

State of South Carolina)	Before the Chief Procurement Officer
)	
County of Richland)	Decision
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In Re: Protests of OfficeMax, Staples Technology Solutions and US Ink and Toner, Inc.)	Case 2010-216
)	
Solicitation No. 5400001431, Statewide Term Contract for Hewlett Packard Printer Toner and Ink Cartridges)	Posted: March 1, 2010
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The South Carolina Consolidated Procurement Code (the Code) grants the right to protest to “any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract.” S.C. Code Ann. § 11-35-4210(1)(b). OfficeMax, Staples Technology Solutions (Staples) and US Ink and Toner, Inc. (US Ink & Toner) filed protests of the Information Technology Management Office’s (ITMO) intent to award a statewide term contract for toner and ink cartridges for Hewlett Packard (HP) printers to Laserprint Managedprint, Inc. (Laserprint). The Chief Procurement Officer (CPO) held hearings on the protests on February 16-17, 2010. Present at the hearings were representatives of Laserprint, OfficeMax, Staples, US Ink & Toner, and ITMO.

Background

Invitation for Bids (IFB) Issued	12/14/2009	
Amendment 1 Issued	12/23/2009	
Bids Opened	01/08/2010	10:00 AM
Intent to Award Issued	01/14/2010	
First Protest Received	01/21/2010	
Stay of Award Issued	01/25/2010	

OfficeMax's protest dated January 21, 2010, Staples and US Ink & Toners' protests dated January 22, 2010, and US Ink & Toner's timely amended protest dated January 29, 2010, are all incorporated by reference.

Protest of OfficeMax Discussion

On January 21, 2010, OfficeMax submitted a letter protesting the intent to award. Laserprint moved to dismiss OfficeMax's protest for lack of standing because it did not submit a bid.

Pursuant to Section 11-35-4210(1)(b) of the Code, only an *actual* bidder has standing to protest.¹ The South Carolina Procurement Review Panel (Panel) has defined a "bidder" as a vendor who submits a bid in response to an Invitation for Bids. In Re: Protest of Smith & Jones Distributing Co., Inc., Appeal by Smith & Jones Distributing Co., Inc., Case No. 1994-5. In that case, the Panel found that where a vendor failed to submit a bid they were not an "actual" bidder and therefore lacked standing to protest. Id. See also, In Re: Protest of Winyah Dispensary, Inc.; Appeal by Winyah Dispensary, Inc., Case No. 1994-18 (finding that only an "actual bidder" to the IFB has standing to protest the award or intended award); In Re: Protest of SC Assoc. of the Deaf, Case No. 2008-5 (finding a party who submitted a late bid has no standing to protest).

However, OfficeMax does not dispute that it did not submit a bid prior to the deadline published on the face of the solicitation, which was at 10:00 AM on January 8, 2010. Instead OfficeMax contends that its failure to submit a timely bid was due to problems with the online bidding system, the South Carolina Enterprise Information System (SCEIS), and the failure of Tammy Cash, the ITMO procurement manager, to direct John Hoag, the OfficeMax

¹ Section 11-35-4210(1)(b) reads "[a]ny actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

representative submitting the bid, to the proper resources to resolve the bidding system problems in a timely manner. Therefore, the threshold issue before the CPO is whether the State erred and if its alleged errors prevented OfficeMax from submitting a timely bid.

Specifically, OfficeMax argued that the SCEIS system returned an error message when Mr. Hoag attempted to submit the bid on the morning it was due. According to OfficeMax, the message was not descriptive enough for either Mr. Hoag or Ms. Cash, to interpret, and the deadline for submission had passed by the time an interpretation was obtained from the SCEIS Help Desk. However, Mr. Hoag was not present at the hearing before the CPO, and the OfficeMax representatives present acknowledged they did not witness this. Page three of the IFB, which was issued on December 14, 2009, notified vendors that they needed to be registered in order to submit a bid response on-line and provided the contact information for the Help Desk in the event of any problems. It further provided a website with specific vendor instructions. Further, Ms. Cash testified that she was unaware that Mr. Hoag had any problems until minutes before the deadline. According to Ms. Cash, she later learned that the error was the result of Mr. Hoag's failure to complete all mandatory fields prior to attempting to submit the bid. Ms. Cash also submitted documentation from the SCEIS Help Desk indicating that there were no technical problems with the system which would have prevented OfficeMax from submitting its bid in a timely manner. There is no evidence that any other bidders encountered problems with the system that morning.

