

STATE OF SOUTH CAROLINA }  
COUNTY OF RICHLAND }

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
Case No. 1990-7

IN RE:

PROTEST OF FISHER SCIENTIFIC  
COMPANY

O R D E R

APPEALED

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This case came before the South Carolina Procurement Review Panel for hearing on October 4, 1990 on the protest by Fisher Scientific Company ("Fisher") of an award of a contract to provide laboratory equipment to the State of South Carolina. In its order dated August 30, 1990, the Panel found Fisher's protest to be timely and chose to hear the merits of this case without remanding to the Chief Procurement Officer ("CPO").

Present at the hearing were Fisher, represented by Julius W. McKay, Esq., and Stephen F. McKinney, Esq.; Curtin Matheson Scientific, represented by Jeffrey Silver, Esq.; Baxter Scientific, Inc., represented by Ken Matthews, Esq.; and the Division of General Services, represented by Helen Zeigler, Esq., and Pat Hudson, Esq., of the South Carolina Attorney General's Office.

#### FINDING OF FACTS

On March 20, 1990, the Materials Management Office issued an Invitation for Bids ("IFB") on a contract to provide laboratory supplies to all state agencies, school districts, municipalities and other governmental entities for a period of five years beginning July 1, 1990. The award was to be made in three lots based on a selection of

frequently used items within three categories - Chemicals (Acids, Dry Chemicals and Solutions, High Purity Solvents); General Laboratory Equipment, Apparatus, Glassware and Supplies; and Bio-Medical Supplies (Diagnostics). Each lot was to be awarded to the two lowest responsive and responsible bidders, as co-primary vendors. Estimated purchases under the contract total \$4 million per year.

The IFB was set up in market basket form. That is, the bidders were asked to submit sealed bids quoting discounts for groups of items which appeared in their catalogues. Once the sealed bids were turned in, the discounts quoted were applied to three "shopping lists" of about one hundred items each to determine the two lowest bidders for each category. The bidders were not told the contents of the shopping lists until after their sealed bids were turned in.

To develop the IFB and determine the content of the "shopping list" for each category, State Procurement initially consulted a committee composed of representatives from the larger state agencies which would be purchasing supplies under this contract.<sup>1</sup> The user committee's input was incorporated into the IFB.

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<sup>1</sup>The committee included representatives from the University of South Carolina, Clemson, the College of Charleston, the Medical University of South Carolina, the Department of Mental Health, and the Department of Health and Environmental Control, among others.

According to Horace Sharpe, the State Procurement officer in charge of this procurement, the user committee recommended letting the incumbent vendors develop the market list because their records are computerized while many of the using agencies' records are not. Therefore, State Procurement consulted the three incumbent vendors - Curtin Matheson, Baxter and Fisher - and by letter of March 19 asked each of them to list, for each category, one hundred items frequently used by the State from the thousands available in the catalogues. (Record, p. 95). On the list, each incumbent was required to cross-reference catalogue numbers for the major suppliers of each item and the prices from the current catalogue.

On April 3, the incumbents submitted their suggested lists. (Record, pp. 85 - 91). Because of a misunderstanding Fisher's list contained items that could be purchased in common from among all the incumbent vendors rather than those items frequently purchased by the State.<sup>2</sup>

Mr. Sharpe testified that the State took the lists submitted by the incumbent vendors, randomly selected about the same number of items from each list, and compiled a final representative list of approximately 100 items for

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<sup>2</sup>Eric Patterson, a sales representative for Fisher, testified that Fisher never received the letter of March 19 and believed that the list was to contain items sold in common by the major suppliers rather than items frequently used by the State. Mr. Sharpe showed the March 19 letter to Mr. Patterson during a March 23 meeting.

each of the three categories. The State did not consult with the using agencies about the final lists and did not attempt to verify that items listed by the vendors were those frequently used by the State.

On April 11, bids were opened and each bidder was given a shopping list for each lot with instructions to calculate prices, by unit, based on the discounts quoted in the bids. Mr. Sharpe then met with each bidder to check the price extensions and make corrections to the shopping lists and bids.

According to Eric Patterson, Fisher's sales representative, Fisher brought requested changes to Mr. Sharpe's attention on May 7, 9, and 14. On May 15, Fisher called Mr. Sharpe asking that several items be deleted from the lists. At that time Mr. Sharpe indicated that the shopping lists were in final form and would not be changed.

On May 15, the State issued a Notice of Intent to Award the contract as follows:

Lot A	Curtin Matheson Baxter Scientific
Lot B	Curtin Matheson Baxter Scientific
Lot C	Fisher Scientific Baxter Scientific

On Lot A, the difference between Curtin Matheson's winning bid and Fisher's losing one was \$107.20.

Fisher received the Intent to Award on May 17 and filed its protest with the Chief Procurement Officer on May 21, 1990.

Fisher presented evidence that it has held the state contract on Lot A of this procurement for the past twelve years. Mr. Patterson estimated that, of the approximately \$4 million per year spent under the contract in 1989, approximately \$3.9 million was paid to Fisher. On Lot A alone, Fisher received approximately \$3.3 million or 86% of the total dollars spent by the State. About 14% of business done on Lot A in 1989 was not done with Fisher.

Fisher's sales data for 1989 indicates that in 73% of all items purchased by the State from Fisher fell into the apparatus category while 37% was made up of equipment over \$500.00. Fisher's analysis of the shopping list used for Lot A in this procurement indicates that 86% of the total dollar amount is in equipment over \$500.00 while 14% is apparatus. (Record, p. 82). According to Fisher's calculations, 33 of the 97 items on the Lot A shopping list were not purchased by the State at all from Fisher in 1989. (Record, p. 83).

