

State of South Carolina)	Before the Chief Procurement Officer
)	
County of Richland)	Decision
)	
In Re: Protest of Qmatic Corporation)	
)	Case 2012-208
)	
Protest of Intent to Award: Solicitation)	Posted: 01/30/2012
5400003397, Statewide Customer)	Mailed: 01/30/2012
Queuing System for the South Carolina)	
Department of Health and)	
Environmental Control)	

The South Carolina Consolidated Procurement Code (the Code) grants the right to protest to any actual bidder who is aggrieved in connection with the intended award of a contract. S.C. Code Ann. § 11-35-4210(1)(b). This solicitation, 5400003397, was issued by the Information Technology Management Office (ITMO) on behalf of the South Carolina Department of Health and Environmental Control (DHEC) for a contractor to furnish, deliver and support a Statewide Customer Queuing System.

Qmatic filed its initial protest letter of the intended award to ACF on December 29, 2011, and its amended protest letter on January 6, 2012. Both are attached and incorporated herein by reference. The Chief Procurement Officer for Information Technology (CPO) held a hearing of this matter on January 20, 2012. Present at the hearing were representatives from Qmatic Corporation (Qmatic), ACF Technologies, Inc. (ACF), DHEC and ITMO.

Findings of Fact

Best Value Bid Issued	October 13, 2011
Amendment One Issued	November 1, 2011
Bids Received	November 15, 2011
Intent to Award Issued	December 23, 2011
Protest Received	December 29, 2011
Award Suspended	December 30, 2011

Conclusions of Law

Allegation that ACF was non-responsive for failure to identify the non-proprietary hardware used for the kiosks and ticket printers.

Qmatic protests that ACF failed to identify, as required, the non-proprietary hardware that would be used for the kiosks and ticket printers.

Paragraph 3.2 requires:

... All hardware and software required for proposed system must be detailed in the bid submitted.

To which ACF responded:

The Business Proposal addresses all parameters as described above and is based on bundling device licensing with user licensing purchases. Please review the Business Proposal for additional information regarding costs, assumptions and high-level summary.

Paragraph 3.2.4.5 requires:

Non-proprietary hardware to include all TV LCDs, ticket printers, ticket printer paper, kiosks, media PCs (or equivalent), greeter PCs (or equivalent) and voice unit with bilingual software (English & Spanish)...

To which ACF responded:

ACF has no proprietary hardware or consumables requirements. Q-Flow supports both English and Spanish and is centrally administered.

Question 21 of Amendment 1 reads as follows:

Please describe in detail the function and features of the kiosk and ticket printers. ...

To which the State responded:

Answer: The one existing kiosk is a standard off the shelf kiosk (Olea Metropolis kiosk with a Dell Optiplex EX small form factor computer, 4GB RAM, 160GB HDD) with a 19" ELO touch screen and an integrated Zebra TTP2030 80mm thermal ticket printer. Further information about the kiosk is available at http://www.olea.com/DataSheets/metropolis_kioskdatasheet_2010.pdf . Initial kiosk screen provides buttons for each service type and, if necessary, a second screen in provided for sub-types.¹

Nowhere in its Technical Proposal did ACF indicate the make and model of the Kiosk it would provide.

In the Instructions to Offerors, --B. Special Instructions the State included a requirement for Descriptive Literature. [EX. 2, pp13]

Your offer must include manufacturer's latest literature showing complete product specifications.

¹ The request was to describe in detail the functions and features of the kiosks and ticket printers. Listing the existing equipment by manufacturer creates some ambiguity. Is this intended as a brand name or equal specification or is it intended to require only this equipment.

While it was not necessary to do so, ACF responded to these instructions with :
ACF ACKNOWLEDGED.

Nowhere in its Technical Proposal did ACF provide any manufacturer's technical specification sheets.

