STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE:	)	
Appeal by Landscaping & Mower, Inc.	)	Case No. 2013-9
	)	
	)	
IFB No. 5400005983 – Rest Areas &	)	
Welcome Centers Maintenance for the	)	
SC Department of Transportation	)	
	)	

This matter 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 of the Consolidated Procurement Code (the Procurement Code). Landscaping & Mower, Inc., (L&M) appealed the September 6, 2013, decision of the Chief Procurement Officer for Supplies and Services (the CPO) denying its protest of two awards made by the South Carolina Department of Transportation (SCDOT). The Panel convened for a hearing of L&M's appeal on November 12, 2013. In the hearing before the Panel, W. Keith Martens, Esquire, represented L&M. Glennith C. Johnson, Esquire, represented SCDOT, and William Dixon Robertson, III, Esquire, represented the CPO.

Findings of Fact

At the opening of the Panel's hearing, the parties stipulated that the contents of the Panel's initial record, those documents transmitted to the Panel by the CPO, could be automatically entered into evidence. Thus, the Panel makes the following findings of fact based upon the documents contained in the record.

1. SCDOT issued this invitation for bids (IFB) on May 2, 2013, seeking grounds maintenance services at designated Welcome Centers and Rest Areas. Record at PRP31; PRP37.

2. The IFB provided that bids were to be submitted online and instructed vendors to register with the South Carolina Enterprise Information System (SCEIS) in order to respond to the IFB. Record at PRP33.

3. The IFB provided a phone number for the Division of State Information Technology (DSIT) help desk in case vendors had difficulties registering with SCEIS. *Id.* In addition, the IFB contained a hyperlink to an online document containing further vendor instructions. *Id.*

4. The IFB advised vendors that their online response would be their "official response" and instructed them to attach the additional requested documents to their online bid. Record at PRP33. A completed bidding schedule was one of the documents vendors were asked to attach to their online bids. Record at PRP46, Information for Offerors to Submit.

5. The IFB provided that vendor questions regarding the solicitation should be submitted by May 13, 2013. Record at PRP31. The IFB also required that such questions be submitted in writing to the procurement officer and warned that "[o]ral explanations will not be binding." Record at PRP41.

6. The IFB advised bidders that they must affirmatively claim any applicable resident vendor preferences by line item and that they should review the statute establishing such preferences (S.C. Code Ann. § 11-35-1524) prior to requesting them. Record at PRP32; PRP45.

7. The bidding schedule for this IFB separated the designated welcome and/or rest areas into seven line items. Record at PRP59 – PRP65. Each line item on the bidding schedule provides three boxes corresponding to the three available preferences which could be claimed by a bidder. *Id.* The bidder was to complete the boxes by checking "Yes" or "No" to reflect whether or not the bidder was claiming the preference. *Id.*

8. L&M submitted an online bid offering bids for five of the seven line items. Record at PRP133 – PRP167. SCDOT stamped this bid as received on the bid opening date, May 31, 2013. Record at PRP133.

9. The online bid form also contained options for claiming resident vendor preferences, which required bidders to respond with "Y" for "Yes" to claim the preference or "N" for "No" to not claim the preference. Record at PRP134 – PRP138. L&M responded "N" for every preference option on the online form. *Id.*

10. L&M also uploaded and attached a copy of the bidding schedule bearing Mr. Chris Hinson's[1] handwriting to its online bid. Record at PRP141 – PRP147. Consistent with the online form, the uploaded bidding schedule is marked with a check mark by "No" for each preference available on the five line items for which L&M submitted bids. Record at PRP141 – PRP145.[2]

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[1] Mr. Hinson is the owner of L&M.

[2] Counsel for L&M also admitted at the Panel's hearing that L&M's online bid did not claim any preferences.

11. Mr. Hinson attended the bid opening on May 31, 2013. Record at PRP169. He brought with him a hard copy of his bid to "submit as a back up if needed." Record at PRP12.

12. The envelope containing the hard copy of L&M's bid was stamped by SCDOT at 9:58 a.m. on May 31, 2013. Record at PRP179. However, as Mr. Hinson admitted in his protest letter, SCDOT did not retain possession of the hard copy after stamping it.[3] Record at PRP12. The bidding schedule included with L&M's hard copy did claim all of the available resident vendor preferences for all line items, including the two that L&M did not bid on. Record at PRP200 – PRP206.[4]

13. SCDOT opened and evaluated the online bids received on May 31, 2013. Record at PRP168. Prior to applying claimed preferences, L&M was the apparent low bidder on Line Items 2, 3, 4, and 5. Record at PRP170.

14. Carlton Landscaping, Ltd. (Carlton), claimed the resident vendor preference for Item 3. Record at PRP170. When that preference was applied, a tie bid resulted between Carlton and L&M. Record at PRP171. The tie was resolved in Carlton's favor by a coin toss in accordance with S.C. Code Ann. § 11-35-1520(9). Record at PRP170 – PRP171.

15. ABC Landscaping, Inc. (ABC), claimed the resident vendor preference for Line Item 5. Record at PRP170. When that preference was applied, ABC was the low bidder for Line Item 5. Record at PRP170; PRP172.

