

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE: Appeal by Tekna Corporation)	
)	Case No. 2012-7
South Carolina Dept. of Transportation:)	
IFB No. 5400004664 – Grnvl. Bridge;)	
IFB No. 5400004672 – Pickens Bridge;)	
IFB No. 5400004674 – Spartanburg Bridge)	
)	
)	

This matter came before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for further administrative review by Tekna Corporation (Tekna) under sections 11-35-4210(6) and 11-35-4410(1) of the Consolidated Procurement Code (the Procurement Code). Tekna appealed the September 5, 2012, decision of the Chief Procurement Officer for Supplies and Services (the CPO) dismissing as untimely Tekna’s protest of three awards for concrete bridge components in three upstate counties. The solicitations in question were conducted by the South Carolina Department of Transportation (SCDOT).

On October 31, 2012, the Panel held a motions hearing to consider the CPO’s Motion to Dismiss, or Alternatively, for Summary Judgment, and Tekna’s Motion for Summary Judgment. In the hearing before the Panel, Harrison M. Trammell, Esquire, represented Tekna, and Dwight F. Drake, Esquire, represented Florence Concrete Products, Inc. (Florence Concrete). SCDOT was represented by Glennith C. Johnson, Esquire, and William Dixon Robertson, III, Esquire, appeared on behalf of the CPO.

Findings of Fact

SCDOT issued three invitations for bids (IFBs) to procure supplies for three concrete bridges in the Upstate. The first, for a bridge at Dividing Water Road in Greenville County, was

issued on July 19, 2012. Record at PRP39 – PRP74. This IFB was amended on July 20, 2012 to reflect description changes to the line items on the bidding schedule. Record at PRP75 – PRP84. The other two IFBs were issued on July 20, 2012; one was for a concrete bridge at Meadow Ridge Road in Pickens County, and the other was for a concrete bridge at Watson Road in Spartanburg County. Record at PRP87 – PRP122; PRP125 – PRP160. The IFBs issued on July 20th were not amended. All three IFBs contained standard clauses regarding preferences for (1) South Carolina or United States end products, and/or (2) South Carolina resident vendors (RVP). The IFB clauses provided:

PREFERENCES – A NOTICE TO VENDORS (SEP 2009)

On June 16, 2009, the South Carolina General Assembly rewrote the law governing preferences available to in-state vendors, vendors using in-state subcontractors, and vendors selling in-state or US end products. This law appears in Section 11-35-1524 of the South Carolina Code of Laws. A summary of the new preferences is available at www.procurement.sc.gov/preferences. *ALL THE PREFERENCES MUST BE CLAIMED AND ARE APPLIED BY LINE ITEM, REGARDLESS OF WHETHER AWARD IS MADE BY ITEM OR LOT. VENDORS ARE CAUTIONED TO CAREFULLY REVIEW THE STATUTE BEFORE CLAIMING ANY PREFERENCES. THE REQUIREMENTS TO QUALIFY HAVE CHANGED. IF YOU REQUEST A PREFERENCE, YOU ARE CERTIFYING THAT YOUR OFFER QUALIFIES FOR THE PREFERENCE YOU'VE CLAIMED. IMPROPERLY REQUESTING A PREFERENCE CAN HAVE SERIOUS CONSEQUENCES.* [11-35-1524(E)(4)&(6)] [02-2B111-1]

PREFERENCES – SC/US END-PRODUCT (SEP 2009)

Section 11-35-1524 provides a preference to vendors offering South Carolina end-products or US end-products, if those products are made, manufactured, or grown in SC or the US, respectively. An end-product is the tangible project identified for acquisition in this solicitation, including all component parts in final form and ready for the use intended. The terms “made,” “manufactured,” and “grown” are defined by Section 11-35-1524(A). By signing your offer and checking the appropriate space(s) provided and identified on the bid schedule, you certify that the end-product(s) is either made, manufactured, or grown in South Carolina, or other states of the United States, as applicable. Preference will be applied as required by law. Post award substitutions are prohibited. See “Substitutions Prohibited – End Product Preferences (Sep 2009)” provision. [02-2B112-1]

PREFERENCES – RESIDENT VENDOR PREFERENCE (SEP 2009)

To qualify for the RVP, you must maintain an office in this state. An office is a nonmobile place for the regular transaction of business or performance of a particular service which has been operated as such by the bidder for at least one year before the bid opening and during that year the place has been staffed for at least fifty weeks by at least two employees for at least thirty five hours a week each. In addition, you must either: (1) maintain at a location in South Carolina at the time of the bid an inventory of expendable items which are representative of the general type of commodities for which the award will be made and which have a minimum total value, based on the bid price, equal to the lesser of fifty thousand dollars [\$50,000] or the annual amount of the contract; or (2) be a manufacturer headquartered and having an annual payroll of at least one million dollars in South Carolina and the end product being sold is either made or processed from raw materials into a finished end product by that manufacturer or its affiliate (as defined in Section 1563 of the Internal Revenue Code). [02-B114-1]

Record at PRP52 – PRP53; PRP100 – PRP101; and PRP138 – PRP139 (emphasis in originals).

