

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE: Appeal by Qmatic, Inc.	)	
	)	Case No. 2012-3
	)	
BVB No. 5400003397	)	
Statewide Customer Queuing System	)	
for the South Carolina Department of	)	
Health and Environmental Control	)	
	)	

---

This case came before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for further administrative review under sections 11-35-4210(6) and 11-35-4410(1)(a) of the Consolidated Procurement Code (the Procurement Code). Qmatic, Inc. (Qmatic) appealed the January 30, 2012, decision of the Chief Procurement Officer (the CPO) for the Information Technology Management Office (ITMO) granting two issues of protest and ordering re-solicitation. On June 8, 2012, the CPO moved for dismissal or, alternatively, summary judgment. All of the other parties were afforded an opportunity to file written responses to the CPO's motion. Thereafter, with the consent of the parties, the Panel heard argument on the CPO's motion by telephone conference call on June 15, 2012. M. Michael Egan, Esquire; Derrick L. Bingham, Esquire; and John E. Cuttino, Esquire, represented Qmatic. Rivers S. Stilwell, Esquire, represented ACF Technologies, Inc. (ACF). John Harleston, Esquire; and Julie F. McIntyre, Esquire, represented the South Carolina Department of Health and Environmental Control (DHEC). W. Dixon Robertson, III, Esquire; and Molly R. Crum, Esquire, represented the CPO.

## **I. Findings of Fact**

### **A. Factual Background for the Solicitation and Protest**

ITMO issued this best value bid (BVB) solicitation on behalf of the South Carolina Department of Health and Environmental Control (DHEC) on October 13, 2011. The BVB sought bids for a statewide, web-based queuing system for DHEC “to assist with [DHEC’s] client management services.” The BVB established a question deadline of October 24, 2011, and a bid deadline of November 15, 2011. Amendment 1, which answered vendor questions but did not change the bid deadline, was issued on November 1, 2011. Two vendors, ACF and Qmatic, submitted bids, and on December 23, 2011, ITMO posted an intent to award the contract to ACF. The intended award was suspended on December 30, 2011, after Qmatic filed a protest.

In its initial protest letter, filed on December 29, 2011, Qmatic sought award of the contract and raised questions regarding how the bids were evaluated and how the evaluation factors stated in the BVB were applied. In particular, Qmatic expressed concern that DHEC had not understood the pricing in its bid for software and maintenance alone. This protest letter also generally asserted that Qmatic’s proposal was superior to ACF’s proposal. On January 6, 2012, Qmatic formally amended its original protest as allowed by the Procurement Code. In its amended protest letter, Qmatic asserted that ACF’s proposal was not responsive to the BVB in several particulars: (1) ACF did not identify a subcontractor who would be performing 10% or more of the work specified in the solicitation; (2) ACF did not include a specific proposal for non-proprietary kiosks with ticket printers, as required by the BVB; and (3) ACF did not respond to the BVB on a point-by-point basis. Qmatic’s amended protest letter again questioned how the evaluation factors were applied and suggested re-solicitation as an alternate remedy based on the Panel’s decision in *In re: Protests of Office Max, et al.*, Panel Case No. 2010-3 (May 12, 2010).

The CPO granted Qmatic's protest with regard to two of the specifications required by the BVB. First, the CPO found that AFC had failed to identify in its bid the non-proprietary hardware it proposed to use for the kiosks and ticket printers. Second, the CPO found that ACF had failed to include pricing for the non-proprietary televisions (TVs) it proposed to use in its solution. The CPO found that both of these omissions rendered ACF's bid non-responsive. Moreover, the CPO found that ITMO acted improperly by asking Qmatic to clarify its bid price by resubmitting its bid sheets without the price of the TVs; this clarification was improper because ITMO did not comply with the governing statute regarding clarification.<sup>1</sup> Because Qmatic's clarification was not properly documented and because the requested clarification amounted to the State attempting to make ACF responsive, the CPO found that Qmatic's revised price proposal was equally non-responsive. The CPO ordered the solicitation re-bid.

#### **B. Additional Findings**

In addition to the above, the Panel notes that Qmatic has conceded that it is only appealing the remedy ordered by the CPO. Furthermore, ACF has acknowledged that it chose not to appeal the CPO's findings that its bid was non-responsive for failing to identify non-proprietary hardware for the kiosks and ticket printers and for failing to include pricing for non-proprietary TVs. In addition, neither party has appealed from the CPO's findings that certain ambiguities existed within the solicitation itself: (1) the State's answer to a question about the functions and features of the kiosks with ticket printers merely identified the manufacturer and model of the existing equipment and did not explain whether the State required identical or equivalent equipment; (2) despite requiring a fixed price for the non-proprietary TVs and kiosks,

---

<sup>1</sup> Section 11-35-1520(8) of the Procurement Code provides: "Clarification of a bidder's bid must be documented in writing by the procurement officer and must be included with the bid. Documentation concerning the clarification must be subject to disclosure upon request as required by Section 11-35-410." S.C. Code Ann. §11-35-1520(8) (2011). This provision is made applicable to BVBs by section 11-35-1528(1). S.C. Code Ann. § 11-35-1528(1) (2011).