Fisher also presented a table purporting to show what it would have cost the State to buy from the other vendors what it bought from Fisher in 1989. (Plaintiff's Ex. 1). The table was compiled by applying the discounts quoted by each vendor in this bid to the products sold to the State by Fisher in 1989.

According to Fisher's table, Fisher's price to the State would have been \$2,250,417. The next low vendor would have been Baxter at \$2,251,349. The difference between

Fisher's and Baxter's extrapolated prices is \$932 with a randomly chosen margin of error of  $\pm 10$  or 20%. Baxter is the same or lower in price than Fisher in five of six categories chosen by Fisher for comparison.

Fisher admitted that its table reflects only sixty percent of the total state purchases for 1989. Mr. Patterson stated that Fisher offered the table as an example of a way to structure this procurement other than market basket.

Curtin Matheson offered the testimony of Carlton Stott, its regional vice-president, that it was a participant and a winning vendor in the 1986 procurement of this same contract. Mr. Stott testified that the 1986 contract was procured using a procedure similar to the market basket used in this bid. In 1986, however, the market basket was drawn from information supplied by the user committee rather than from the incumbent vendors.

According to data compiled by Mr. Stott, 61% of items which appeared on the 1986 list for Lot A also appear on the 1990 Lot A market basket. (Defendant's Ex. 2). Mr. Stott admitted that some of the items on his 1986 and 1990 lists might not be comparable.<sup>3</sup>

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<sup>3</sup>For example, Mr. Stott acknowledged that the term "furnace" could encompass several different items while the term "oven" could apply to up to fifty different types of ovens.

## CONCLUSIONS OF LAW

Fisher's protest alleges that:

(1) The shopping lists prepared by the State were produced in an arbitrary fashion, without regard to the actual purchasing history of the using agencies and, as a result, the lists contain a substantial number of items which are infrequently or never used by the State.

(2) The arbitrary lists resulted in the bid evaluation, comparison and award process itself being arbitrary and ineffective in meeting the State's actual needs in the most inexpensive fashion. (Record, p. 25).

In support of its allegations, Fisher presented evidence only on Lot A, therefore, the Panel considers Fisher's protest to be directed only to Lot A.<sup>4</sup>

Fisher argues that the market basket for Lot A in this case was produced randomly and, therefore, is arbitrary for a number of reasons: (1) Fisher's own proposed list did not contain frequently used items; (2) Mr. Sharpe randomly selected items from all proposed lists rather than deliberately selecting the top 100 frequently used items; and (3) the user agencies never verified that the final list contained frequently used items. Fisher claims the inevitable result of the alleged arbitrariness of the list is that the State cannot obtain the most cost effective

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<sup>4</sup>To the extent that Fisher's protest might be read to allege arbitrariness as to Lots B and C, the Panel dismisses it because Fisher produced no evidence thereon.

provider, which is mandated by the Consolidated Procurement Code.<sup>5</sup>

General Services correctly points out that the only way to determine the true cost effective bidder in this case is to calculate bids using all 40,000 items in the bidders' catalogues. This method would obviously burden both the State and the vendors beyond reason. General Services and the winning vendors argue that the market basket as designed is representative of the State's needs in this case and is a reasonable, cost effective way to procure laboratory supplies without the burden.

General Services further points out that the IFB does not promise that the shopping lists will contain the most frequently used items only that it will contain "a significant number of items (major brand lines) frequently used by the state." (Record, p. 40). The IFB also states that bidders will be required to assist in developing and pricing the list of items used to determine awards. (Record, p. 40).

The Panel finds that, viewing the evidence as a whole, the procedure used in this case was fair to all vendors and to the State and did not result in an arbitrary procurement.

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<sup>5</sup>Fisher cites the Procurement Code policy of providing "increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds of the State" (11-35-20(e)) and Reg. 19-445.2040 which provides that the purpose of a specification is to obtain supplies in a cost effective manner.

The State consulted with both the using agencies and the incumbent vendors in drawing up the shopping list for Lot A. The State further allowed the participation of all the vendors, including Fisher, in calculating final bid prices.

Fisher's real complaint is that the State's use of Fisher's own proposed list may have affected the composition of the final list. This is because Fisher's list contained commonly sold rather than frequently used items. The Panel finds no evidence that the State or the other vendors are responsible for Fisher's mistake.<sup>6</sup> Also Fisher's list was only one of three used to compile the final list and Mr. Sharpe testified that he randomly selected items equally from all three lists.<sup>7</sup>

The Panel finds that Fisher's data based on 1989 sales is not persuasive on the question whether the shopping list for Lot A is arbitrary. Fisher merely demonstrated that the list could have contained different items than it did. Fisher did not show that its failure to submit a proper list or that the using agencies' failure to review the final list made a difference in the outcome of this procurement.

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<sup>6</sup>Mr. Sharpe uncontradicted testimony is that he mailed a copy of the March 19 letter to Fisher's office in Norcross, Georgia.

<sup>7</sup>Mr. Sharpe explained that he purposely avoided deliberate selection of the top 100 most frequently used items because he was afraid that such a list would unfairly favor the incumbent bidders.

Fisher was given the opportunity to participate in this procurement from start to finish. A number of changes were made in the list in response to Fisher's suggestions. Only when it became clear to Fisher that it would not receive the award of Lot A did Fisher complain that the process was arbitrary and unfair. The Panel does not believe that the mere possibility that Fisher's own mistake affected the outcome of this procurement warrants overturning the award and nullifying all of the effort by both the vendors and the State.

For the foregoing reasons, the Panel holds that award of this contract shall proceed according to the original Notice of Intent to Award dated May 10, 1990 and issued May 15, 1990 and the protest of Fisher Scientific Company is hereby dismissed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

  
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Hugh K. Leatherman, Sr.  
Chairman

Columbia, South Carolina  
November 5, 1990