

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE: Protests of Office Max, Staples)	
Technology Solutions, and U.S. Ink and)	Case No. 2010-3
Toner, Inc.)	
)	
Appeal of Laserprint Managedprint, Inc.)	
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This matter came before the South Carolina Procurement Review Panel (the Panel) for a hearing on April 28, 2010. The Panel heard the appeal by Laserprint Managedprint, Inc. (Laserprint), of the March 1, 2010, decision of the Chief Procurement Officer for the Information Technology Management Office (the CPO for ITMO). The CPO's decision granted the protests of U.S. Ink and Toner, Inc. (U.S. Ink), and Staples Technology Solutions (Staples).¹ The CPO canceled the intent to award to Laserprint and ordered the State to resolicit the contract. Laserprint sought further administrative review before the Panel.

In the hearing before the Panel, John E. Schmidt, III, Esquire, represented Laserprint. Michael H. Montgomery, Esquire, represented U.S. Ink. Keith C. McCook, Esquire, and Molly Crum, Esquire, represented the CPO.

Findings of Fact

With this solicitation, ITMO sought to establish a statewide source or sources of supply for the purchase of Hewlett Packard Printer Toner/Ink. The solicitation asked bidders to provide percentage discounts for the following four items: HP Laser Jet Printer Ink Cartridges/Toner; HP Ink Jet Printer Ink Cartridges/Toner; HP All in one Multifunction Toner/Ink; and HP Photo

¹ The Panel notified the original protestants, OfficeMax, Staples, and U.S. Ink, of the April 28, 2010, hearing. OfficeMax and Staples chose not to participate in the Panel hearing. At the beginning of the Panel hearing, the parties agreed that the protests of OfficeMax and Staples would not be the subject of discussion during the hearing.

Printer Ink Cartridges/Toner.² The IFB also contained an “optional” fifth item asking bidders to explain how they would handle empty ink and toner cartridges and whether recycling them would add value to the contract. The bidding schedule also allowed bidders to claim various preferences for each item, including preferences for resident vendor and for U.S. end-product. The initial contract term was for one year, with the option for four one-year renewals. ITMO estimated the potential one-year value of the contract to be \$50,000.00. However, the IFB also contained a disclaimer alerting bidders that the State did not guarantee the purchase of “any specified item or total amount.” Beyond stating that the award will be made to the one bidder who was the lowest responsible and responsive bidder, the IFB was silent as to how the discounts for the various items would be weighted. Furthermore, the IFB did not provide a method for converting the percentage discounts into dollar amounts which could be evaluated and compared to determine the lowest bid.

The solicitation was issued on December 14, 2009, and amended once on December 23, 2009, in response to vendor questions. No vendor filed a protest regarding the solicitation requirements or the amendment. ITMO issued the intent to award the contract to Laserprint on January 14, 2010. The intent to award notes that the resident vendor and the U.S. end-product preferences were applied in the award. The intent to award also lists the potential value of the contract as \$750,000 for a maximum contract period of five years. Three bidders, OfficeMax, Staples, and U.S. Ink, subsequently protested the intended award, and the intent to award was suspended on January 25, 2010.

Tammy Cash, the ITMO procurement officer who handled this solicitation, testified before the Panel. Ms. Cash testified that she initially intended to add up the percentage discounts

² Testimony before the Panel clarified that each “item” encompassed multiple ink and toner cartridges on the HP August 9, 2009, price list.

to determine the lowest bidder, but that when she opened the bids she realized that she had failed to take into consideration how to apply the preferences to the bids. She also discovered that she had relied on the wrong information when estimating the total potential value of the contract and that the true potential value of the contract was \$5,000,000.00 per year, not \$50,000.00 per year. Despite recognizing these potential problems with the solicitation, Ms. Cash thought that she could salvage the solicitation in a manner that would be fair to all the bidders. To that end, Ms. Cash devised a method for converting the percentage discounts to dollar amounts for the purposes of evaluation and application of the preferences. Ms. Cash first took the current contract's total volume of sales for one year (\$51,523.82) and multiplied it by three, which was the term of the current contract, for a total of \$154,571.46. Next, Ms. Cash divided the total by four, which represented the four line items³ contained in the bidding schedule, and set a price of \$38,642.86 for each of the four line items. Ms. Cash then discounted that amount by the percentage discounts bid by each vendor to arrive at each vendor's initial bid price on each line item. Finally, Ms. Cash applied the preferences claimed by the individual vendors to each line item price. Using this method, Ms. Cash determined Laserprint to be the low bidder; Laserprint claimed and received preferences for resident vendor (7%) and U.S. end-product (2%). Ms. Cash admitted in her testimony that this method was not set forth in the bid documents. She also admitted that her method was one of several possible ways to evaluate the bids.