16. SCDOT posted a notice of an intent to award Line Item 3 to Carlton on July 19, 2013. Record at PRP174.

17. SCDOT posted a notice of an intent to award Line Item 5 to ABC on July 19, 2013. Record at PRP175.

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[3] It is immaterial whether Mr. Hinson was told by SCDOT staff to keep the hard copy or whether he kept it of his own accord. Either way the effect is the same: SCDOT did not take possession of the bid and it was not kept safe and unopened as required by section 11-35-1520(4) of the Procurement Code and its ensuing regulation. S.C. Code Ann. § 11-35-1520(4) (2011); S.C. Code of State Regulations, Regulation 19-445.2045(A) (2011). The State clearly cannot evaluate a bid not in its possession at the time of opening. *Id.* Moreover, the State is also precluded from using such a bid to correct the "mistake" alleged by Mr. Hinson, i.e., his failure to claim the resident vendor preferences in his online bid, by virtue of section 11-35-1520(7) of the Procurement Code and Regulation 19-445.2085. *See* S.C. Code Ann. § 11-35-1520(7) (2011) ("After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted. After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations promulgated pursuant to it."); S.C. Code of State Regulations, Regulation 19-445.2085(B) (2011) ("To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such a bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition."). Nonetheless, like the CPO, the Panel cautions agencies against stamping a bid received, but not keeping it.

[4] For the purposes of its decision, the Panel accepts that the "hard copy" Mr. Hinson presented to the CPO at his August 27, 2013, hearing is indeed the hard copy he had with him at the bid opening on May 31st.

18. L&M protested the intended awards of Line Items 3 and 5 by a letter dated July 23, 2013. Record at PRP24 – PRP26. These intended awards were suspended on July 29, 2013. Record at PRP177 – PRP178.

In addition to the findings listed above, the Panel accepts as true the following assertions regarding Mr. Hinson's experience with this procurement from his July 23rd protest letter:

1. Mr. Hinson has been a vendor with SCDOT for five years and has always submitted paper bids in the past. Record at PRP12.

2. This year he was told that the bid would be conducted online, but that bidders would be allowed to submit a hard copy if their online bid did not go through. *Id.*

3. SCDOT's procurement officer, Andy Bowman, told bidders that she would be available to assist them with their bids up until 10:00 a.m. on bid day. *Id.*

4. Mr. Hinson called the SCEIS help desk when he was ready to submit his bid and spoke with a lady who "was trying to help [him] out of a book." *Id.*

5. Mr. Hinson's online bid and uploaded documents accidentally marked the "No" box for the resident vendor preferences. *Id.*

6. Mr. Hinson's online bid was never corrected to claim the resident vendor preferences, although he did call the help desk and was told he needed to call back. *Id.*

7. On bid day, Mr. Hinson took the hard copy of his bid, which did claim the resident vendor preferences, to the opening. *Id.* Mrs. Suber of SCDOT stamped his bid, but told him "to just hold onto it at that time." *Id.*

8. Mr. Hinson tried repeatedly to contact Mrs. Bowman prior to bid day and left messages for her asking for help, but he did not know at the time that she was sick and out of the office. Record at PRP13.

The CPO's Motion to Dismiss L&M's Appeal

Although the CPO's decision considers the application of the resident vendor preferences and the question of whether a hard copy of a bid which was not retained by the State could be used to correct a bid mistake, L&M's appeal letter to the Panel states "My complete reason for the appeal is not being able to get in touch with Andy [Bowman] or not having accurate help or instructions." Record at PRP16. At the beginning of the Panel's hearing, the CPO moved for

dismissal[5] of L&M's appeal on the grounds that this reason does not state a basis for relief under the Procurement Code. In opposing the motion, L&M argued that L&M's paper bid was allowable under the terms of the IFB, which permitted multiple offers. Moreover, L&M argued that it was SCDOT's mistake not to keep the paper bid after it stamped the envelope and that Mr. Hinson was not obligated to tell SCDOT to keep the bid. For the reasons discussed below, the Panel grants the CPO's motion to dismiss the appeal.

The Panel notes that no provision of the Procurement Code requires the State to provide specific help or training to prospective bidders, let alone the availability of a particular procurement officer to answer verbal questions in the days leading up to bid opening. Moreover, the IFB itself requires vendor questions to be submitted in writing and warns that "[o]ral explanations or instructions will not be binding." L&M has not alleged any defect with the written question and answer process, nor has it alleged any deficiencies in the instructions in the IFB. Instead, its complaint seems to be directed at the quality of the help obtained from the DSIT help desk and the absence of Ms. Bowman prior to bid opening. While the Panel sympathizes with Mr. Hinson's frustrating experience in participating in an online procurement for the first time, the fact remains that he was indeed able to submit an online bid, which was evaluated with the other online submissions as specified by the IFB. However, there is simply no provision in the Procurement Code which would allow this Panel to overturn valid awards under these circumstances.

Therefore, for the reasons stated above, the Panel dismisses L&M's appeal for failure to state a claim under the Procurement Code.

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[5] L&M objected to the motion as being untimely in light of the Panel's procedural memorandum which "requests that the parties make motions with as much advance notice as possible before the date of the hearing." Panel's Procedural Memorandum at page 3, "Motions." The Panel finds that this statement indicates a preference, not an absolute requirement. Given the shortened timeframes for protests and appeals under the Procurement Code, the Panel has frequently entertained dispositive motions made on the day of the hearing.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY:
C. BRIAN MCLANE, SR., CHAIRMAN

This 21st day of November, 2013.

Columbia, South Carolina