

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE: Appeal by Maddock Construction	)	
Equipment, LLC	)	Case No. 2016-3
Sol. No. 5400010560	)	
Extra heavy-duty, PTO-driven, Trailer	)	
Type Ditchers for the South Carolina	)	
Department of Transportation	)	

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This matter came before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for review by Maddock Construction Equipment, LLC (Maddock) under sections 11-35-4210(6) and 11-35-4410(1)(a) of the Consolidated Procurement Code (the Procurement Code). Maddock has appealed the Chief Procurement Officer’s (the CPO’s) February 26, 2016, decision denying Maddock’s protest of the South Carolina Department of Transportation’s (SCDOT’s) intended award to U.S. Ditcher (Ditcher). With the consent of the parties, the Panel entertained Ditcher’s motion to dismiss as untimely one of Maddock’s appeal issues by conference call on May 11, 2016. Thereafter, the Panel convened a hearing to consider the merits of the remaining appeal issues on May 13, 2016. In the hearing before the Panel, John E. Schmidt, III, Esquire, represented Maddock. E. Wade Mullins, III, Esquire, represented Ditcher. Linda C. McDonald, Esquire, represented the South Carolina Department of Transportation (SCDOT), and William Dixon Robertson, III, Esquire, represented the CPO.

**I. Motion to Dismiss Appeal Issue**

Prior to the Panel’s scheduled hearing on May 13th, Ditcher moved to dismiss one of the appeal issues raised in Maddock’s appeal letter dated February 26, 2016. With the consent of the parties, the Panel heard argument on Ditcher’s motion by conference call on May 11, 2016. In its appeal letter, Maddock raised an issue alleging Ditcher’s bid should have been found non-

responsive for taking exception to the 120 day delivery schedule set forth in the solicitation. Record at PRP24 – PRP25. It is uncontroverted that this issue was not raised in Maddock’s original protest letter dated February 1, 2016, or in its amended protest letter dated February 8, 2016. Record at PRP37 – PRP43. Based on longstanding Panel precedent, Ditcher argued that the Panel lacked jurisdiction to consider the issue because it was not raised by the protest letters. *See In re: Protest of DP Consultants, Inc.*, Panel Case No. 1998-6 (December 15, 1998) (“The protest letters establish the issues of the case, and any issues not established in the protest letter are untimely filed under the time constraints of S.C. Code § 11-35-4210.”); *In re: Protest of Volume Services*, Panel Case No. 1994-8 (August 31, 1994) (“The letter to the Panel cannot add issues. If new issues were allowed to be included in the appeal letter to the Panel, no effect would be given to the requirements of [the protest statute].”); and *In re: Protest by J&T Technology, Inc.*, Panel Case No. 1987-3 (July 13, 1987) (“The protestant cannot alter or modify its grievance as the protest develops except as permitted by § 11-35-4210.”) Maddock argued that the Panel should consider the issue in the interest of fairness because it did not learn that its own bid had been found non-responsive for the same reason until after the CPO issued his written determination denying Maddock’s protest.<sup>1</sup> The Panel was not persuaded by Maddock’s argument and dismissed the delivery schedule appeal issue as untimely based on its longstanding precedent.

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<sup>1</sup> After the CPO denied its first protest, Maddock filed a second protest with the CPO alleging that Ditcher’s bid was non-responsive for taking exception to the delivery schedule. The second protest was filed on the same day Maddock filed this appeal before the Panel. The second protest was dismissed as untimely by the CPO, and the Panel has addressed an appeal from that written determination in a separate decision: *In re: Appeal by Maddock Construction Equipment, LLC*, Panel Case No. 2016-4.

## I. Findings of Fact

### A. The Initial Record Before the Panel

On December 8, 2015, SCDOT issued an invitation for bids (IFB) seeking to acquire four extra heavy-duty, PTO-driven, trailer type ditchers. Record at PRP56; PRP90. The section of the IFB describing the scope of the solicitation provided the following information:

The SCDOT is soliciting for trailer type ditchers. The ditchers shall be extra heavy-duty, PTO-driven, trailer type units designed for highway ditch construction and cleaning operations. They shall utilize a single rotating cutter head to remove and discharge materials from the ditch. *The units shall be new, and of a model in current production or an update of an existing model.* Each unit shall be furnished with identical equipment, options, and features. Units supplied to this specification shall meet or exceed the requirements herein.

Record at PRP63 (emphasis added). The language highlighted above is also located in the Scope of Work/Specifications section of the solicitation. Record at PRP73, paragraph 1. The IFB also specified that the offered unit “shall be equipped with an automatic leveling system.” Record at PRP73. Elsewhere the IFB instructed bidders to submit “manufacturer’s latest literature showing complete product specifications and one complete set of service literature.” Record at PRP72, “DESCRIPTIVE LITERATURE – REQUIRED.”