Conclusions of Law

In its protest, which was drafted without counsel, U.S. Ink identified three grounds of protest. First, U.S. Ink asserted Laserprint should not have claimed the U.S. end-product preference because the majority of Hewlett Packard ink and toner cartridges are manufactured

³ Ms. Cash testified that she did not evaluate the fifth line item, which asked bidders to explain how they would handle recycling and whether recycling could benefit the State. Therefore, Ms. Cash did not include the fifth line item in her calculation to determine the lowest bidder.

outside of the United States. Second, U.S. Ink argued that it offered greater discount percentages than Laserprint and that its bid was lower than Laserprint's bid. Third, U.S. Ink questioned the method used by the State to convert the discount percentages bid to dollar amounts for purposes of evaluation and award. Specifically, U.S. Ink argued that the State's assumption that the spend amount would be equal for all four line items in the solicitation badly skewed the results because the actual usage would not be equal. U.S. Ink also submitted a protest addendum which reaffirmed its assertions that the U.S. end-product preference claim was invalid and that the award should have been made only on the discount percentages because the bid did not ask for individual item pricing. U.S. Ink also asked the following questions: "Does the State intend to award on Discount (%) as specified or use another method not specified in the bid? If another unspecified method[,] what is that method and what is the State's justification for such action?"

At the hearing before the Panel, Laserprint moved to dismiss U.S. Ink's second and third grounds of protest as untimely specification protests. Laserprint argued that the bid documents allowed for a claim of a U.S. end-product preference and that because the allowance of such claims was apparent from the bid, U.S. Ink should have raised its objection in a solicitation protest, not a protest of the intended award. Furthermore, Laserprint argued that the IFB's failure to include a method for converting the percentage discounts to dollar amounts was also apparent from the bid, which also should have been raised as a solicitation protest.

The relevant section of the Procurement Code provides that a bidder who is aggrieved by the intended award of a contract must protest within ten days of the intended award "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." S.C. Code Ann. §11-35-4210(1)(b) (Supp. 2008). In this case, the Panel found that U.S. Ink could not have discovered

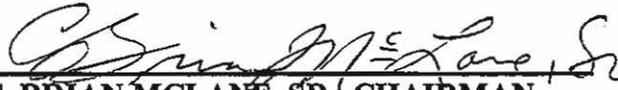
the true potential value of the contract, which affected the application of preferences, or the method the State used for evaluating the bids until the intent to award was posted. In light of these facts, the protest issues raised by U.S. Ink could not have been raised as solicitation protests because they were unknown at that time. Therefore, the Panel found these protest issues to be timely protests of the intended award and denied Laserprint's motions to dismiss.

The primary issue in this case concerns U.S. Ink's assertion that the method used to convert the discount percentages to dollar amounts was flawed, which raises an issue as to how the bids were evaluated. Under the Procurement Code, awards must be based solely on the evaluation criteria contained in the IFB. S.C. Code Ann. § 11-35-1520(6) (Supp. 2008). In this case, Ms. Cash evaluated the bids using a method she devised after the opening of the bids – a method which was not explained in the IFB itself. Clearly, the State's evaluation was based on criteria not included in the IFB and therefore violated the Procurement Code. Because the evaluation and resulting intent to award violated the Procurement Code, the CPO acted appropriately when he ordered the solicitation rebid. S.C. Code Ann. § 11-35-4310(2) (Supp. 2008) (A CPO may order a solicitation rebid if he finds that a solicitation is in violation of the law.); *see also In re: Protest of Today's Business Systems*, Panel Case No. 1994-2 (April 15, 1994) (“If problems in the solicitation process exist, then the remedy is not to award the contract to one offeror or another, but to address the problems with the solicitation, and resolicit[.]”)

Therefore, for the reasons stated above, the Panel grants U.S. Ink's protest and upholds the CPO's order directing the solicitation to be rebid.⁴

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 
C. BRIAN MCLANE, SR., CHAIRMAN

This 12 day of May, 2010.

Columbia, South Carolina

⁴ Because the Panel has upheld the CPO's order to rebid, it need not address the issue of the U.S. end-product preference under S.C. Code Ann. § 11-35-1524 (2009 Act 72, § 2, effective September 7, 2009). However, the Panel does note that the CPO concluded during his hearing that preferences should not have been applied in this solicitation because the total potential value of the contract is \$25 million.