Paragraph 3.2 Specifications stated:

All hardware (kiosks, thermal ticket printers, TV's, VGA converters, etc.) in your proposal must be non-proprietary **and must be itemized in your cost proposal.** (emphasis added)

In its Business Proposal, ACF provided a spreadsheet listing all the locations to be installed with column headings for the pricing of particular components at each site. The only reference to the kiosk is one of the columns labeled:

ACF Kiosk with Pedestal @ \$4000 / unit (SC DHEC to provide LAN and Electrical)

In its Executive Summary, ACF stated that its system was already in production at DHEC offices in Columbia and Charleston. In response to question 21, the State identified the equipment currently in use at DHEC. However, there is nothing ACF's responses to this solicitation to indicate what kiosks ACF would provide or the technical capabilities of those kiosks. ACF was non-responsive to the requirement to identify the kiosks and ticket printers.

Allegation that ACF was non-responsive for failing to provide specifications on the kiosks.

Qmatic protests that ACF was non-responsive for failing to provide genuine specifications as to what will be provided for kiosks. The solicitation stated that "Your offer must include manufacturer's latest literature showing complete product specifications." ACF failed to include the manufacturer's product specifications.

The CPO finds ACF's failure to provide the manufacturer's literature is a minor informality under Section 11-35-1520(13)(g), which specifically identifies the failure of a bidder to furnish cut sheets or product literature as a minor informality. This issue of protest is denied.

Allegation that ACF failed to specify in the SLA financial penalties for untimely performance.

Qmatic protests that ACF failed to specify in the SLA financial penalties for untimely performance. ACF moved to dismiss this issue of protest as untimely since it did not appear in Qmatic's initial or amended letters of protest. The CPO granted this motion.

Allegation that ACF failed to identify and provide an implementation timeline.

Qmatic protests the ACF failed to identify an implementation timeline. ACF moved to dismiss this issue of protest as untimely since it did not appear in Qmatic's initial or amended letters of protest. The CPO granted this motion.

Allegation that ACF was non-responsive for failing to identify subcontractors.

Qmatic protests that ACF was non-responsive for failing to identify subcontractors who would be providing 10% or more of the work as required by the solicitation. Qmatic believes that the software proposed by ACF comes from a company called Qnomy, that the cost to ACF for that software would be more than 10 % of the price bid by ACF, and ACF failed to list Qnomy as a subcontractor. (Solicitation page 30) ACF testified that it was a reseller of the Qnomy product but that Qnomy was not a subcontractor on this project.

Section 11-35-310(30) defines a subcontractor as:

(30) "Subcontractor" means any person having a contract to perform work or render service to a prime contractor **as a part of the prime contractor's agreement with a governmental body.** [emphasis added]

Typically a reseller agreement authorizes the reseller to sell the products of the manufacturer to as many customers as it can but does not identify or limit the reseller to specific projects. There is no evidence of a contract between ACF and Qnomy that specifically identifies work directly related to this project. Consequently Qnomy is not considered a subcontractor. This issue of protest is denied.

Allegation that ACF was non-responsive for failing to provide a detailed response to requirements 3.3.5.2 to 3.3.5.7.

Qmatic protests that ACF was non responsive for failing to make a detailed response on how exactly its proposal would meet the requirements of the BVB on a point-by-point basis; specifically requirements 3.3.5.2 to 3.3.5.7. ACF's proposal shows a response to each of these requirements. For example, for requirement 3.3.5.2 for an appointment / calendar system, ACF responded: "ACF complies with all stated objectives of the Appointment System via Q-Flow fully integrated Calendar Module." ACF's response to the other protested requirements are similarly brief; however, there is a response to each requirement. It is up to the evaluators to determine to what extent those responses were satisfactory and complete and reflect that determination in their scoring. This issue of protest is denied.

Allegation regarding the evaluations

Qmatic protests that while the solicitation set out the five evaluation criteria and the weights assigned, it did not reveal how many evaluators there would be or explain at all how the evaluation criteria would be applied. For example, it did not explain how the points for cost would be calculated, or how the evaluators would allocate the available points for each criteria.

