

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE: Appeal by J-Kell, Inc.)	
)	Case No. 2016-2
Sol. No. 5400008056)	
State Term Contract for IT Temporary)	
Services)	
)	

This matter is before the South Carolina Procurement Review Panel (the Panel) for further administrative review pursuant to a request by J-Kell, Inc. (J-Kell) under sections 11-35-4210(6) and 11-35-4410(1)(a) of the Consolidated Procurement Code (the Procurement Code). J-Kell has appealed the Chief Procurement Officer's (the CPO's) February 4, 2016, written determination denying J-Kell's protest in connection to a solicitation for state term contracts for IT Temporary Services. The CPO filed a motion to dismiss J-Kell's appeal on the grounds that notice of the solicitation was given as specified by the Procurement Code and that two issues J-Kell raised for the first time in its appeal letter were untimely. J-Kell responded to the motion and argued that the equitable doctrine of promissory estoppel should be applied to the Information Technology Management Office's (ITMO's) use of the South Carolina Enterprise Information System (SCEIS) to provide additional notice of solicitations. With the consent of the parties, the Panel entertained the motion by conference call on March 28, 2016, and now issues this order. Geoffrey K. Chambers, Esquire, represented J-Kell, and W. Dixon Robertson, III, Esquire, represented the CPO.

Background

On September 2, 2015, ITMO issued a fixed price bid solicitation to establish new state term contracts for IT Temporary Staff Augmentation Services. Record at PRP23 – PRP77. These

state term contracts are available to agencies needing to supplement their IT staff on a temporary basis. The new contracts are intended to replace existing state term contracts that are reaching their statutory term limits. Record at PRP28; PRP39. The solicitation for the current contracts was issued on May 15, 2009.¹ On October 28, 2009, J-Kell was one of ninety-eight vendors awarded a contract under the 2009 solicitation.² Although the contracts awarded under the 2009 solicitation were scheduled to expire on August 25, 2014, they have been extended twice and are now scheduled to expire on August 25, 2016.³

On September 2, 2015, ITMO issued the new solicitation on SCEIS and published notice of it in the South Carolina Business Opportunities (SCBO) newsletter.⁴ Record at PRP116 - 117. J-Kell does not dispute that notice of the new solicitation was given in this manner. The new solicitation contained several provisions which have been challenged by J-Kell in either its protest letter or its appeal letter. The new solicitation required contractors to furnish general liability insurance coverage. Record at PRP61, Clause 07-7B056-2. It also required contractors to procure insurance against risks relating to information security and privacy (“cyber liability” insurance). Record at PRP61 – PRP62, Clause 07-7B058-1. In addition, the new solicitation contained a provision limiting temporary assignments to a maximum period of thirty-six months, including any extensions. Record at PRP46, ¶ 21. Finally, the new solicitation contained a provision

¹ Fixed Price Bid No. 5400001342, <http://webprod.cio.sc.gov/SCSolicitationWeb/contractSearch.do?solicitnumber=5400001342e> (last viewed March 29, 2016).

² Contract No. 4400001799, at page 22 of the award statement: http://webprod.cio.sc.gov/SCContractWeb/attachmentDisplay.do?attachname=Intent+to+Award.doc&objecttype=BP_P_DOC&objectvr=00&objectno=005056A0402D1EE393A8E8994AF5186. (last viewed March 30, 2016).

³ Modification to Solicitation No. 5400001342, http://www.mmo.sc.gov/webfiles/IT_CONTR/Fixed%20Price%20Bids/IT_Temp_Contract_Sheet_3-10-16.pdf. (last viewed March 29, 2016).

⁴ SCBO is published online daily by the State Fiscal Accountability Authority’s Division of Procurement Services. <http://www.mmo.sc.gov/PS/general/scbo/PS-scbo-index.phtml> (last accessed March 31, 2016).

prohibiting the extension of current placements after award of the new state term contract. Record at PRP47, ¶ 33.