After publication of the IFB, but before award, counsel for Ditcher sent a letter to SCDOT’s procurement officer, Emmett Kirwan, asking for “clarification” of the solicitation and offering proposed specifications.<sup>2</sup> Record at PRP104 – PRP105. One of the specifications suggested by Ditcher was that the proposed unit be equipped with an automatic leveling system. Record at

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<sup>2</sup> The Panel notes that the IFB prohibited communications between bidders and agency employees during the period between the solicitation’s publication and final award. Record at PRP68. However, Ditcher’s counsel’s letter was addressed to SCDOT’s procurement officer as directed by this IFB clause; therefore, it was not a prohibited communication. Although Maddock originally included prohibited communications as a protest issue before the CPO, it withdrew this issue of protest at the close of its case before the Panel.

PRP105. There is no evidence in the record before the Panel that this letter and proposed specifications caused the IFB to be amended in any way.

On January 5, 2016, SCDOT received bids from Ditcher, Maddock, and L&E Management. Record at PRP47. Ditcher's bid is included in the record before the Panel. Record at PRP98 – PRP102. In its bid, Ditcher offered ditcher model RD15H and included a picture of model RD15. Record at PRP100; PRP102. On January 11, 2016, Mr. Kirwan e-mailed Mr. Scordilis of Ditcher seeking confirmation that the proposed ditcher met certain requirements.<sup>3</sup> Record at PRP107. Mr. Scordilis responded:

Confirming herewith as follows:

- Proposed side arm ditcher RD15HYDRO will cut a trapezoidal ditch with 45 -50 degree sides.
- Boom minimum reach is 138 inches plus from tractor centerline to ditch centerline
- The down reach is at least 50 inches plus.

Hope to have complied with the requested specification.

Record at PRP107.

On January 22, 2016, SCDOT posted notice of Intent to Award the contract to Ditcher. Record at PRP93. The Intent to Award notes that although L&E Management bid a lower price than Ditcher, its bid was non-responsive because it did not meet the solicitation requirements. *Id.* Maddock protested the intended award to Ditcher on February 1, 2016, and amended its protest on February 8, 2016.

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<sup>3</sup> The Panel notes that this communication was permitted by section 11-35-1520(8) of the Procurement Code and explicitly allowed by the terms and conditions of the IFB. Record at PRP72.

## **B. Testimony of Dave Maddock**

Mr. Dave Maddock, currently Chief Technology Officer at Maddock Construction Equipment, LLC, testified before the Panel. Mr. Maddock testified that Maddock has been selling equipment to SCDOT for the last seven years. Mr. Maddock also explained to the Panel that he designed the automatic leveling system on Maddock's ditchers and wrote the controlling software for the system itself. He testified that he received SCDOT's IFB and understood the scope of work and believed that Maddock was the only manufacturer that could meet the solicitation's requirements. In particular, Mr. Maddock testified that Maddock's ditcher was the only one in the country with an automatic leveling system.

Regarding Ditcher's bid, Mr. Maddock testified that he had been unable to locate model RD15H on Ditcher's website or in any product literature. He also testified that he had seen a model RD15 seven to eight years ago in a SCDOT facility, but not in operation. He testified that he could tell by looking at the RD15 that it did not have an automatic leveling system. Upon cross examination, Mr. Maddock admitted that he did not work for Ditcher and was not privy to Ditcher's trade secrets, business model, or production schedule. Moreover, Mr. Maddock conceded that he did not know what models Ditcher is currently producing or whether the RD15H is an update of an existing model. Indeed, Mr. Maddock agreed that if the RD15H is an update of an existing model it would comply with the solicitation's requirement that the unit be "in current production or an update to an existing model." Mr. Maddock explained that he considered information available in the marketplace to conclude that Ditcher did not have a current product meeting the solicitation's requirements.

### III. Conclusions of Law

The only appeal issue remaining before the Panel is the question of whether Ditcher's bid should have been found to be non-responsive for failing to bid a model with automatic leveling in current production as required by the solicitation. As the protesting party, Maddock bears the burden of proving Ditcher's non-responsiveness by a preponderance of the evidence. *In re: Appeal by Heritage Community Services*, Panel Case No. 2013-1 (May 6, 2013); *In re: Protest by Blue Bird Corp.*, Panel Case No. 1994-15 (December 16, 1994). Mr. Maddock was the only witness called to testify in the Panel hearing, and his testimony has been summarized above. In addition to Mr. Maddock's testimony, Maddock points to Ditcher's failure to include product literature specific to the model RD15H with its bid as evidence that the RD15H is not in current production. Weighing the evidence before it, the Panel concludes that Maddock's contention that Ditcher bid a model not in current production is based on speculation and belief, not actual proof that Ditcher does not have the RD15H currently in production or that it is not an update to an existing model. In particular, the Panel finds Mr. Maddock's observations of an RD15 model from seven to eight years ago to be too remote to be relevant. Furthermore, Ditcher's signed bid, its proposed specifications that included an automatic leveling system, and its answers in response to SCDOT's request for confirmation are evidence that Ditcher's proposed product will meet the solicitation's requirements. As for the lack of current product literature included with the bid, the Panel finds that the CPO correctly waived Ditcher's failure to include product literature as a minor informality under section 11-35-1520(13)(g) of the Procurement Code. S.C. Code Ann. § 11-35-1520(13)(g) (2011).

