

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. 2016-4
Sol. No. 5400010560)	
Extra heavy-duty, PTO-driven, Trailer)	
Type Ditchers for the South Carolina)	
Department of Transportation)	

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) March 21, 2016, decision dismissing as untimely Maddock’s protest claiming that the successful bid took exception to the delivery schedule and was therefore non-responsive.¹ The successful bidder, U.S. Ditcher (Ditcher), filed a motion to dismiss Maddock’s appeal relating to the issue of the delivery schedule on the grounds that it was untimely filed. With the consent of the parties, the Panel entertained the motion by conference call on May 11, 2016, and now issues this order. 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.

Findings of Fact

On December 8, 2015, SCDOT issued an invitation for bid seeking to acquire extra heavy-duty, PTO-driven, trailer type ditchers. Record at PRP46. The solicitation contained the following

¹ This protest and appeal was the second one filed by Maddock in connection with this solicitation. The first protest was denied by the CPO on February 16, 2016, and is the subject of a separate appeal to the Panel. The appeal of the first protest decision is addressed in the Panel’s decision for Case No. 2016-3.

requirement: “All items shall be delivered within 120 days after receipt of purchase order.” Record at PRP58. On January 22, 2016, SCDOT posted a Notice of Intent to Award to Ditcher as the apparent lowest priced responsive and responsible bidder.² Record at PRP76. On February 1, 2016, Maddock protested the intended award, alleging that Ditcher had bid a ditcher model not in “current production,” which Maddock contended was a material requirement of the solicitation. Record at PRP82 – PRP85.

On February 8, 2016, Maddock filed an amended protest letter and additionally claimed that Ditcher had engaged in prohibited communications with SCDOT during the pendency of the solicitation. Record at PRP86 – PRP89. In its February 8th amended protest letter, Maddock notes that it has attached a copy of Ditcher’s bid as Exhibit B. Record at PRP89. Ditcher’s bid contains the following handwritten notation:

DELIVERY: 7/15/2016 AND 8/15/2016.

Record at PRP102. Maddock did not raise any issue regarding Ditcher’s bid and the delivery schedule in its original or amended protest letter. Record at PRP82 – PRP85; PRP86 – PRP89.

On February 16, 2016, the CPO issued his decision denying Maddock’s protest. Record at PRP78 – PRP81. As an attachment to his decision, the CPO included a copy of a memorandum from SCDOT’s procurement file that noted that Maddock’s bid had been rejected as non-responsive for taking exception to the delivery schedule. Record at PRP93. Thereafter, Maddock filed its second protest with the CPO on February 26, 2016, alleging that Ditcher’s bid should also have been rejected as non-responsive for taking exception to the delivery schedule. Record at PRP13 – PRP19. In support of its claim, Maddock contended that it did not receive notice that its

² The Intent to Award noted that L&E Management’s bid was lower in price than Ditcher’s bid, but that L&E’s bid was not eligible for award because it was non-responsive to the solicitation requirements. Record at PRP76. Counsel for the CPO noted during the Panel’s conference call that Maddock was the highest bidder and that SCDOT was only required to include notice of non-responsiveness to *lower* bidders on the Intent to Award.

own bid had been rejected for taking exception to the delivery schedule until the filing of the CPO's February 16th decision. Record at PRP32 – PRP35. Maddock also claimed that the memorandum should have been produced by SCDOT in response to Maddock's February 1st FOIA request. Record at PRP34. On March 21, 2016, the CPO denied Maddock's February 26th protest, finding it to be untimely filed.

Discussion

The only issue decided by the CPO, and thus, the only issue before the Panel, is the question of whether Maddock's February 26th protest was timely filed. The time for filing a protest is established by section 11-35-4210(1)(b), which requires a protesting bidder to file a protest "within ten days of the date . . . notification of intent to award . . . is posted in accordance with this code." S.C. Code Ann. § 11-35-4210(1)(a) (2011). A protestant who files a timely protest pursuant to section 11-35-4210(1)(a) may amend the protest as long as the amended protest is filed within fifteen (15) days of the issuance of the notice of intent to award. S.C. Code Ann. § 11-35-4210(2)(b) (2011). The Panel has consistently ruled that the time set by statute for the filing of a protest is jurisdictional and cannot be waived. *In re: Appeal by J-Kell, Inc.*, Panel Case No. 2016-2 (April 11, 2016); *In re: Protest of Atlas Food Systems and Services, Inc.*, Panel Case No. 1997-6 (June 5, 1997); *In re: Protest of Blue Cross and Blue Shield of SC*, Panel Case No. 1996-9 (July 5, 1996).

As noted above, the Intent to Award was posted on January 22, 2016. Thus, a protest needed to be filed on February 1, 2016, in order to be timely. Similarly, any amendment to a filed protest needed to be filed on February 8, 2016, in order to be timely.³ Maddock's second protest, which was filed on February 26th, some thirty-five days after the posting of the Intent to Award,

³ The fifteenth day fell on Saturday, February 6; thus, in accordance with section 11-35-310(13), the final day to file the amended protest fell to the end of the next business day or February 8, 2016.

was clearly untimely. Nonetheless, Maddock urges the Panel to find that its second protest was timely filed because it was filed within ten days of the CPO's February 16th order, which was the date on which it first learned that its bid had been disqualified for taking exception to the delivery schedule. The Panel is not persuaded by this argument and finds that the date on which Maddock found out that its own bid had been disqualified has no bearing on the issue of whether Ditcher's bid was non-responsive for taking exception to the delivery schedule. Maddock possessed all of the information it needed to raise the delivery schedule issue with regards to Ditcher's bid when it filed the amendment to its first protest on February 8th and included a copy of Ditcher's bid bearing the complained-of delivery language. Having failed to raise the issue in its first protest despite being in possession of the necessary information, Maddock cannot now overcome the jurisdictional bar with claims of unfairness or unequal treatment.

Conclusion

Having found that Maddock's second protest challenging Ditcher's responsiveness to the delivery schedule to be untimely, the Panel grants Ditcher's motion to dismiss Maddock's appeal related to that protest in its entirety.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL


BY: C. Brian McLane, Sr., Chairman

Date: May ^{25th}, 2016.
Columbia, SC