

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE:)	
Appeal by Greenville Office Supply)	Case No. 2014-5
)	
)	
IFB No. 5400006696)	
Statewide Term Contract for Office)	
Supplies and Copy Paper)	
)	

This matter came before the South Carolina Procurement Review Panel (the Panel) for further administrative review pursuant to sections 11-35-4210(6) and 11-35-4410(1)(a) of the Consolidated Procurement Code (the Procurement Code). Greenville Office Supply (GOS) appealed the June 10, 2014, decision of the Chief Procurement Officer (the CPO) denying its protest of intended awards of statewide term contracts for office supplies and copy paper to Forms & Supply, Inc. (F&S). The Panel convened for a hearing of GOS's appeal on August 27, 2014. At the Panel hearing, Bruce W. Bannister, Esquire, represented GOS; and W. Dixon Robertson, III, Esquire, represented the CPO. M. Elizabeth Crum, Esquire, and Amber B. Carter, Esquire, represented Staples Contract and Commercial, Inc. Charles H. McDonald, Esquire, appeared on behalf of F&S, but did not participate in the hearing.

Findings of Fact

The Materials Management Office (MMO) conducted this invitation for bids (IFB) for the purpose of acquiring statewide term contracts for office supplies and copy paper. Record at PRP48. The IFB indicated that the State intended to award one contract for the entire state and one contract for each of three regions in the state, with a maximum of four contract awards. Record at PRP48. No bidder would receive both the statewide contract and a contract for a

region. *Id.* The IFB provided that award would be made “to the lowest responsible and responsive bidder(s)” and indicated that “unit prices will govern over extended prices unless otherwise stated.” Record at PRP69. The IFB also contained the following provision regarding responsiveness:

(c) Responsiveness. Any Offer which fails to conform to the material requirements of the Solicitation may be rejected as nonresponsive. Offers which impose conditions that modify material requirements of the Solicitation may be rejected. If a fixed price is required, an Offer will be rejected if the total possible cost to the State cannot be determined. Offerors will not be given an opportunity to correct any material nonconformity. Any deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer.

Record at PRP53.

The IFB was issued on September 26, 2013, and was amended nine times.¹ Record at PRP44 – PRP123. Bidders were asked to complete and submit two electronic spreadsheets with their bids. Record at PRP66. Attachment A was a spreadsheet with line items for office supplies, and Attachment B was a spreadsheet with line items for copy paper. Record at PRP83. Attachment A is relevant to the issues before the Panel, and the Panel notes that Attachment A was revised four times after the IFB was issued. *See* Record at PRP89 (Amendment 1, issued on October 10, 2013); Supplement to Record, Amendment 2 at page 1 (issued on October 15, 2013); PRP111 (Amendment 5, issued on November 20, 2013); and PRP117 (Amendment 7, issued on January 21, 2014). The Panel finds that the final version of Attachment A was issued with Amendment 7 and listed 123 line items. Supplement to Record, “Attachment A Revised 01/21/2014.” Although the original bid opening date was October 25, 2013, it was extended

¹ Prior to the start of the Panel’s hearing, the parties consented to supplement the record before the Panel by adding a copy of Amendment 2, which should appear between pages PRP98 and PRP99, and a copy of a document entitled “Attachment A Revised 01/21/2014,” which should appear between pages PRP117 and PRP118. As an aside, the Panel notes that the high number of amendments in this solicitation is a cause for concern. The Panel urges procurement personnel to make every effort to clarify the State’s requirements prior to issuing a solicitation and to consider cancelling and issuing a new solicitation if confusion could result from numerous amendments.

numerous times through amendments and was finally set at February 18, 2014, in Amendment 9. Record at PRP44; PRP89; PRP103; PRP108; PRP114; PRP117; PRP120; and PRP123.

