STATE OF SOUTH CAROLINA	)	**BEFORE THE CHIEF PROCUREMENT OFFICER**
COUNTY OF RICHLAND	)	
	)	DECISION
In the Matter of Protest of:	)	
	)	CASE No. 2008-104
	)	
Capital City Catering	)	
	)	
	)	
	)	
Materials Management Office	)	POSTING DATE:
RFP No. 08-S7635	)	
Cafeteria/Restaurant Foodservice	)	
& Day Catering Services for the	)	
State Museum	)	March 27, 2008

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Capital City Catering (Capital). With this request for proposals (RFP), the Materials Management Office (MMO) attempts to procure cafeteria/restaurant and day catering services for the South Carolina State Museum (SCSM). In its letter, Capital protested MMO's intent to award to Catering by Dupre (Dupre) alleging that 1) MMO was negligent in the receipt and handling of Dupre's offer by date stamping the offer before it was completed, allowing additional work for submission, 2) receiving some of the proposal in an unsealed envelope after the deadline, 3) Dupre's proposal was deficient and non-responsive due to timeliness and not being sealed, 4) MMO and Dupre manipulated the time stamp, completion of information and failure to submit a sealed proposal as required, 5) MMO's waiving of its requirement that Dupre submit electronic versions of its proposal, and 6) MMO's failure to reject Dupre's proposal as non-responsive.

In order to resolve the matter, the CPO conducted a hearing on March 17, 2008. Appearing before the CPO were Capital, represented by Tony Ellis; Dupre, represented by Robert Percival; SCSM, represented by James M. Stiles; and MMO, represented by John Stevens, State Procurement Officer.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On October 10, 2007, MMO published the RFP. [Ex. 1]

2. On November 9, 2007, MMO opened proposals.

3. On November 12, 2007, Capital submitted a protest of the bid opening to the CPO.

4. On January 23, 2008, the CPO dismissed that protest on jurisdictional issues as prematurely filed. [CPO Decision No. 2007-138]

5. On February 22, 2008, MMO posted an intent to award to Dupre. [Ex. 2]

6. On February 29, 2008, Capital filed its protest.

DISCUSSION

While Capital alleges a number of infractions, its arguments restate three primary allegations: 1) Dupre's proposal was late, 2) Dupre's proposal was not sealed, 3) MMO waived its requirement that Dupre submit electronic versions of its proposal. Evidence received regarding the events surrounding the three allegations will be discussed separately herein.

Allegation - Dupre's Proposal was Late

Dupre's proposal, consisting of two envelopes, was hand delivered to Edna Sims, MMO Administrative Specialist who coordinates bid openings just before the 2:30 deadline by Barbie, a

representative of Dupre. The RFP required that proposals include a technical proposal and price proposal, each in a separate envelope. Ms. Sims accepted Dupre's proposal and date and time stamped a large manila envelope that contained Dupre's technical proposal and a white, letter-sized envelope that contained Dupre's price proposal. Both envelopes were time stamped: "2007 Nov 9 PM 2 29."[1] Once Dupre's envelopes were stamped in, Ms. Sims asked Barbie to write Dupre's mailing address on the white envelope. In plain view of all present, Barbie wrote Dupre's mailing address on the outside of the sealed envelope and returned it to Ms. Sims. After Barbie wrote Dupre's mailing address on the outside of the white envelope, Ms. Sims announced that the opening time had arrived and that no more proposals would be accepted[2].

According to Capital's protest letter, the time was 2:30 and 15 seconds (although no evidence was introduced at the hearing to support this allegation). Capital alleged that Dupre's proposal was late, that it was incomplete at 2:30 PM, and that Ms. Sims inappropriately allowed Dupre additional time past the bid deadline to complete its proposal. Capital argues that Ms. Sims should have rejected Dupre's proposal as nonresponsive.

Regarding proposal openings, the Consolidated Procurement Code (Code) and the accompanying regulations require "Proposals must be opened publicly in accordance with regulations of the board" [11-35-1520(5)] and:

> Proposals shall be opened publicly by the procurement officer or his designee in the presence of one or more witnesses at the time and place designated in the request for proposals. Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. [19-445.2095(C) (1)]

[1] Once the two envelopes were tendered to Ms. Sims and clocked in by her, the bidder has submitted its proposal and therefore did so in a timely manner regardless of minor informalities. *See, e.g.,* *Chestnut Hill Constr., Inc.*, B-216891, 85-1 CPD ¶ 443 (Apr. 18, 1985) ("The time when a bid is submitted is determined by the time that the bidder relinquishes control of the bid.")