OfficeMax provided only hearsay testimony and no evidence as to the events surrounding its failed attempt to submit its bid. Based on the failure of OfficeMax to provide proof of any extenuating circumstances with the online system or any error by the State, the CPO is unable to provide Office Max with any relief. In addition, OfficeMax was clearly not an actual bidder and

therefore lacks standing to protest this award. Accordingly, the protest of OfficeMax is dismissed.

Protests of Staples and US Ink and Toner Discussion

First, both Staples and US Ink & Toner claimed that the State should not have applied equal weight to each line item when determining the bidders' price and instead the State should have appropriately weighted each line item based on actual usage as determined by historical purchasing data. According to Staples, the solicitation was unclear on how the line items would be weighted. US Ink & Toner further suggested that the IFB should have used two categories rather than four.² Laserprint moved to dismiss these issues as untimely because they protested the specifications.

The Code provides rights to prospective bidders who are aggrieved by the solicitation's requirements stating:

A prospective bidder...who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation For Bids...or any amendment to it, if the amendment is at issue. An Invitation for Bids..., not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this code. S.C. Code Ann. § 11-35-4210(1)(A).

Regarding a protest of award, the Code reads,

Any actual bidder...who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a

² There was actually a fifth line item, which was for recycling, but it is not relevant to this allegation.

protest of the award or intended award of a contract. S.C. Code
Ann. § 11-35-4210(1)(B) [Emphasis added]

Therefore, a matter that could have been raised as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract. The IFB was issued on December 14, 2009, and the lack of different weightings for each line item and the number of categories were apparent in the original solicitation. Staples and US Ink & Toner could have timely protested these solicitation requirements within 15 days of the issue date but failed to do so.³ The first protest letter was filed on January 21, 2010, which was well beyond the time required by the Code. Therefore, the motion to dismiss these issues as untimely is granted.

US Ink & Toner also protested the process used to determine the winning bid stating “[t]he bid should be awarded using only the discount percentage numbers.” US Ink & Toner further explained,

The bid specifically called for a Discount (%) and by Amendment 1 the discount percentage was from HP’s List Price dated August 9, 2009, The bid did not call for individual item pricing. It only called for a discount percentage. Therefore, the award should have been made on the discount percentages. However, the State appears to have converted these percentages to dollars and then made the award based on those dollar calculations... This is not in accordance with the bid conditions.

In reviewing the evaluation process used to determine the award of this contract, the CPO found the following:

- 1) The solicitation was issued to establish a one-year state term contract with four one-year options to renew, which resulted in a total potential term of five years;
- 2) The solicitation required that the price be in the form of a single percentage discount applied to the latest HP Manufacturer’s Price List for HP Printer Supplies (Solicitation, Page 16);
- 3) The solicitation also stated that award would be made to the lowest responsible and responsive bidder (Solicitation, Page 21) and the award would be made to one Offeror (Solicitation, Page 21);

³ The Amendment on December 22, 2009 did not address these issues. Even if it had been relevant, this protest would have been untimely regardless.

- 4) The bidding schedule required bidders to submit a percentage discount for each of five line items (Solicitation, Pages 31 thru 37); and
- 5) Although the solicitation is silent as to how the five percentages would be applied to determine the lowest bid, all five line items were awarded to Laserprint.

Section 11-35-1520(6) of the Code mandates:

The invitation for bids must set forth the evaluation criteria to be used. Criteria must not be used in bid evaluation that are not in the invitation for bids. Bids must be evaluated based on the requirements in the invitation for bids and in accordance with the regulations of the board.

The Panel has noted that only the evaluation criteria set forth in the IFB may be used in the evaluation of the bid. In Re: Protest by General Sales Company, Case No. 1983-5; In re: Protest of Miller Tire Service, Case No. 1984-6; In Re: Protest of Davis-Garvin Agency, Inc., Case No. 1988-9.

By way of background, the CPO first notes that line item five was listed as: Optional: HP Ink/Toner Recycling (Solicitation, Page 36). The following language is found in the bidding schedule for line item five indicating that the award would be based on a subjective basis rather than the percentage discount supplied by the bidder.