The amendment to the first IFB did not make any changes to the language regarding preferences.

Record at PRP75 – PRP84. In addition, the bid schedule for each IFB contained nine line items, each of which provided a space for the bidder to indicate any preference claimed for each line item. Record at PRP67 – PRP72; PRP115 – PRP120; and PRP153 – PRP158.

On August 23, 2012, SCDOT awarded the three contracts to Florence Concrete, and the statements of award each indicated that preferences for resident vendor and SC/US end products had been applied to determine the lowest bidder. Record at PRP85 – PRP85; PRP123 – PRP124; PRP161 – PRP162. Tekna protested the awards on that same day, asserting that “these preferences do not apply to supplies or services related to construction.” Record at PRP12. The CPO dismissed the protest without a hearing on September 5, 2012. Record at PRP5 – PRP9. Tekna appealed the CPO’s decision to the Panel on September 14, 2012. Record at PRP25 – PRP27.

Conclusions of Law

In his motion to dismiss Tekna's appeal, the CPO argues that Tekna's protest concerning whether or not the preferences should have been applied to these three IFBs raised an issue related to the solicitation documents themselves. Because Tekna did not file its protest within fifteen days of the issuance of these solicitations, as required by the Procurement Code, the CPO contends he properly dismissed Tekna's protest as being untimely and urges the Panel to dismiss Tekna's appeal on the same grounds. Tekna, on the other hand, argues that it was not "aggrieved" until the preferences were applied to determine the lowest bidder and the awards were posted on August 23rd. Because it filed its protest on the same day the awards were posted, Tekna asserts that its protest was timely and should not have been dismissed by the CPO.

The Panel has not directly addressed the preference statute since 2002 in the case of *In re: Protest of Warren Truck Equipment, Inc.*, Panel Case No. 2002-1 (March 26, 2002) (wherein the preference issue concerned whether or not a vendor had received adequate notice of the applicability of preferences). Since that time, the preference statute has been rewritten and now contains the following provision:

(E)(4) A solicitation must provide potential bidders an opportunity to request the preferences that apply to a procurement. By submitting a bid and requesting that a preference be applied for that bid, a business certifies that its bid qualifies for the preference for that procurement. For purposes of applying this section, a bidder is not qualified for a preference unless the bidder makes a request for the preference as required in the solicitation. *If a solicitation specifies which preferences, if any, apply to a procurement, the applicability of preferences to that procurement is conclusively determined by the solicitation unless the solicitation document is timely protested as provided in Section 11-35-4210.* If two or more bidders are tied after the application of the preferences allowed by this section, the tie must be resolved as provided in Section 11-35-1520(9). Price adjustments required by this section for purposes of evaluation and application of the preferences do not change the actual price offered by the bidder.

S.C. Code Ann. § 11-35-1524(E)(4) (2011) (emphasis added). In other words, when a solicitation's terms indicate that preferences will be applied,¹ then a bidder who disagrees with the application of preferences must protest the solicitation document as provided by Section 11-35-4210. Under the facts of this case, the Panel finds that the solicitations and bidding schedules clearly indicated that SCDOT intended to apply the resident vendor and end product preferences. Because these solicitations specified that the preferences would be applied, this provision of the Procurement Code required Tekna, who disagreed with their application, to protest the solicitation documents as specified in Section 11-35-4210.

A protest of a solicitation's documents is governed by section 11-35-4210(1)(a) of the Procurement Code. S.C. Code Ann. § 11-35-4210(1)(a) (2011). This section provides, in pertinent part:

A prospective bidder . . . who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation for Bids . . . or any amendment to it, if the amendment is at issue.

Id. The Panel finds that for the purposes of this case, the "date of issuance" is July 20, 2012, the date that the first IFB was amended and the date that the other two IFBs were issued. Therefore, a timely solicitation protest in this case needed to be filed no later than August 6, 2012. Because Tekna did not file its protest until August 23, 2012, the Panel finds that it was untimely. *In re: Protest of Nat'l Cosmetology Ass'n*, Panel Case No. 1996-17 (November 15, 1996).

¹ Like the CPO, the Panel declines to take a position on whether SCDOT should have applied preferences to these procurements. However, the Panel urges the State to carefully review the exceptions contained within the preference statute when assembling solicitation documents, taking care to include standard contractual language regarding preferences only where applicable.

Therefore, for the reasons stated above, the Panel grants the CPO's motion to dismiss Tekna's appeal.²

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 
C. BRIAN MCLANE, SR., CHAIRMAN

This 13th day of November, 2012.

Columbia, South Carolina

² Because the Panel has dismissed Tekna's protest as untimely, it need not address the CPO's alternative motion for summary judgment nor Tekna's motion for summary judgment.