[2] A bid is timely if possession of the same is relinquished when the closing of bids is announced. *See, e.g.,* Carothers Construction v. United States, 18 Ct.Cl. 745, 35 Cont.Cas.Fed. (CCH) P 75,758 (1989).

The RFP compliments the statute and regulations by requiring "Any offer received after the Procurement Officer of the governmental body or his designee has declared that the time set for opening has arrived, shall be rejected unless the offer has been delivered to the designated purchasing officer or the governmental bodies' mail room which services that purchasing office prior to bid opening." [Ex. 1, p. 5, Deadline for Submission of Offer]

Clearly, Dupre delivered the proposal to Ms. Sims before the deadline, as both Dupre's manila envelope and white envelope were time stamped by Ms. Sims at 2:29 PM. According to Ms. Sims' testimony, she time stamped the envelopes, asked Barbie to write Dupre's mailing address on the sealed white envelope, watched her do so, and then declared the time set for the opening had arrived. No evidence was introduced to even suggest that anything was done to the envelope other than to add the address to the outside of the envelope.

This allegation results entirely from Ms. Sims asking Dupre's representative to write its mailing address on the outside of its price proposal. According to all testimony and argument, Dupre had already written "Catering by Dupre, Inc." and "Price Proposal for Solicitation # 08-S7635" on the envelope before Barbie delivered it.

<u>Allegation – Part of Dupre's proposal was not sealed</u>

Capital alleged that part of Dupre's proposal was not sealed; that the manila envelope had "papers sticking out along with a separate white sealed envelope." Capital argued that Dupre's proposal should be have been rejected by MMO as a consequence.[3]

[3] There are numerous cases which suggest that the failure to seal a proposal can be treated as a minor informality or technicality which may be waived where there is no prejudice. In addition to the cases cited, *see*, Matter of Ryan-Walsh Stevedoring Company, Inc., 1975 WL 8680, B- 182039, 75-1 CPD P 129 (Comp.Gen.1975) and William H. Tuller, Bureau of Reclamation, 37 Comp. Gen. 37, B- 132536, 1957 WL 1277 (Comp.Gen. 1957).

Regarding offerors submitting sealed offers, the Code allows agencies to solicit competitive "sealed" proposals. [11-35-1530] The Code, however, does not define the term "sealed." Looking to the dictionary, the term to "seal" has various meanings. In the context of this case, a sealed proposal, the range of possible applicable meanings of "sealed" are: "a) a closure, as on a package, used to prove that the contents have not been tampered with; b) to affix a seal to in order to prove authenticity or attest to accuracy, legal weight, quality, or another standard; c) to close hermetically." The American Heritage Dictionary of the English Language, Third Edition, 1996.

In the practice of public procurement, the object of requiring sealed proposals is to prove that the contents have not been tampered with between the time of submission and the opening. However, the standard is certainly not hermetically sealed. It isn't sealed with wax as was the custom in medieval times either.

Public agencies insist that bidders and offerors submit sealed bids and proposals in order to prevent bidder mischief after submittal. All parties, including the offerors, the procuring agency, and the public are protected. The bidders can trust that their sealed offers will be protected and unopened until the designated time and that no one will disclose their bid price to competitors. When time is called by the bid clerk, no further bids are accepted. Therefore, bidders whose bids were opened first are protected against a competitor altering his bid after their bids have been read aloud. The public is protected from bidder collusion and mischief that could result through bidders manipulating the process.

In this case, several facts mitigate the risk or even the possibility of bidder manipulation. First, Barbie delivered Dupre's proposal to MMO just before the opening deadline - at 2:29; less than 1 minute before the opening. Therefore, Dupre did not require protection against someone revealing its bid amount prematurely. Dupre's proposal was submitted just before being opened publicly anyway. Dupre's price proposal was sealed at all times. Conversely, no price proposals had been read aloud for

Dupre to overhear before submitting its proposal. (In fact, at proposal openings, bid clerks do not ever read price proposals aloud.) Ms. Sims testified that Dupre's price proposal was: a) in her possession before the designated time and it never left her sight, b) in plain sight of all participants at the bid opening, c) sealed at all times before the opening and was not altered. Her testimony is not refuted by anyone.

Allegation - MMO waived its requirement that Dupre submit electronic versions of its proposal

Capital alleged that Dupre did not submit with its proposal a specified number of copies in electronic format. Capital argued that MMO "failed to comply with its own solicitation language" in that MMO did not reject Dupre's proposal.