The calculation used to allocate the points for cost has been in use in the State for many years and while not the only method the State might use in allocating those points, the Procurement Review Panel finds in In Re: Protest of Polaroid Corporation, Case No. 1988-12, that:

Polaroid claims that it should have received more credit for having the lowest cost because cost is the most important factor. Cost in this case was evaluated using a standard mathematical formula. The Panel can find nothing unfair or unreasonable in crediting each proposal for its price in this objective way and rejects Polaroid's argument in this regard.

Moreover, there is no requirement in the Code or Regulations that the State should put vendors on notice as to the number of evaluators or how the evaluators are to allocate the points available for each evaluation criteria. This issue of protest is denied.

Allegation of improper cost evaluation.

In its initial letter of protest, Qmatic raised the issue of DHEC's decision to accept a proposal that was only for software and software maintenance/support and that QMatic's cost, for software only, of \$1,542,631.80 is lower than the awarded cost of \$1,659,080.00 yet ACF received the highest score for cost.

A table showing the calculations used to allocate points for cost was introduced at the hearing [Ex 6] and showed ACF's total bid price as \$1,623,942 and Qmatic's lowest bid price² as \$2,449,234.68 with a line underneath labeled "Less TVs and associated items – Qmatic Only," that indicated that Qmatic's bid price was reduced by \$218,340, for an evaluated total cost of \$2,230,894.68. Section 11-35-1520(6) of the Code requires that bids be accepted unconditionally without alteration or correction.

John Walker from ITMO indicated that ACF had not bid televisions so the State sought clarification³ from Qmatic about the effect of eliminating the TVs from its bid and asked Qmatic to resubmit its price sheets without televisions.

² Qmatic submitted two price proposals.

³ Section 11-35-1520(8) requires that: "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

Section 11-35-1520(8) authorizes for discussions only with apparent responsive bidders:

Discussion with Bidders. As provided in the invitation for bids, discussions may be conducted with apparent responsive bidders for the purpose of clarification to assure full understanding of the requirements of the invitation for bids...

The solicitation clearly required the bidders to include the cost of the televisions in their bid.

Paragraph 3.10 of the Solicitation states:

Hardware Required from Vendor under initial system setup: Anticipated number of kiosks (with Ticket printers) and non-kiosk ticket printers are approximately 68 and 44, respectively. Approximately one hundred forty-two (142) TV's are expected to support the 78 locations (12 ea 27" TV's, 62 ea 32" TV's, 68 ea 42" TV's).

Paragraph 3.2.4.5 requires the bidder to provide:

Non-proprietary hardware to include all TV LCDs, ticket printers, ticket printer paper, kiosks, media PCs (or equivalent), greeter PCs (or equivalent) and voice unit with bilingual software (English & Spanish)...

Paragraph 3.2 Specifications stated:

All hardware (kiosks, thermal ticket printers, TV's, VGA converters, etc.) in your proposal must be non-proprietary **and must be itemized in your cost proposal.** (emphasis added)

Paragraph 4.10 of the solicitation states:

Business / Cost Proposal

The Offeror must submit a Business/Cost Proposal as outlined in the Bidding schedule section VIII. In addition Offeror must submit price for each location specified in Section IX.

Attachment A to the solicitation is a form listing all 78 DHEC locations that will be automated through this contract and lists the required number of TV's, Kiosks, Additional Ticket Printers, Front-line Licenses, and Manager Licenses⁴.

ACF's response to paragraph 3.10, ACF stats:

ACF acknowledged – costs are offered in the Business Proposal but do not include pricing for TVs as ACF does not stock or sell TVs unless under special agreement to be negotiated upon request.

subject to disclosure upon request as required by Section 11-35-410.” There was no documentation of this “clarification” attached to Qmatic’s bid as introduced into evidence.

