an Invitation for Bids ("IFB") was issued for a one-year contract to provide pharmacy services to the South Carolina Department of Mental Health's Thad E. Saleeby Center. The IFB contained the following provision at Note C:

THE MINIMUM AMOUNT OF FEES QUOTED MUST
BE AT LEAST "0". NO CREDIT OR NEGATIVE
(-) AMOUNTS WILL BE CONSIDERED.

(Record, p. 21). Two bidders responded to the IFB - MAP and Pee Dee Pharmacy. Pee Dee bid a zero for every item under Lot A.

On September 28, at the bid opening, Pee Dee's bid was announced as a "no bid." Horace Sharpe, Procurement specialist, testified at the previous hearing before the Panel that it is customary for bidders who do not want to bid on a particular project but who do wish to remain on the bidder's list to return a blank bid or a bid marked "no bid"

or "--0--". Mr. Sharpe testified that he thought Pee Dee's "0" bid was a no bid.

Mr. Mike Rast, President of MAP, testified that, after Pee Dee's bid was announced as a "no bid", he assumed that MAP would receive award of the contract. Mr. Rast later learned from Mr. Joe Fraley, Procurement Specialist, that MAP would not get the contract because Pee Dee was low bidder.

Mr. Rast testified that he believes Pee Dee's bid is confusing because, although the amount quoted for Lot A, Item 4 (Over-the-Counter Medications) is zero, it is actually a negative amount because of reimbursement the State receives from another source.² (See, Record, p. 20). According to Mr. Rast, Pee Dee's bid therefore violates the prohibition against negative amounts found in the second Note C to the bid solicitation. (Record, p. 21). Mr. Rast claims negative amounts also violate federal law.

Mr. Fraley testified that he included the prohibition against negative amounts in the bid solicitation documents because the state procurement tabulation system was unable to count negative numbers. Mr. Fraley stated that he was unaware of any possible violations of federal law at the time the bid solicitation was prepared.

²Mr. James W. Taylor, Jr., the Procurement Officer for the Department of Mental Retardation, testified that the State might not receive such reimbursement if there was no charge for the medication.

CONCLUSIONS OF LAW

The only issue before the Panel is that raised by MAP as the third grounds of its December 11, 1989 protest:³

At the opening of bids, the bid of Pee Dee was announced as a "no bid" and it was indicated to a representative of Medical Arts Pharmacy that Medical Arts had submitted the only appropriate bid which would be accepted. It was only much later that Medical Arts Pharmacy was advised that the bid of Pee Dee Pharmacy was not considered a "no bid" and in fact the Pee Dee Pharmacy bid was going to be accepted. Obviously, on these facts, the bid of Pee Dee was confusing, and as such should have been rejected."

(Record of January 8, 1990, p. 3). In remanding this issue to the CPO, the Panel stated in its January 10, 1990, order:

At the beginning of the hearing the Panel stated that it would hear and consider evidence relating only to the timeliness issue. Under the Panel's decision today, MAP is entitled to a hearing on the merits of its claim that Pee Dee's bid is confusing. Because a new hearing on the merits is possible, the Panel offers the following comments and words of caution and guidance.

MAP was not given the opportunity to fully develop the third ground but it would appear to be based entirely on Mr. Sharpe's confusion at bid opening in announcing Pee Dee's bid as a "no bid." Based on its review of the original of Pee Dee's bid in evidence (Def.'s Ex. 1), the Panel finds nothing confusing about the bid on its face.

³On January 25, 1990, in its letter requesting a hearing on remand, MAP attempted to raise an additional ground of protest before the CPO. That ground - the alleged failure of the CPO to issue his December 8, 1989 decision within ten days - is clearly not timely.

Pee Dee did not write "no bid" anywhere on its bid. It simply wrote "0" on all items except one in compliance with the IFB. If Mr. Sharpe had examined Pee Dee's bid more carefully he would have observed that Pee Dee completed the entire first page (including delivery terms and discount period), filled in "20" as the number of days the bid was good on the second page, and filled in 13.5% as the wholesale discount on the fifth page. (Def.'s Ex. 1). Mr. Sharpe may have been unfamiliar with the terms of the IFB which allowed zero bids and, therefore, incorrectly interpreted Pee Dee's bid as a "no bid" without careful examination. Whatever the cause, the State's confusion at bid opening was not justified.

To the extent that MAP has other reasons or ways in which it believes that Pee Dee's bid is confusing, it may fully develop them before the CPO. However, the Panel sees no merit to this charge if the only evidence is the State's initial confusion.

(January 10, 1990, Order of the Panel, at pp. 7-8).

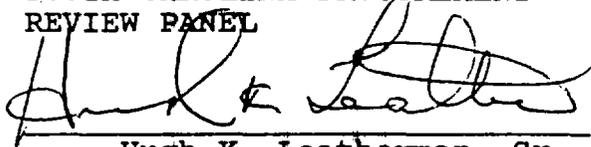
On remand, MAP presented no evidence to substantiate its claim that Pee Dee's bid is confusing other than that already rejected by the Panel. For the reasons stated by the Panel in its earlier order quoted above, the Panel finds no merit to MAP's third ground and that ground is hereby dismissed.

To the extent that MAP presented evidence concerning Pee Dee's bidding allegedly negative amounts in violation of the IFB and Medicaid/Medicare law, the Panel has already found those issues to be untimely raised. MAP has appealed that finding to the Circuit Court and the Panel no longer has jurisdiction to consider those issues.

For the reasons stated above, the March 5, 1990 decision of the Chief Procurement Officer dismissing MAP's protest is affirmed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Hugh K. Leatherman, Sr.
Chairman

APRIL 10th, 1990
Columbia, South Carolina