The RFP reads, in part, "an original copy of your offer must be accompanied by the specified number of copies in the following format: compact disk (CD) in the following formats: **CD-R; DVD ROM; DVD-R; OR DVD+R.** Formats such as CD-RW, DVD-RAM, DVD-RW, DVD-+RW, or DVIIX **are not acceptable** and will results in the Offeror's proposal being rejected." [Ex. 1, p. 9, Magnetic Media – required Format] [Emphasis per the original]

Clearly, MMO insisted on the inclusion of electronic media in a certain format. However, at the hearing John Stevens argued that he considered the omission a minor informality or irregularity.

Capital disagreed arguing that the electronic media was clearly a mandatory requirement of the RFP. Therefore, Capital argued, it cannot be waived or forgiven.

CONCLUSIONS OF LAW/DETERMINATION

Regrettably, except for Ms. Sims, the actual participants at the bid opening either were not available or chose not to testify at the hearing. Due to an illness, Ms. Barbie of Dupre was not

available to testify.[4] According to statements from Capital, three people represented Capital at the proposal opening, but none who actually attended the opening chose to testify. Mr. Percival spoke on behalf of Dupre and Mr. Ellis spoke on behalf of Capital. However, neither of them was present at the opening nor did they witness any of the actual events.

Allegation - Dupre's Proposal was Late and Dupre's proposal was not sealed

Ms. Sims testified that the Dupre proposal was in her possession before the designated time. Her testimony is substantiated by her time stamp on the envelopes. Her request that Dupre complete a ministerial annotation on the outside of the sealed envelope does not change the fact that Dupre's proposal was in the state's possession before 2:30. If she had not requested the addition of the address on the white envelope, the correction of a minor informality, this issue would not have arisen at all.[5]

Everyone agreed that Dupre's technical proposal was not sealed when Barbie first arrived, but that Dupre's price proposal was sealed at all times. Ms Sims acknowledged that she allowed Barbie to complete Dupre's address on the outside of the price proposal, but she testified that it was prior to the proposal deadline.

Capital argued that the manila envelope was not glued or taped shut, but we do not know if Barbie closed the metal clasp on the outside, which could have "sealed it" or not. Ms. Sims acknowledged that she isn't sure whether Barbie clasped the manila envelope closed or not.

Other jurisdictions have dealt with similar situations.[6] For example *In Matter of: Rhoads Construction Company, Inc*., B- 242992, 91-1 CPD P 561, 1991 WL 107958 (Comp.Gen.) the decision set forth similar principles as follows:

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[4] The CPO offered a continuance to Mr. Percival, but he asked to proceed with the hearing.

[5] There is no allegation nor evidence that the Dupre representative did anything other than write "PO Box 2264, Columbia, SC 29207" on the outside of the envelope which remained sealed during the same.

[6] *See*, where the argument was made that by not being sealed the bid was non-responsive it was decided as follows:

The protester argues that Pittman's bid should have been rejected as nonresponsive because Pittman failed

> Rhoads argues that Mortenson's bid was nonresponsive due to the fact that it had arrived in an unsealed envelope, contrary to instructions which were contained in the solicitation. Since the requirement that bid envelopes be sealed is for the purpose of maintaining and protecting the integrity of the competitive procurement process, a contracting officer generally may accept a bid or offer in an unsealed rather than a sealed envelope as provided by the solicitation where the circumstances surrounding the submission of the bid or offer demonstrate that the other competitors were not prejudiced. United Teleplex, B-237160.2, Feb. 2, 1990, 90-1 CPD ¶ 146; Ryan-Walsh Stevedoring Co., Inc., B-182039, Mar. 5, 1975, 75-1 CPD ¶ 129. Here, the record indicates that the bid was hand-delivered and received at the bid depository 4 minutes prior to the 1:30 p.m. bid opening and that it never was out of the possession of the government after it was delivered. Also, according to the agency, there is no evidence that any of the bid documents had been changed or otherwise tampered with. Since there is nothing in the record which shows that the acceptance of this unsealed bid would prejudice any other competitor, we conclude that the agency acted properly in accepting Mortenson's bid. Thus, we have no legal basis for questioning the propriety of the award to that firm.[7]

Allegation - MMO waived its requirement that Dupre submit electronic versions of its proposal

Capital argues that MMO should have rejected Dupre's bid as nonresponsive to the requirement of the RFP that offerors submit electronic media versions of their proposals. The regulations require that "Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected." [19-445.2070(A)] [Emphasis added] The Code defines a responsive offer as "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals." [11-35-1410(7)] [Emphasis added]

> to comply with the solicitation requirement that all bid modifications be submitted in sealed envelopes**.** We disagree. Responsiveness concerns whether a bid constitutes an offer to perform, without exception, the exact thing called for in the invitation. Central Mechanical Constr., Inc., B-220594, Dec. 31, 1985, 85-2 CPD ¶ 730. Since Pittman's bid complied with all of the IFB's material provisions, it was responsive. Matter of Qualicon, B- 237288, 90-1 CPD P 158, 1990 WL 277692 (Comp.Gen.).