⁴ Paragraph 3.10 stated the State’s anticipated need for approximately one hundred forty-two (142) TV’s to support the 78 locations (12 ea 27” TV’s, 62 ea 32” TV’s, 68 ea 42” TV’s) and bidders were to provide detailed pricing for each of the 78 locations. However, Attachment A, on which bidders were to provide detailed pricing per location, only indicated a total number of televisions per location without indicating how many, of what size. Attachment A does not allow for a firm-fixed price for each location.

On page 5 of ACF's Business Proposal under the title ACF Per Location Breakdown Cost ACF listed the following Assumption:

SC DHEC to provide and mount TVs (ACF typically does not sell TVs unless by special arrangement)

In the Introduction to the solicitation the State did put bidders on notice that:

The SC DHEC reserves the right to reject any or all of the hardware items listed in your proposal and instead purchase these non-proprietary items from the appropriate state term contracts or the open market.

However in order to protect the integrity of the public procurement process, the determination of the highest ranking, responsible bidder responding to the requirements of the solicitation as published must be made prior to determining what which products would be purchased from other sources.

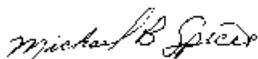
ACF was non-responsive to a material and essential requirement of the solicitation for failing to include the price of the televisions. There was a question and answer period during the solicitation process and ACF had the opportunity to request a revision of the specifications but did not avail itself of that opportunity. Budget and Control Board Regulation 19-445.2070 requires that any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.

The State attempted to make ACF responsive by removing the requirement to bid the televisions after bid opening and asking Qmatic to submit a revised price proposal making it equally non-responsive.

Determination

For the reasons state above, protest is affirmed and a re-solicitation of the State's requirements is ordered.

For the Information Technology Management Office



Michael B. Spicer
Chief Procurement Officer

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2011)

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 General Appropriations Act for Fiscal Year 2011-2012, "[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...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." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, an incorporated 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).

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M. Michael Egan
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December 29, 2011

VIA E-MAIL AND FEDEX TRACKING # 793067822003
Mike Spicer, Chief Procurement Officer (via e-mail)
Agnes Copeland, Procurement Manager (via e-mail)
INFORMATION TECHNOLOGY MANAGEMENT OFFICE
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: **Solicitation: 5400003397**
Description: DHEC Statewide Customer Queuing System
SC Dept of Health & Environment Control
Posting Date: 12/23/11 of Intent to Award

Dear Mr. Spicer and Ms. Copeland:

Our firm represents Qmatic Corporation ("Qmatic") with regard to the above referenced Solicitation. Please consider this letter a formal bid protest pursuant to SC ST § 11-35-4210(1)(b). Qmatic as a bidder has a right to protest pursuant to SC ST § 11-35-4210(1). We have been informed that DHEC, State of South Carolina, has published a notice of intent to award the contract to ACF Technologies, Inc., whom we believe is the only other bidder. We are hopeful that DHEC has perhaps misunderstood the bid of Qmatic and, in any case, we respectfully request that DHEC reconsider its "Intent to Award" that was posted on December 23, 2011.

A key point is that for the award which DHEC proposes to make, the price of Qmatic is significantly lower than the ACF price. DHEC decided to accept a proposal that is only for software and software maintenance/support. For this package, the price as bid by Qmatic is \$1,542,631.80. This price is much lower than the \$1,659,080.00 that has been bid by ACF. This aspect of the bidding constitutes 60% of the "Best Value" bid. We fear that DHEC, because of the complexity of the bid package required by the proposal, may not have realized this significant price differential between Qmatic on the one hand and AFC on the other.

As a part of this bid protest, we request on behalf of Qmatic the bid tabulations demonstrating how the five evaluation factors were tabulated by the state for Qmatic and the other bidder. We ask for this information because Qmatic truly seeks to understand how it compared to the other bidder.

Qmatic believes strongly that it compared very favorably on not only the price evaluation, but also on the other four evaluation factors as well.