The IFB contained the following provision regarding amendments:

AMENDMENTS TO SOLICITATION (JAN 2004)

(a) The Solicitation may be amended at any time prior to opening. All actual and prospective Offerors should monitor the following web site for the issuance of Amendments: www.procurement.sc.gov (b) Offerors shall acknowledge receipt of any amendment to this solicitation (1) by signing and returning the amendment, (2) by identifying the amendment number and date in the space provided for this purpose on Page Two, (3) by letter, or (4) by submitting a bid that indicates in some way that the bidder received the amendment. (c) If this solicitation is amended, then all terms and conditions which are not modified remain unchanged. [02-2A005-1]

Record at PRP49. This language was also quoted in all the amendments to this solicitation. Record at PRP89; Supplement to Record, Amendment 2 at page 1; PRP105; PRP108; PRP111; PRP114; PRP117; and PRP123. In addition, the amendment containing the final revision to Attachment A advised bidders: “When submitting your offer, use only the revised Attachment A referenced in this amendment for Office Supplies. Discard all previous editions of the referenced attachment.” Record at PRP117. As previously noted, this amendment was issued on January 21, 2014.

GOS submitted its bid on October 30, 2013. Record at PRP126. GOS utilized the original IFB cover pages, and acknowledged receipt of Amendments 1, 2, and 3 in the space provided on Page Two of the IFB. Record at PRP126 – 127. The Attachment A GOS submitted with its bid is entitled “Attachment A Revised 10/15/20113 [sic]” and contained 164 line items. Record at PRP177 – PRP182. GOS entered unit prices for every line item listed in this version of Attachment A. *Id.* In some instances, this version of Attachment A listed an identical product in more than one line item, at times with varying quantities. *Id.* For example, line items 26, 50,

73, and 108 describe a Cardinal one-inch, white view binder with a manufacturer item number of CRD90021. Record at PRP177 – PRP180. For this particular binder, GOS entered four different unit prices in its bid: 0.54 each for line item 26; 0.53 each for line item 50; 0.52 each for line item 73; and 0.58 each for line item 108. *Id.* Including this particular binder, there are seventeen products that are duplicated in the line items listed in the October 15th version of Attachment A. *See* Exhibit 2, received into evidence without objection during the Panel hearing and incorporated herein by reference. For these products duplicated over separate line items in the October 15th version of Attachment A, GOS entered different unit prices for each line item. *Id.* The Panel also finds that the January 21st version of Attachment A (the final version) collapsed the duplicated line items for these seventeen products into one line item each. *Id.*

Mr. Scott Hart, GOS's Vice President, testified at the Panel hearing that he was responsible for GOS's bid in response to this IFB. Although Mr. Hart admitted that GOS did not submit the final version of Attachment A, he testified that he had received and reviewed all of the amendments to the solicitation. Moreover, he conceded that GOS's bid only acknowledged Amendments 1, 2, and 3. Mr. Hart testified that he did not think that the amendments changed GOS's bid because the revisions to Attachment A only consolidated items and did not add items. Thus, GOS did not alter its bid or Attachment A after submitting it on October 30, 2013. Finally, Mr. Hart explained that it was not unusual for GOS or any other office supply vendor to submit different unit prices for identical products and that the price differences usually related to quantity.

Amendment 9 specified the bid opening date as February 18, 2014. Thereafter, on March 31, 2014, MMO's Procurement Manager, Theresa Watts, determined that GOS's bid was non-responsive and rejected it for failing to meet the requirements of Amendment 7. Record at

PRP17. Ms. Watts' determination specifically notes that GOS's bid did not return the correct Attachment A and failed to acknowledge Amendments 4 through 9.² *Id.*

On April 1, 2014, MMO posted a notice of intent to award the statewide term contract to F&S; no intended awards were posted for the regional contracts. Record at PRP187. The notice acknowledged that two bidders, GOS and Office Depot, submitted lower bids than F&S, but noted that their bids had been rejected as non-responsive. GOS protested the intended award to F&S on April 9, 2014. Record at PRP15 – PRP16. The CPO issued his determination denying GOS's protest on June 10, 2014.