[7] *See, also,* International Shelter Systems, Inc., 1992 WL 15040 (Comp.Gen.), 71 Comp. Gen. 142, B- 245466, 92-1 CPD] where the Comptroller General stated as follows in a similar argument:

> International Shelter also argues that Southern Structures failed to submit the modification in accordance with the IFB's prescribed submission procedures and Southern Structures's bid should therefore be rejected. International Shelter notes that Southern Structures submitted its bid modification without: (1) a sealed and labeled envelope**;** [FN4] (2) including an original and two copies as required by the IFB; and (3) depositing the hand delivered bid modification in the bid depository box as required by the IFB. None of these irregularities were significant or prejudicial to the other bidders. Specifically, the IFB requirement for a specified number of bid copies is not material. FAR § 14.405(a). Also, a bidder's failure to comply with sealed envelope requirement may be waived where, as here, no other bidders are

While Dupre's omission of the electronic media is a nuisance, it does not materially vary the requirements of the RFP, which are that Dupre's agreed to provide cafeteria/restaurant and day catering services for the South Carolina State Museum (SCSM) in accordance with the essential specifications. In its proposal, Dupre took no exception the material requirements of the RFP. Therefore, Dupre's proposal was responsive.

Capital argued that Dupre's omission of electronic copies of its proposal cannot be overlooked because it was a mandatory requirement of the RFP. The Procurement Review Panel has distinguished a "mandatory" requirement from an "essential" one in previous decisions for many years. For example, Protest of National Computer Systems, Inc., Case No. 1989-13 (failure to include a sample photocopy of student tests, which were needed to demonstrate that the offeror could supply legible copies, was a minor informality, despite being mandatory) and Protest of Gregory Electric Co., Case No. 1989-17(II) (failure to include documents regarding vendor's qualifications is a minor informality, despite being mandatory).

The Code defines a minor informality or irregularity as "one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders." [11-35-1520(13)] In the event of a minor informality or irregularity in a proposal, the Code authorizes the procurement officer to either give the bidder an opportunity to cure the deficiency or waive such deficiency when it is to the advantage of the State.

Dupre's omission of electronic media does not affect Dupre's total bid price, quality, quantity, or performance of the contract.

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exposed to the bid prior to the opening and there is otherwise no prejudice to the other bidders.

The Code lists twelve examples that are defined as of minor informalities and irregularities in bids, including "failure of a bidder to return the number of copies of signed bids required by the solicitation."

Mr. Stevens argued that MMO's forgiveness of the omission of electronic versions of a proposal is similar in nature to the Code's requirement that we forgive an offeror's omission of the required number of copies of a proposal.

The CPO agrees. Dupre's omission of electronic copies of its proposal was a minor informality or irregularity, as defined in SC Code Section 11-35-1520(13). Therefore, it is waived.[8]

Capital's protest is not that it provided a better price or even a better proposal but rather Capital seeks the disqualification of Dupre on the grounds that it should be declared non-responsive based upon two technicalities which it contends impair the integrity of the procurement process. Capital is correct that the issues are technicalities but not correct that they affect the integrity of the process. Capital presented no eye witness evidence that the Dupre proposal was not timely submitted or that there was even an opportunity for anyone to interfere with the process. The only evidence presented was that Dupre's proposal was submitted before the time for the receipt of proposals was declared closed. Certainly no evidence was presented that there existed an opportunity for anyone to alter any documents once the closing had occurred. The integrity of the process was fully preserved.

Therefore, the protest is denied.

Voight Shealy

R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

[8] While Capital's bid complied with this requirement, it is not prejudiced by its waiver. Rather, to the extent any prejudice could be suffered by anyone, it is the State which does not have the benefit of having the Dupre proposal on both hard copy and in an electronic format.

March 27, 2008
Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

> (6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 66.1 of the 2007 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars ($250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2007 S.C. Act No. 117, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).