For example, 10% of the evaluation was based on a live demonstration of the product. Qmatic put on a two and a half hour demonstration (even though only an hour and a half was required) and this demonstration went very well. First, the product itself performed flawlessly. Second, all questions were answered and the comments at the demonstration were very favorable. It is difficult for Qmatic to suppose that the demonstration could have gone any better or that its competitor did better at this aspect of evaluation, because the product performed well and the observers seemed well pleased with the entire Qmatic demonstration.

Hence, Qmatic strongly believes that it did better than ACF on at least 70% of the evaluation factors, the 60% on price and the 10% of demonstration. The State and the Agency would be better served by the acceptance of the Qmatic proposal and the public interest would be better served as well. In other words, the intent to award to ACF would violate state law by not reflecting the true "Best Value."

The evaluation factors also included a category entitled "Quality of the Technical Proposal." First, the overall bid package of Qmatic was exhaustively thorough. It was a 254 page submittal that addressed every conceivable aspect of the technical proposal. One aspect of this technical proposal is the ownership of the underlying software. Unlike the competitor, Qmatic owns the underlying source code of its software. The strength which comes from this ownership is the ability to use the code as desired by Qmatic and by its customer in the event of upgrades, further development, assuring compatibility with operating systems and hardware/firmware, or a desire to change some aspect of the software that would require changes to the source code

A further point on the "Technical Quality" of the Qmatic proposal is that regardless of the language in which the software is written, it is plainly the software which the operator, DHEC, would prefer for its operational purposes. This is a part of the evaluation which Qmatic believes, if considered from the point of view of the user agency, would greatly exceed that of ACF. Ultimately, Qmatic's software is going to serve the user/operator agency better and Qmatic believes that if the user agency, DHEC, is given a more heavily weighted voice on this subject, it would choose Qmatic.

The bid package states that the award will be given to the "highest ranked" bidder. However, how this ranking is tabulated is not clear. Because the "Quality of the Technical Proposal" amounts to 15% of the evaluation and because of the strong belief of Qmatic that it had the better technical proposal, then on 85% of the bid package "Evaluation Factors," Qmatic believes it was best, including that important factor, price.

Another factor was projects of a similar nature. We respectfully remind the State that the in the adjoining state of Georgia, the DMV has awarded a huge contract to Qmatic. Qmatic has great depth of experience, not only in queuing systems in general, but also for large installations for state agencies that must serve a very large public at multiple locations.

We request two things. First, we request that the award be made to Qmatic as the most responsive and responsible bidder with the highest ranking when the bid proposal is properly understood and evaluated, with proper weighting to each factor. Second, we request a meeting between Qmatic, DHEC and Procurement Services so that Qmatic can be given a fair opportunity to explain its price and to dispel what it believes has been perhaps a misunderstanding as to price. Further, Qmatic genuinely seeks to know how it compared and in what way, if any, it did not meet the expectations of South Carolina. Qmatic believes very strongly that it complied in full with the bid request, that it is both responsible and responsive as a bidder. We trust that you can understand why Qmatic is surprised and disappointed at the outcome. First, Qmatic has an excellent product with a very strong track record. Second, given that strong product and track record, Qmatic is disappointed to not be awarded the contract when it also had the lowest price.

Last, this letter is intended as a formal bid protest. Hence, we hereby invoke any and all administrative procedures and remedies Qmatic may have to contest the award.

We look forward to hearing from you. My request is that you respond directly to Qmatic (Sales Director Mr. Bob Davis at bob.davis@qmatic.com or CEO Mr. Thomas Sareyko at Thomas.sareyko@qmatic.com) to seek the information you require. We also would greatly appreciate your forwarding to Qmatic the bid tabulation documents showing the evaluation factors for all bidders and the numeric method of ranking. Last, please let us know if you will meet with Qmatic. We request that this meeting occur before any award is made to ACF.

