

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE: Appeal by Trinity 7 Security, LLC)	
)	Case No. 2012-8
IFB No. 5400003880)	
)	
)	
)	

This matter came before the South Carolina Procurement Review Panel (the Panel) pursuant to a request by Trinity 7 Security, LLC, (Trinity 7) for further administrative review under sections 11-35-4210(6) and 11-35-4410 of the Consolidated Procurement Code (the Procurement Code). Trinity 7 appealed the October 12, 2012, decision of the Chief Procurement Officer (the CPO) for Supplies and Services denying its protest challenging a written finding of non-responsibility. In the Panel’s hearing on February 27, 2013, Johnny Simpson, Esquire, represented Trinity 7, and William Dixon Robertson, III, Esquire, represented the CPO. Representatives from Denmark Technical College (Denmark Tech) and Defender Services, Inc. (Defender), were also in attendance at the Panel hearing.

Findings of Fact

The Materials Management Office (MMO) conducted this solicitation on behalf of Denmark Technical College (Denmark Tech) to procure armed security guard services for its campus in Denmark, South Carolina. The Invitation for Bids (IFB) was issued on June 28, 2012, and the deadline for submitting bids was August 2, 2012. Record at PRP18. The IFB established that an award “will be made to the lowest responsible and responsive bidder.” Record at PRP44. In addition, the IFB required bidders to submit information to aid the

procurement officer in determining the responsibility of the vendor and eligibility for award.¹ In particular, the IFB provided:

QUALIFICATIONS – REQUIRED INFORMATION (JAN 2006)

In order to evaluate your responsibility, offeror shall submit the following information or documentation for the offeror and any subcontractor, if the value of the subcontractor's work exceeds 10% of your price (if in doubt, provide the information):

- (a) Include a brief history of the offeror's experience in providing work of similar size and scope.
- (b) *Your most current financial statement, financial statements for your last two fiscal years, and information reflecting your current financial position.* If you have audited financial statements meeting these requirements, you must provide those statements. [Reference Statement of Concepts No. 5 (FASB, December, 1984)]
- (c) A detailed, narrative statement listing the three most recent, comparable contracts (including contact information) which you have performed and the general history and experience of your organization.
- (d) A list of every business for which offeror has performed, at any time during the past three year(s), services substantially similar to those sought with this solicitation. Err on the side of inclusion; by submitting an offer, offeror represents that the list is complete.
- (e) List of failed projects, suspensions, debarments, and significant litigation. [05-5015-1]

Record at PRP43 (emphasis added).

On August 2, 2012, MMO opened the bids received and determined that Trinity 7 was the apparent low bidder. Record at PRP66. However, Stacy Langdale, a Procurement Manager for MMO, conducted a responsibility determination prior to award and issued a written finding that Trinity 7 was a non-responsible bidder on August 15, 2012. Record at PRP71 – PRP74. Based on this finding of non-responsibility, Trinity 7 was ineligible for award. *Id.* Therefore, MMO posted a notice of intent to award the contract to Defender, the next lowest responsible and responsive bidder, on August 17, 2012. Record at PRP82. Trinity 7 protested the award on

¹ The IFB stated: "To be eligible for award of a contract, a prospective contractor must be responsible. In evaluating an Offeror's responsibility, the State Standards of Responsibility [R.19-445.2125] and information from any other source may be considered." Record at PRP43.

August 21, 2012, and MMO suspended the intended award to Defender on August 27, 2012. Record at PRP13 and PRP83.

Ms. Langdale’s written determination of non-responsibility noted that Trinity 7 did not submit audited financial statements, but rather balance sheets for 2011 and 2012 that reflected financial difficulty. Record at PRP73. Because the potential value of the contract was in excess of one million dollars, Ms. Langdale also accessed a Dun and Bradstreet report for Trinity 7. *Id.* This report reflected negative ratings for both Financial Stress Class and Credit Score Class. *Id.*; *see also* Dun and Bradstreet Report for Trinity 7 Security, LLC (printed August 09, 2012) at PRP75 – PRP79. In addition, the report noted that two liens had been filed against the company by the State of South Carolina for unpaid taxes in 2011 and 2012.² Record at PRP75, PRP77.

