

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

New England Laboratory Casework Co.,
Inc.

Materials Management Office
IFB #5400005675

Science Education Supplies
Statewide Term Contract

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2013-115

POSTING DATE: August 6, 2013
MAILING DATE: August 6, 2013

This matter is before the Chief Procurement Officer (CPO) pursuant to a protest filed by New England Laboratory Casework Co., Inc. (New England) under authority of South Carolina Code Section 11-35-4210. With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure statewide term contracts for science education supplies. After evaluating the bids received, MMO rejected New England's bid and posted intents to award to Fisher Scientific Company, LLC, Wards Science, Sargent Welch, and Carolina Biological Supply Company. On May 9, 2013, New England protested MMO's intents to award alleging:

The letter received indicated the reasons for the "non-responsive" bid were that an error was made when entering the discount and a competitive discount schedule. These reasons for disqualifying New England Lab are unjust and do not impact any "net pricing" that the State of South Carolina would be entitled to and furthermore any combination of list pricing with changed discounts could still equal the same cost, so therefore it would not jeopardize any other competitors pricing or give an unfair advantage to anyone.

After considerable review of the bid documents, specifically the discount section, it does not state anywhere that a single discount for all products offered must be used and that tiered pricing is unacceptable and will not be considered.

During the bidding process of this solicitation it was never mentioned nor occurred to anyone that a single discount should be used for this request. In fact, it was mentioned via a telephone conversation that we were uploading our discount

schedule for all of our products. I would have thought if multiple discounts were not acceptable, something would have been said.

As the issues to be decided are clear, the CPO makes this decision without a hearing, based upon an administrative review of the protest letter [Ex. 1 attached]; the response to the protest from John Stevens, State Procurement Officer [Ex. 2 attached]; the procurement manager, Stacy Adams' determination rejecting New England's bid [Ex. 5]; and the procurement file.

NATURE OF PROTEST

The letter of protest and the response by John Stevens, State Procurement Officer, are attached and incorporated herein by reference

FINDINGS OF FACT

The following dates are relevant to the protest:

1. MMO published the IFB 03/07/2013. [Ex. 3]
2. Pre-bid Conference was conducted at the Materials Management Office 03/19/2013 at 10:00 AM.
3. Questions from prospective bidders were due by 03/19/2013 at 12:00 Noon.
4. MMO issued Amendment #1 03/21/2013. [Ex. 4] The amendment rewrote the IFB in its entirety and replaced the original IFB. [Ex. 4]
5. On 04/05/2013, MMO opened the bids.
6. After evaluating New England's bid, Ms. Adams rejected it as nonresponsive to the requirements of the IFB. She prepared a written determination, which she provided to New England. [Ex. 5]
7. Intent to Award was posted 05/02/2013. [Ex. 6]
8. The CPO received the protest letter from New England on 05/10/2013 at 10:50 AM.

DISCUSSION

According to the Scope of the Solicitation,

The intent of this procurement is to establish statewide contracts for the purchase of Science Education Supplies normally used in an instructional setting at the preschool, primary, secondary and limited post secondary levels of schooling. Laboratory Equipment and Supplies, as may be required by an official operating laboratory and/or for research and educational purposes in a university setting (undergraduate and graduate level schooling), would normally use the Laboratory Supplies, Equipment and Chemicals term contract.

[Ex. 4, p. 4] MMO advised the prospective bidders, “Award will be made to multiple vendors and the estimated annual sales will be divided amongst the awarded vendors.” [Ex. 4, Contract Value, p. 4]

The solicitation, processed as an invitation for bids, required bidders to provide their current catalog prices for at least 30,000 line items, to bid a discount off the manufacturer’s published list prices, and enter the estimated extended discount value to the State. In the Scope of Work/Specifications, MMO advised bidders, in pertinent part: “Bids shall be submitted in the form of a discount off distributor’s/manufacturer’s published price list.” [Ex. 4, Scope of Work/Specifications, p. 17] The IFB explained to prospective bidders, “Award will be made by individual item.” [Ex. 4, Award Criteria, p. 24] The IFB listed only one item. It read further:

Each Offeror will provide a “% Discount” off manufacturer’s published list price for all items offered. An Estimated Annual Dollar Value of \$1,100,000 has been established. A minimum discount of 10% is required. To calculate the Estimated Extended Value, the % Discount being offered will be multiplied by the Estimated Annual Dollar Value.