Sincerely Yours,

Owen Gleaton Egan Jones & Sweeney, LLP


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For The Firm

MME/mh

CC: Mr. Thomas Sareyko
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January 6, 2012

VIA E-MAIL AND FEDEX TRACKING # 793091505978
Mike Spicer, Chief Procurement Officer (via e-mail)
Agnes Copeland, Procurement Manager (via e-mail)
INFORMATION TECHNOLOGY MANAGEMENT OFFICE
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: **Solicitation: 5400003397**
Description: DHEC Statewide Customer Queuing System
SC Dept of Health & Environment Control
Posting Date: 12/23/11 of Intent to Award

Dear Mr. Spicer and Ms. Copeland:

Our firm represents Qmatic Corporation ("Qmatic"), with regard to the above-referenced Solicitation. Please consider this letter a formal amendment to Qmatic's bid protest pursuant to SC ST § 11-35-4210(1)(b). Qmatic as a bidder has a right to protest pursuant to SC ST § 11-35-4210(1). Further, it may amend its bid protest for up to ten days. SC ST § 11-35-4210(2)(b). Accordingly, Qmatic hereby amends its bid protest of December 29, 2011, to include the following additional grounds. This amendment is in addition to, and not in lieu of, the grounds in the earlier bid protest of December 29, 2011.

First, Qmatic amends as to the kind of relief sought. Previously, Qmatic sought to be awarded the contract outright as the highest ranked, responsible and responsive bidder. To this, Qmatic seeks, in the alternative, the remedy of a rebid of the contract, a remedy permitted by South Carolina statute under appropriate circumstances. The grounds for this relief are discussed below.

Second, before addressing the substance of the amendment, we thank you for agreeing to meet with Qmatic by telephone on a date to be determined. This telephone conference with Qmatic will permit direct explanations and clarifications that will help you properly evaluate this bid protest.

Since our letter of December 29, 2012, Qmatic has received from you the requested bid tabulations and proposals. From a careful review of these materials, it becomes apparent that Qmatic's bid was responsive and the bid of its sole competitor was not responsive. This calls for an outright award to Qmatic.

First, the bid of the competitor was not responsive because the proposal required an identification of subcontractors who would be providing 10% or more of the work. This is not a mere technicality. On the contrary, it serves the purpose of permitting the State to know exactly with whom it is doing business. Qmatic believes, upon a reasonable basis, that its competitor is using for its proposal the software of another company for this work. If, as Qmatic believes, more than 10% of the value of the work of the contract will be done by outside software companies, then this should have been identified in the proposal. Qmatic believes that the software comes from Qnomy and that ACF stands as "distributor" or pass-through as to that software. Qmatic cannot, of course, know the nature of the business arrangement between the companies, but the custom nature of the software being sought by DHEC makes it likely that work must be done by Qnomy as a subcontractor to ACF. The failure to identify a significant and important subcontractor makes the bid unresponsive and hence, it would not meet the required criteria of "responsive" bidder.

A second way in which the competitor's bid was not responsive relates to the important item of kiosks with ticket printers. Qmatic tried hard to make its bid responsive and, to that end, posed a direct question, Number 21, to seek out an exact specification of what was required. It then followed the specification and made a very specific proposal. By contrast, the competitor's proposal was unresponsive because, even with the guidance of the response to Number 21, there is no genuine specification as to what will be provided for kiosks. This is the kind of omission that could skew the price and is also, in the end, not responsive. The bid solicitation states that the successful bidder must be responsive, and this is not the case on the kiosks.

A third way in which the competitor's bid was not responsive relates to the bid solicitation requirement that the offeror was required to make a detailed response on how exactly its proposal would meet the requirements of the BVB on a point-by-point basis. Qmatic asserts that this was not done as to subcontracts, not done as to kiosks and not done in general with the particularity which by contrast filled the much longer, much more fulsome proposal of Qmatic.

Given the responsiveness of Qmatic on these critical points, it is the only responsive bidder and thus is entitled to be awarded the contract outright.