Conclusions of Law

At the close of GOS's case before the Panel, the CPO moved for a directed verdict on the grounds that the undisputed facts establish that GOS submitted the incorrect Attachment A and that GOS bid different unit prices for products that were duplicated in the October 15th version of Attachment A but that were ultimately collapsed into one line item on the final version of Attachment A. As a result, the CPO argued it was impossible for the State to determine which prices GOS intended to bid or to compare GOS's bid, which listed 164 line items, with those of the other bidders listing only 123. Therefore, the CPO asserted that GOS's bid was non-responsive and that neither the Procurement Code nor Panel precedent would have permitted the procurement officer to seek clarification to cure the non-responsiveness of GOS's bid. The Panel agreed and granted the CPO's motion for the reasons discussed below.

MMO conducted this solicitation pursuant to the competitive sealed bidding provisions codified at section 11-35-1520 of the Procurement Code. Under this statute, an award or intended award is to be made "to the lowest responsive and responsible bidders whose bid meets

² Ms. Watts' determination also notes that GOS returned the incorrect Attachment B and bidder's schedule. GOS successfully challenged these findings before the CPO and, therefore, they are not at issue before the Panel.

the requirements set forth in the invitation for bids.” S.C. Code Ann. § 11-35-1520(10) (2011). A responsive bidder is “a person who has submitted a bid or offer which conforms in all material aspects to the [IFB].” S.C. Code § 11-35-1410(7). The Panel has previously held that the responsiveness of a sealed bid is determined at the time of bid opening solely from the four corners of the bid document and that the State cannot seek clarification after bid opening to cure questions of responsiveness. *In re: Protest of Two State Constr. Co.*, Panel Case No. 1996-2 (April 1, 1996); *see also* S.C. Code Ann. § 11-35-4210(7) (2011) (“After bid opening, changes in bid prices . . . *prejudicial to the interest of the State or fair competition* must not be permitted.) (emphasis added).

In the instant case, GOS’s bid offered different prices on products for which the State sought one unit price and there was no way for Ms. Watts to determine from the bid document itself which price GOS intended to control. Moreover, the Panel finds it would have been inherently prejudicial to fair competition for Ms. Watts to have contacted GOS or to have altered GOS’s bid by picking one price from the several offered. *See In re: Protest of Miller’s of Columbia, Inc.*, Panel Case No. 1989-3, (wherein the Panel noted that contacting a vendor after opening for the purposes of supplying missing information “would have created the potential for abuse, would have made [the vendor] responsive, would have been prejudicial to fair competition[,] and, was therefore forbidden by the Procurement Code.”) (emphasis in original); *In re: Protest of Industrial Sales Co., Inc.*, Panel Case No. 1993-11 (June 30, 1993) (“The State’s involvement in the creation of an offeror’s proposal is inherently prejudicial to other offerors.”); *In re: Protest of Otis Elevator Company*, Panel Case No. 2009-2 (September 10, 2009) (wherein the Panel found that it was prejudicial to fair competition for a procurement

officer to correct a bid in the absence of a mistake). Therefore, the Panel finds that GOS's bid was non-responsive as a matter of law and denies GOS's protest and appeal.³

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: /s/ C. Brian McLane, Sr. ^(dms)
C. BRIAN MCLANE, SR., CHAIRMAN

This 10th day of September, 2014.

Columbia, South Carolina

³ Having found GOS's bid to be non-responsive, the Panel need not address the other appeal issues raised in GOS's appeal letter.

officer to correct a bid in the absence of a mistake). Therefore, the Panel finds that GOS's bid was non-responsive as a matter of law and denies GOS's protest and appeal.³

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 
C. BRIAN MCLANE, SR., CHAIRMAN

This 10th day of September, 2014.

Columbia, South Carolina

³ Having found GOS's bid to be non-responsive, the Panel need not address the other appeal issues raised in GOS's appeal letter.