[Ex. 4, Calculating the Low Bid, p. 24] The IFB spelled out specific instructions how to complete the bidding schedule, and even included an example of how bidders were to enter their bids:

Example: If the Offeror is extending a 20% Discount off manufacturer’s published list price, 20% would be entered and multiplied by 1,100,000 providing an Estimated Extended Discount Value of \$220,000.

Item	Estimated Annual Dollar Value of the Contract	Unit of Measure for Vendor Discount	Unit - % Discount Being Offered	Estimated Extended Discount Value
1	\$ 1,100,000	Percent	20%	\$ 220,000.
Product Catg.: 49063 – Natural Science Equipment and Supplies				
Item Description: GENERAL SCIENCE EDUCATION SUPPLIES				

[*Id.* (emphasis in original)] The IFB read further, “Award will be made to the responsive and responsible Offeror with the highest Discount being offered providing the most savings for the State.” [Ex. 4, Calculating the Low Bid, p. 24]

Seeking clarity in its intentions and recognizing that comparison of bids is dependent upon all bidders bidding in the same manner, the IFB allowed bidders to ask questions. [Ex. 4, Questions from Offerors, p. 9] It stipulated that

Offeror, by submitting an Offer, represents that it has read and understands the Solicitation and that its Offer is made in compliance with the Solicitation. Offerors are expected to examine the Solicitation thoroughly and should request an explanation of any ambiguities, discrepancies, errors, omissions, or conflicting statements in the Solicitation. Failure to do so will be at the Offeror’s risk. Offeror assumes responsibility for any patent ambiguity in the Solicitation that Offeror does not bring to the State’s attention.

[Ex. 4, Duty to Inquire, p. 8] Nothing in the procurement file indicates that New England or any other bidder questioned the instructions for completing the bid schedule. Finally, the IFB advised bidders, “Any Offer which fails to conform to the material requirements of the Solicitation may be rejected as nonresponsive.” [Ex. 4, Responsiveness/Improper Offers, p. 9]

New England bid electronically. It erroneously keyed in the State’s estimated annual purchase instead of a discount amount. It attached a schedule with ranges of discounts for different product categories. It did not include the bidding schedule prescribed in the IFB.

Stacy Adams, MMO Procurement Manager, rejected New England's bid as nonresponsive writing:

New England Laboratory Casework Co., Inc.'s offer was submitted online and also included attachments to their online offer. An error was made when the Offeror was keying in an amount for their offered discount. The offeror keyed in 1,100,000% resulting in a Net Value of \$1,650,000,000,000.00. This was clearly a mistake; however, an attachment to their online submittal was included titled as "Discount Schedule" (attached for reference). A copy of the original Bid Schedule was not included with their response. Rather than submitting a single unit discount percent as required on the Bidding Schedule, the Discount Schedule listed a range of discount percentages dependent on the category of products being purchased. Since evaluation and award of bids are based on the percentage discount being offered, it is impossible to determine a single discount when the offeror submitted a range of percentages and a range of product lines. Submitting in this way clearly contains changes that would impact pricing. Therefore, the error cannot be classified as a "minor informality or irregularity." It would be prejudicial to other offerors for the procurement officer to wave the error or provide the offeror the opportunity to cure it. New England Laboratory Casework Co., Inc. did not attend the Pre-Bid Conference and did not surface this issue during the question and answer period. Nor did New England Laboratory Casework Co., Inc. issue a timely protest of the solicitation document. In accordance with Regulation 19-445.2085, because the offer from New England Laboratory Casework Co., Inc.'s offer did not conform to the essential requirements of the invitation for bids, it must be rejected and deemed nonresponsive.

Based on all of the above, New England Laboratory Casework Co., Inc.'s entire offer is "Non-Responsive".

[Ex. 5]

New England protested Ms. Adams' rejection of its bid.

CONCLUSIONS OF LAW

Regarding award of an invitation for bids, the Consolidated Procurement Code reads, "notice of an award or an intended award of a contract [must be given] to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids."