As to rebid as possible relief for Qmatic's bid protest, the problems raised above and in the original letter of December 29, 2011, would provide the State with adequate grounds to start anew. However, there are additional grounds for setting aside any award and starting anew. These grounds are based on "In Re: Protest of OfficeMax, Staples Technology Solutions, et al.," before the S.C. Procurement Review Panel, Case No. 2010-3, dated May 12, 2010, a copy of which we enclose. This case stands for the proposition that the bid comparisons here make it necessary to rebid the proposals because the method of bid comparison was not explained in the solicitation. The OfficeMax decision rests on the logic that if a bid comparison does not rest solely on a dollar comparison of the bids, then there must be in the IFB, a precise definition of how comparisons will be made. As the decision states, "In this case, Ms. Cash evaluated the bids using a method she devised after the opening of the bids—a method that was not explained in the IFB itself." Because of this error, the bid had to be relet.

While the IFB here explained it was a best value bid and set out the five areas of ranking, it did not explain at all how the rankings would be tabulated. For example, it did not explain at all the "Points Assigned for Cost" method that appears in the tabulation sent to Qmatic. This criteria therefore, under the OfficeMax decision cannot be used. The method awards all 60% to the low bidder on price, and then values the other bidder as a percentage of the low bidder. A more appropriate method would have been to compare all prices to a pre-bid agency estimate of the appropriate value of the bid and thus no one would have a "perfect" 60%. The comparison was done by considering ACF to be perfect and awarding it the full 60%. But without respect to method, it should have been explained to the bidders.

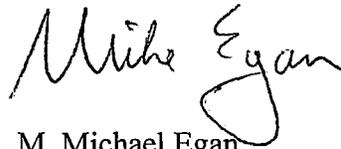
Also not explained was that each evaluation factor would be considered, for some evaluators, as a "winner take all" method. Evaluator Number Five apparently thought that if ACF was the best bid, then it got all the percentage points on the non-price items. This would skew results because this evaluator thought that if ACF was the best in that category, that meant it automatically got all of the percentage for that line item. In addition, the solicitation did not reveal that there would be five individuals who would make the decision as evaluators. Perhaps the upshot of the OfficeMax decision and the bid comparisons on this bid is that there must be a relet because the bidders were not given a fair chance to adopt a bidding strategy to the actual method of selection that was not revealed in the IFB. The OfficeMax decision finds that this violates S.C. ST 11-35-4310(2).

As just an example of the unfairness, assuming, but not conceding, that Qmatic's price was \$2,230,895.00, then under the mathematical method used, of which Qmatic had no

knowledge, it was eliminated from consideration no matter how good its bid was on other factors, because it could never overcome the percentage difference arising solely from price with the remaining four factors. This should have been explained in advance.

We appreciate your consideration and Qmatic looks forward to the telephonic meeting.

Sincerely Yours,

A handwritten signature in cursive script that reads "Mike Egan". The signature is written in black ink and is positioned above the typed name.

M. Michael Egan
FOR THE FIRM

MME/mh
Enclosure

cc: Mr. Thomas Sareyko (w/enclosure)
Mr. Bob Davis (w/enclosure)

SCPD 2010-3 (S.C.Procure.Rev.Panel), 2010 WL 5620035 (S.C.Procure.Rev.Panel)

In Re: Protests of OfficeMax, Staples Technology Solutions, and U.S. Ink and Toner, Inc.; Appeal of Laserprint Managedprint, Inc.

South Carolina Procurement Decisions

IN RE: Protests of Office Max, Staples Technology Solutions, and U.S. Ink and Toner, Inc.
Appeal of Laserprint Managedprint, Inc.

Case No. 2010-3

May 12, 2010

*1 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 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.

*2 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 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 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?"

*3 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[.]").

*4 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.

C. Brian McLane, Sr.
Chairman

Footnotes

- 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.
- 2 Testimony before the Panel clarified that each "item" encompassed multiple ink and toner cartridges on the HP August 9, 2009,

price list.

- 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.
- 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.

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