paragraph 3.10 of the BVB indicated that the number of TVs and kiosks the State would actually purchase was variable; and (3) the BVB indicated that TVs of different sizes would be required at each location, but Attachment A, which bidders were required to complete and include with their bids, requested bidders provide pricing for all TVs for each location and did not allow for a breakdown by size. Finally, neither party has challenged the CPO's finding that ITMO failed to properly document the clarification it requested from Qmatic. The Panel finds that these factual findings by the CPO are binding on the parties because they have not been appealed. *See In re: Protest of Kodak and Xerox Corp.*, Panel Case No. 1988-15 (December 15, 1988) (where the only remaining issue before the Panel was the remedy awarded, the Panel accepted the findings and conclusions set forth in the CPO's order).

#### **Conclusions of Law**

First, the CPO has moved that the Panel dismiss Qmatic's appeal for lack of standing, arguing that Qmatic was not adversely affected by the CPO's decision ordering re-solicitation because re-solicitation was a remedy sought by Qmatic in its amended protest letter. The Panel agrees that section 11-35-4210(6) of the Procurement Code does require a party to be adversely affected by a CPO's decision in order to request further review before the Panel. However, the Panel disagrees that Qmatic has not been adversely affected by the CPO's decision because both its original and amended protest letters also sought award of the contract. Therefore, the Panel denies the CPO's motion to dismiss for lack of standing. *See In re: Protest of Today's Business Systems*, Panel Case No. 1994-2 (April 15, 1994) (wherein the Panel considered an appeal to determine whether the remedy ordered by the CPO was proper based on the issues raised by protest).

Next, the CPO has moved that the Panel grant summary judgment and deny Qmatic's appeal on the grounds that the CPO's order granted Qmatic all the relief to which it is entitled because re-solicitation is the appropriate remedy under the circumstances presented here. The Panel has considered and ruled on summary judgment motions in the past. *In re: Appeal of Triad Mechanical Contractors*, Case No. 2006-7 (October 19, 2006). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). In determining whether any genuine issues of material fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Osbourne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). Summary judgment should be granted "when plain, palpable and undisputed facts exist on which reasonable minds cannot differ." *Bayle v. South Carolina Dep't of Transportation*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001).

In its appeal letter and in argument before the Panel, Qmatic has asserted that it is entitled to award of the contract because of DHEC's misconduct in favoring ACF during the solicitation process and because only two bidders submitted proposals in response to the BVB. However, nothing in Qmatic's protest letters raises any allegation of wrongdoing on the part of DHEC, nor does the CPO's order make any finding regarding DHEC's conduct. Indeed, ITMO conducted the solicitation on DHEC's behalf, and it was ITMO, not DHEC, that requested clarification from Qmatic. Therefore, the Panel finds that any allegations regarding DHEC's conduct are not properly before it. *See In re: Protests of Logisticare Solutions, LLC, and Medical Transportation Management, Inc.*, Panel Cases No. 2011-1 and 2011-2 (May 11, 2011) ("[T]he issues to be decided by the CPO and the Panel are established by the protest letter, and . . . issues

raised for the first time in an appeal letter are untimely under the time constraints of S.C. Code Ann. section 11-35-4210.”).

Viewing the evidence before it in the light most favorable to Qmatic, the Panel finds the following facts are relevant to the remedy issue before it: (1) the BVB itself and answers given in Amendment 1 created ambiguities with regard to the State’s actual and stated requirements; (2) ACF’s bid was non-responsive; (3) ITMO attempted to salvage ACF’s bid by asking Qmatic to clarify its bid by resubmitting its bid sheets after removing pricing for the TVs; (4) ITMO failed to document this request for clarification from Qmatic as required by the Procurement Code and its regulations; and (5) evaluating ACF’s non-responsive bid and Qmatic’s clarified bid resulted in evaluations being conducted on criteria not set forth in the solicitation. Taken as a whole, the Panel finds that these circumstances affected the fairness of the entire solicitation process and that the proper remedy in this case is re-solicitation. *See* S.C. Code § 11-35-4310 (2011) (If an intended award has been issued in violation of the law, the CPO is authorized to cancel the intended award and order a re-bid.); *see also, In re: Today’s Business Systems*, Panel Case No. 1994-2 (April 15, 1994) (“If a fairness or competitive problem exists with a specific procurement process or solicitation . . . the correct remedy is to resolicit[] the procurement with the appropriate changes.”); *In re: Protests of Office Max, et al.*, Panel Case No. 2010-3 (May 12, 2010) (The CPO correctly ordered re-solicitation when the evaluations were based on criteria not stated in the solicitation). Therefore, for the reasons stated above, the Panel grants the CPO’s motion for summary judgment and upholds his decision ordering that DHEC’s statewide queuing system be re-solicited.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

**BY:** /s/ C. Brian McLane, Sr.

**C. BRIAN MCLANE, SR., CHAIRMAN**

This 28<sup>th</sup> day of June, 2012.

Columbia, South Carolina