Ms. Langdale’s written determination also noted that she spoke by phone with Mr. McMichael, Trinity 7’s president, on August 13, 2012. Record at PRP73. Mr. McMichael “confirmed that he was working on getting the taxes taken care of, but ‘he really needed this contract in order to be able to do that.’” *Id.* When her discussion with Mr. McMichael “confirmed the validity of failure to pay State taxes as indicated on the D&B Report, and the indicated inability to cure same without this contract,” Ms. Langdale sought additional information regarding responsibility from Mr. Bonnette³ and Allison Kirkland at Denmark Tech. *Id.* Mr. Bonnette informed Ms. Langdale “that Trinity 7 . . . had been providing security guard service for the College since mid-June under an emergency procurement.” *Id.* Mr. Bonnette also indicated that he had a good working relationship with Trinity 7. *Id.* However, after reviewing the Dun and Bradstreet Report and receiving the details that Mr. McMichael had provided to Ms.

² In the hearing before the Panel, counsel made mention of the Internal Revenue Service (the IRS). However, the documents contained in the record before the Panel clearly establish that the South Carolina Department of Revenue, not the IRS, issued the tax liens in question.

³ Mr. Bonnette is the Vice President of Fiscal Affairs at Denmark Tech.

Langdale, Denmark Tech agreed that a finding of non-responsibility would be appropriate. Record at PRP74.

Mr. McMichael testified in the hearing before the Panel, and while he admitted that Trinity 7 was experiencing financial difficulties at the time of the bid and the intended award, he attributed those difficulties to “growing pains.” He stated that Trinity 7 was a capable company that had been performing the security services at Denmark Tech under an emergency contract since June 2012. Mr. McMichael expressed his belief that Trinity 7 was the best company for this particular contract because he is familiar with Denmark Tech’s campus and the people in authority there. Mr. McMichael also stated that he thought minority companies should be allowed to “grow and prosper” and that he needed this contract for his company to accomplish those goals.⁴

On cross examination, Mr. McMichael acknowledged that the IFB asked Trinity 7 to submit financial information for the purposes of determining responsibility. He admitted that his bid did not include income statements, but provided a balance sheet that he prepared because he did not have an accountant at the time. He also confirmed that this balance sheet reflected liabilities exceeding his assets. In addition, Mr. McMichael admitted that the South Carolina tax liens were in force at the time he submitted his bid and at the time of the non-responsibility determination. He confirmed that Trinity 7 paid the outstanding tax liens on August 31, 2012, which was approximately two weeks after the intended award was posted. Finally, Mr. McMichael acknowledged that at the time she was making her responsibility determination, the

⁴ In his appeal letter to the Panel, Mr. McMichael asserted that Trinity 7 is “being unjustly targeted due to systematic and entrenched prejudices [and] fear of black male prosperity in business and other areas.” Record at PRP14. However, when asked during the Panel hearing to explain how he felt he had been “disenfranchised” by the procurement and protest process, he declined to offer any evidence of specific acts of discrimination. Rather, he offered his belief that a minority business should be “given the benefit of the doubt” and given a chance by considering a past record of performance. In addition, when asked whether Ms. Langdale had acted inappropriately or done anything wrong during the procurement process, he admitted that she had not.

only financial information Ms. Langdale had to consider was the financial information he had submitted with Trinity 7's bid, the outstanding tax liens, and the Dun and Bradstreet report.