Of these provisions challenged by J-Kell, only one was modified after the issuance of the new solicitation. In Amendment #1, which ITMO issued on September 17, 2015, ITMO answered three vendor questions relating to the “cyber liability” insurance requirement. Record at PRP83, Questions 1; PRP83, Question 26; and PRP88, Question 58. In response to these questions, ITMO modified the “cyber-liability” insurance requirement by reducing the aggregate limit from ten million (\$10,000,000.00) dollars to five million (\$5,000,000.00) dollars. Record at PRP80, Item Number 9. None of the subsequent amendments to the new solicitation changed the thirty-six month assignment limit, the ban on extending current placements, or the general liability insurance requirement.

On December 8, 2015, ITMO issued Amendment #8, which related to a personnel provision. Record at PRP110. On December 17, 2015, J-Kell sent a protest letter to the CPO, purporting to protest Amendment #8. Record at PRP20 – PRP22. However, J-Kell’s protest letter did not mention the substance of Amendment #8. Rather, J-Kell complained that incumbent contractors were not notified directly of the new solicitation through SCEIS⁵ and that, as a result of not receiving direct notice, incumbent contractors were deprived of the opportunity to participate in the Question and Answer phase of the solicitation. Record at PRP20 – PRP21. J-

⁵ ITMO uses SCEIS to post solicitations and related documents, and to receive bids. J-Kell specifically claims that ITMO offered vendors the opportunity to sign up to receive notifications relating to contract modifications and solicitations through specific commodity codes in SCEIS. J-Kell contends that ITMO used a general “temporary services” commodity code in sending notification for the new solicitation rather than the IT-specific commodity code used by current contractors. On the day of the Panel’s conference call, the CPO offered evidence in the form of e-mails between J-Kell’s president and the ITMO procurement officer showing that the commodity code used for the new solicitation was the same one used for the 2009 solicitation. The Panel finds that the question of which commodity code was actually used is not one it needs to reach because it accepts as true J-Kell’s contention that it did not receive direct notification of the new solicitation through SCEIS.

Kell's protest letter also expressed concern that the solicitation contained provisions that are unfair to small businesses, but the only specific provision identified in the protest letter is the "cyber liability" insurance requirement. Record at PRP21.

On February 4, 2016, the CPO issued his written determination denying J-Kell's protest. Record at PRP2 – PRP8. In short, the CPO found that notice of the new solicitation was given as required by the Procurement Code in sections 11-35-1525(3) and 11-35-1520(3) through posting online on SCEIS and through publication in SCBO. Record at PRP3 – PRP4. In addition, the CPO noted that there is no provision in the Procurement Code which requires direct notice to incumbent vendors, especially considering that they should know when their existing contracts are set to expire. *Id.* He denied the protest as to this ground.

Regarding the "cyber liability" insurance requirement and the other unspecified provisions unfair to small businesses, the CPO found that J-Kell was attempting to protest the requirements of the solicitation itself. A protest of a solicitation's requirements is governed by the time limits set forth in section 11-35-4210(1)(a) of the Procurement Code, which require a solicitation protest to be filed within fifteen days of the issuance of the solicitation or relevant amendment, whichever is later. Record at PRP4. Despite J-Kell's assertion that its protest is timely by virtue of Amendment #8, the CPO found that the issues raised by the protest letter concern requirements established by the issuance of the solicitation on September 2, 2015, and the issuance of Amendment #1 on September 17, 2015. *Id.* Because J-Kell did not file its protest letter until December 17, 2015, three months after the issuance of Amendment #1, the CPO found that the remaining issues of protest were not timely and that he lacked jurisdiction to consider them. Record at PRP4 – PRP5.