Tendering Text: Optional Hewlett Packard Cartridge Recycling Note that this lot will be evaluated as an option to this contract and if the value added is in the State of South Carolina's best interest it may be added to this contract. Please describe in detail how your firm will handle empty ink and toner cartridges. The State realizes that some types of cartridges are more valuable than others due to the market demands for specific types of cartridges. Provide a detailed response on each type of cartridge (Part # and description) and the cost that the State will be paid for each or whether a cartridge can be recycled or not. Other ~Value Added Services~ Please describe in detail any other value added services that your company offers that may enhance the value of this contract for both the State and contract Vendor. These services will strictly be an option for the State to participate in or not.

Despite the requirement that only criteria specified in the IFB may be used, the procurement manager, in order to develop a formula to determine the low bid, multiplied an

annual value of \$51,523.82, instead of the one-year value of \$50,000 stated in Amendment One, by three years rather than the five year total potential term stated in the solicitation. Further, since the bidding schedule indicated line item 5 was optional, the procurement manager then divided the three year total of \$154,571.46 by 4 to get a potential value of \$38,642.87 for each of the 4 remaining line items. Subsequently, the procurement manager applied the discount bid by each bidder for each of the first four line items to the \$38,642.87, adjusted each for resident and US end-product preferences, and added together to arrive at that offeror's bid price.

This is an Invitation for Bids which must be awarded to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation for bids.⁴ There is absolutely no indication in the solicitation that the procurement manager would evaluate this contract over a three year potential term when the solicitation clearly indicates that the total potential term is five years. This resulted in a 40% reduction in the price evaluated in determining the low bid. While strictly speaking, the use of an annual contract value of \$51,523.82 instead of the \$50,000 published in the solicitation is negligible, the magnitude and effect on the evaluation will not be ignored. The CPO finds that bids were evaluated using criteria not stated in the solicitation and therefore the intended award of the contract violates the Code.

Further, the Intent to Award indicates that Laserprint was awarded all line items including line item five, but it does not reflect any discount or pricing information for line item five. Even if line item five was awarded in accordance with the evaluation criteria listed in the solicitation, it was awarded based on subjective criteria, which is also in contradiction to the requirements of the Code.

⁴ Section 11-35-1520(10) and Regulation 19-445.2065(A)

Moreover, the State grossly underestimated the value of this contract when it advised bidders that it was worth \$50,000 per year instead of the \$5,000,000 per year it was really worth.⁵ One would expect that bids based on a total potential value of \$250,000 (\$50,000 x 5 years) would be significantly different than bids based on a potential value of \$25 million (\$5 million x 5 years). The CPO further notes that the Intent to Award inexplicably establishes the total potential value at \$750,000, and not the \$250,000 published in the solicitation.

Prior to award of a contract, if the CPO determines that a solicitation or proposed award of a contract is in violation of the law, then the solicitation or proposed award may be canceled, revised to comply with the law and rebid, or awarded in a manner that complies with the Code. S.C. Code Ann. § 11-35-4310(1) and (2); See also, In Re: Protest of Business Systems of SC Inc., Appeal by American Specialty Products, Inc., Case No. 2002-3.

Determination

Based on the violations above, the intended award to Laserprint is cancelled, and the State is directed to re-solicit its requirements for HP Printer Toner and Ink Cartridges in accordance with the Code and the Regulations.⁶

⁵ In responding to a question about the total amount spent per year under the prior contract, Amendment One indicated that the amount for one year was about \$50,000. However, at the hearing, Ms. Cash acknowledged that she made a mistake when she provided this figure because it should have been \$5,000,000 per year instead.

⁶ Staples' and US Ink & Toner's protest letter also raised an allegation that the award to Laserprint was based on an improper claim of the US End Product Preference. At the hearing before the CPO, Laserprint acknowledged its claim of the US End Product preference was inappropriate stating that while a few HP inks and toners are manufactured in the United States the vast majority, approximately 95%, are manufactured outside the United States. Based on the CPO's decision above regarding the evaluation process, it is unnecessary to rule on this allegation and determine if Laserprint's claim of the preference was harmless error. The CPO also makes no findings regarding Laserprint's intent in this regard.

As an aside, the CPO notes that it became apparent during the hearing that the option to select preferences should not have been included in the solicitation at all. According to Section 11-35-1524(E)(2) of the Code, the preferences

For the Information Technology Management Office



Michael B. Spicer
Chief Procurement Officer

do not apply to solicitations where a single award has a total potential value is in excess of \$500,000. Here the total potential value is approximately \$25 million, which is well beyond the threshold.

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 83.1 of the 2008 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." 2008 S.C. Act No. 310, Part IB, § 83.1. 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).