Conclusions of Law

Trinity 7 has requested the Panel to review Ms. Langdale's written determination of non-responsibility. In reviewing a determination of non-responsibility, the Panel must decide whether the determination is "clearly erroneous, arbitrary, capricious, or contrary to law." S.C. Code Ann. § 11-35-2410(A) (2011). Because Trinity 7 has not challenged the accuracy of the financial information relied upon and has not alleged a statutory or regulatory violation with regard to the non-responsibility determination, the only issue before the Panel is whether or not Ms. Langdale's determination was arbitrary or capricious. Moreover, as the appealing party, Trinity 7 bears the burden of proof before the Panel. *See In re: Protest of Value Options, et al.*, Panel Case No. 2001-7 at 7 (August 3, 2001) ("The burden of proof is on the appellants to demonstrate by a preponderance of the evidence that the determination made by the procurement officer is clearly erroneous, arbitrary, capricious or contrary to law."). In addition, the Panel has noted that it will not overturn a finding of non-responsibility on the grounds that it is arbitrary or capricious unless the appellant "demonstrate[s] a lack of reasonable or rational basis for the agency decision" *Id.* (quoting *Robert E. Derecktor of Rhode Island, Inc., v. Goldschmidt*, 516 F. Supp. 1085 (D. R.I. 1981)). At the close of Trinity 7's case, the CPO moved for dismissal of the appeal, arguing that Trinity 7 had failed to meet its burden of proof because it did not demonstrate that Ms. Langdale's determination lacked a reasonable or rational basis. For the reasons explained below, the Panel agrees and dismisses Trinity 7's appeal.

Under the Procurement Code, responsibility must be determined for every contract let by the State. S.C. Code Ann. § 11-35-1810(1) (2011). In making a responsibility determination, a

procurement officer should consider the bidder's "capacity to meet the terms of the contract" and the bidder's "past record of performance for similar contracts." *Id.* Section 11-35-1810(1) authorizes the State Budget and Control Board to establish state standards of responsibility by regulation, and it has done so by promulgating Regulation 19-445.2125. S.C. Code of State Regs. Reg. 19-445.2125 (2011). Regulation 19-445.2125 sets forth the factors a procurement officer must consider in determining responsibility, and expressly provides that the procurement officer should consider whether a bidder has "the appropriate financial . . . resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements." *Id.* at Reg. 19-445.2125(A)(1). In addition, subsection (B) of the regulation provides as follows:

At any time prior to award, the prospective contractor shall supply information requested by the procurement officer concerning the responsibility of such contractor. . . . In determining responsibility, the procurement officer may obtain and rely on any sources of information, including but not limited to the prospective contractor; knowledge of personnel with the using or purchasing agency; commercial sources of supplier information; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; government agencies; and business and trade associations.

Id. at Reg. 19-445.2125(B).

Ms. Langdale's written determination thoroughly describes the information she considered in determining Trinity 7's responsibility. Record at PRP67 – PRP70. The incomplete balance sheets submitted by Mr. McMichael indicated financial distress, as did the Dun and Bradstreet report and the outstanding tax liens. Indeed, Mr. McMichael acknowledged before the Panel that Trinity 7 was having financial difficulties at the time of the bid and award and that the financial information cited by Ms. Langdale in her finding of non-responsibility was accurate at the time. Moreover, Mr. McMichael admitted that the documents Ms. Langdale relied upon were the only financial information she had to consider in determining Trinity 7's

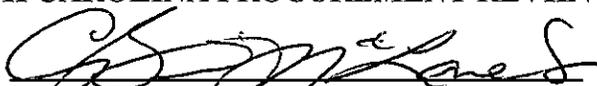
financial capability. Based on the evidence before it, the Panel finds that Ms. Langdale's determination that Trinity 7 lacked the financial resources to perform a contract with a potential value in excess of one million dollars had a rational basis. Furthermore, the Panel finds that Mr. McMichael failed to present any evidence to the Panel which would warrant overturning her written determination of non-responsibility.⁵

Therefore, for the reasons discussed above, the Panel dismisses Trinity 7's appeal for failing to prove that Ms. Langdale's determination of non-responsibility lacked a reasonable or rational basis.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY:


C. BRIAN MCLANE, SR., CHAIRMAN

This 11 day of March, 2013.

Columbia, South Carolina

⁵ Mr. McMichael suggested to the Panel that his performance under the emergency contract should have been given greater weight than his financial capability when determining his responsibility. The Panel finds that Ms. Langdale's written determination did adequately consider his performance under the emergency contract for the five and a half week period he had performed during the solicitation process. As provided in sections 11-35-1810 and 11-35-2410, a responsibility determination is a matter of business discretion which the Panel will not overturn absent a showing that it was "clearly erroneous, arbitrary, capricious, or contrary to law." Nothing in the record before the Panel or Mr. McMichael's testimony provides a basis for reversing Ms. Langdale's determination.