J-Kell timely appealed the CPO's determination to the Panel on February 12, 2016. Record at PRP11 – PRP14. In addition to renewing its challenges based on lack of notice and the “cyber liability” insurance requirement, J-Kell's appeal letter raises for the first time issues regarding the thirty-six month assignment limit and the ban on extending current placements after the new state term contract is established. *Id.* J-Kell's appeal letter expresses concern that the solicitation's requirements are burdensome on small businesses and that they may result in negative outcomes for any State agency with an ongoing or soon to be assigned IT project employing temporary IT staff. Record at PRP12 – PRP13. J-Kell asks the Panel to reverse the CPO and require that “the solicitation be required to go out for comment with reasonable and sufficient notice to current suppliers on the IT Temporary Staff Contract that this solicitation ends and replaces.” Record at PRP13. Alternatively, J-Kell asks the Panel to strike “the Security and Privacy insurance requirements; the Current Suppliers with Consultants on Assignment(s) provision; and the 36 month absolute limit on temporary employment” *Id.*

Discussion

I. Notice of Solicitation

J-Kell has challenged the sufficiency of the notice given by ITMO for the new solicitation. The new solicitation is a fixed price bid solicitation governed by section 11-35-1525 of the Procurement Code. S.C. Code Ann. § 11-35-1525 (2011). Section 11-35-1525(3) provides that “[a]dequate public notice” of the fixed price bid solicitation shall be given as specified in section 11-35-1520(3), which is the statutory provision governing invitation for bid solicitations. *Id.* § 11-35-1525(3). Section 11-35-1520(3) provides:

Notice. Adequate notice of the invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids. The notice must include publication in “South Carolina Business Opportunities” or a means of central electronic advertising as approved by the designated board office. . . .

S.C. Code Ann. § 11-35-1520(3) (2011). As the “designated board office,” the State Fiscal Accountability Authority (the Authority)⁶ has approved SCBO as the means of central electronic advertising for state procurements. S.C. Code of State Regulations, Reg. 19-445.2040(A) (2011).

Following these statutory and regulatory provisions, the Panel has explicitly held that adequate notice is given by publication of a solicitation on the State’s procurement website and in SCBO. *In re: Protest of Warren Truck Equipment, Inc.*, Panel Case No. 2002-1. That is precisely what occurred here: ITMO posted the new solicitation on SCEIS and published notice of it in SCBO. As a matter of law, therefore, the Panel finds that ITMO provided adequate notice of the new solicitation.

Although J-Kell agrees that notice was given as required by the applicable statutory and regulatory provisions, it argues that ITMO created an additional notice requirement for itself by providing vendors with the opportunity to sign up for notifications using SCEIS commodity codes. Because it did not receive notice through this method, J-Kell urges the Panel to apply the equitable doctrine of promissory estoppel to enforce ITMO’s “promise” to send direct notification through SCEIS. Our state courts have recognized a remedy under promissory estoppel if the claimant can prove:

- (1) the presence of a promise unambiguous in its terms;
- (2) reasonable reliance upon the promise by the party to whom the promise is made;
- (3) the reliance is expected and foreseeable by the party who makes the promise; and
- (4) the party to whom the promise is made must sustain injury in reliance on the promise.

Satcher v. Satcher, 351 S.C. 477, 483-484, 570 S.E.2d 535, 538 (Ct. App. 2002) (citation omitted).

⁶ The Authority was created by Act 121, the Restructuring Act of 2014. One of the Authority’s divisions is the Division of Procurement Services, which “provides the State’s central procurement operation for all state agencies covered by the South Carolina Consolidated Procurement Code.” www.sfaa.sc.gov/divisions?p=6 (last accessed March 31, 2016).

Assuming for the sake of argument that giving vendors the option to sign up for solicitation notifications through an automated SCEIS process constitutes an unambiguous promise, the Panel finds that it was not reasonable for J-Kell to rely on that promise for several reasons. First, the method of notification is established by statute and regulation, and neither ITMO nor the Panel has the authority to re-write the statute or regulation. Second, the Panel has previously declined to impose additional notice requirements for incumbent vendors. *See In re: Protest of Quantum Resources*, Panel Case No. 1990-17 (wherein the Panel held that state procurement services' practice of sending incumbent contractors courtesy copies of new solicitations did not create a binding procedure upon which incumbents could rely, especially where notice had been given as required by statute and through publication in SCBO). Third, as an incumbent contractor, J-Kell should have been aware that its current contract was nearing expiration and that the State would need to issue a new solicitation to continue temporary IT staffing services. *See In re: Protest of Winyah Dispensary, Inc.*, Panel Case No. 1994-18 at 3, n. 1. In the absence of any Procurement Code provision requiring actual notice to incumbent contractors, the Panel finds that J-Kell's reliance on receiving direct notice of the new solicitation through SCEIS to be unreasonable as a matter of law. Therefore, the Panel declines to recognize the doctrine of promissory estoppel under the circumstances. Furthermore, having found that adequate notice of the new solicitation was given, the Panel upholds the CPO's determination denying J-Kell's protest with regard to the notice issue.⁷

⁷ While the Panel has found that adequate notice of the new solicitation was given, it is troubled by allegations that the solicitation is disadvantageous to small businesses. The Panel takes this opportunity to urge ITMO to conduct its solicitations in a transparent manner, thereby ensuring participation by those vendors who have provided services in the past.

II. Timeliness of Protest and Appeal Issues

J-Kell's protest letter challenged the "cyber liability" insurance requirement and other unspecified solicitation requirements which were unfair to small businesses. In order to protest the solicitation of a contract or an amendment thereto, an aggrieved prospective bidder must file its protest within fifteen days of the issuance of the solicitation documents, "or any amendment to it, if the amendment is at issue." S.C. Code Ann. § 11-35-4210(1)(a) (2011). The Panel has consistently held that the time limit for filing set by the statute is jurisdictional and cannot be extended. *In re: Protest by First Sun EAP Alliance, Inc.*, Panel Case No. 1994-11. In addition, the Panel has held that an amendment is "at issue" only when "it provide[s] new or different information than the solicitation documents." *In re: Protest of Mechanical Contractors Ass'n of S.C.*, Panel Case No. 1995-12 at 1.

The "cyber liability" insurance requirement was included in the solicitation documents issued on September 2, 2015, and was modified by Amendment #1, which was issued on September 17, 2015. Even using the later September date, J-Kell's protest, which was not filed until December 17, 2015, is clearly untimely. Moreover, its reliance on the issuance of Amendment #8 on December 8, 2015, to make its protest timely is misplaced because the protest letter does not raise any issue in connection with the specification modified in Amendment #8. *See In re: Protest of South Carolina Ass'n of the Deaf*, Panel Case No. 2008-2 (wherein the Panel noted that a protest filed within fifteen days of an irrelevant amendment "[was] an impermissible attempt to extend the applicable protest period" where the issues raised by the protest were all related to provisions in the original IFB specifications). Therefore, the Panel, like the CPO, finds that it lacks jurisdiction to consider J-Kell's protest of the "cyber liability" insurance requirement.

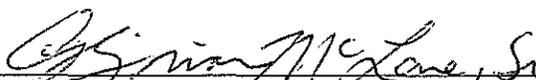
In its appeal letter, J-Kell raises new protest issues regarding the thirty-six month assignment limit and the ban on extending current placements. Because these issues are raised for the first time on appeal, the Panel lacks jurisdiction to consider them. *In re: Protest of Volume Services*, Panel Case No. 1994-8 at 2 (applying the protest provision set forth in section 11-35-4210 of the Procurement Code, the Panel held that “[T]he issues in the case are established in the protest letter. The letter appealing to the Panel cannot add issues.”); *accord, In re: Protest of DPConsultants, Inc., and Horizon Software Systems, Inc.*, Panel Case No. 1998-6.

Conclusion

Having found that adequate notice of the solicitation was given and that the remainder of J-Kell’s protest and appeal issues were untimely, the Panel hereby grants the CPO’s motion and dismisses J-Kell’s appeal in its entirety.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL


BY: C. Brian McLane, Sr., Chairman

Date: April 11th, 2016.
Columbia, SC