[11-35-1520(10) Award] The supporting regulations add, "Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected." [S.C. Code Ann. Reg. 19-

445.2070A, Rejection of Individual Bids]. Further, “Ordinarily a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids.” The Code defines a responsive bidder as “a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.” [11-35-1410(7)]

The IFB required bidders to offer a single discount for all items of its catalog, the only line item in the bidding schedule. Instead, New England discarded MMO’s bidding schedule and replaced it with its own. It offered numerous discounts, in different amounts, for various categories of its products. The only way New England’s bid could be compared to the other offers would be to calculate the discounts for the individual products making up the State’s estimated annual spend. Since the solicitation did not list the specific products included in the estimate, this was not possible. The Procurement Review Panel has ruled in similar circumstances that a procurement officer ordinarily may not alter a bid to make it conform to the solicitation’s bidding schedule. *Appeal by Industrial Sales Co., Inc.*, Panel Case No. 1993-11(I), *reversed on other grounds sub nom. Cameron & Barkley Co. v. South Car. Proc. Rev. Panel*, 317 S.C. 437, 454 S.E.2d 892 (1995); *see also Appeal by Otis Elevator Co.*, Panel Case No. 2009-2 (improper for the procurement officer to “correct” bid in the absence of a mistake as this had a prejudicial effect on fair competition).

New England’s unauthorized rejection of the IFB’s bidding schedule and submission of its own bidding schedule offering multiple discounts violated the terms of the solicitation and the Code, making comparison of bids virtually impossible. Ms. Adams properly rejected New England’s bid as nonresponsive.

DETERMINATION

For the reasons stated above, New England’s protest is denied.

Voight Shealy

R. Voight Shealy
Chief Procurement Officer
For Supplies and Services

Aug. 6, 2013

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised June 2013)

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: <http://procurement.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 108.1 of the 2013 General Appropriations Act, "[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 financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by 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); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.



New England Laboratory Casework Co., Inc
300 Dominion Drive, Suite 550 | Morrisville, NC 27560
P 919.469.8054 F 919.469.8055

May 9, 2013

Protest Letter

Mr. Voight Shealy
Chief Procurement Officer
State of South Carolina
Materials Management Office
Capitol Center
1201 Main Street
Suite 600
Columbia, SC 29201
protest-mmo@mmo.sc.gov

Re: Solicitation # 5400005675 Science Education Supplies

Dear Voight:

We are in receipt of a Determination of a non responsive bid letter from Stacy Adams of your department and are hereby protesting the decision that the State of South Carolina has arrived at. The letter received indicated the reasons for the "non-responsive" bid were that an error was made when entering the discount and a competitive discount schedule. These reasons for disqualifying New England Lab are unjust and do not impact any "net pricing" that the State of South Carolina would be entitled to and furthermore any combination of list pricing with changed discounts could still equal the same cost, so therefore it would not jeopardize any other competitors pricing or give an unfair advantage to anyone.

After considerable review of the bid documents, specifically the discount section, it does not state anywhere that a single discount for all products offered must be used and that tiered pricing is unacceptable and will not be considered. In fact, a statement within Stacy's letter reads "Award will be made to the responsive and responsible offeror with the **highest discount** being offered providing the most savings for the state [06-6050-1]". Based on this statement I would like to challenge the State of South Carolina to provide to us proof that it has received better competitive bids under this solicitation for said products thereby dismissing New England lab from participating in this Solicitation.

During the bidding process of this solicitation it was never mentioned nor occurred to anyone that a single discount should be used for this request. In fact, it was mentioned via a telephone conversation that we were uploading our discount schedule for all of our products. I would have thought if multiple discounts were not acceptable, something would have been said.

New England Lab is not asking to make changes to the net price that the state would pay for laboratory products but we are asking the State of South Carolina to accept New England Lab as a credible, honest, competitive and trustworthy company able to provide products and services to the State agencies of South

Carolina thru fair bidding practices.

Your sincere and fair review of this situation is appreciated in advance of a meeting to resolve this matter.

Submitted with great respect to the tax payers of South Carolina.

Sincerely,

Kevin Casey | Regional Sales Manager
New England Laboratory Casework Co., Inc.
300 Dominion Drive, Suite 550 | Morrisville, NC 27560
cell: 443-844-1190 email: kcasey@newenglandlab.com

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June 10, 2013

R. Voight Shealy, CPM
Chief Procurement Officer for Supplies and Services
South Carolina Budget & Control Board
Division of Procurement Services
1201 Main St., Suite 600
Columbia, SC 29201

Re: Solicitation No. 5400005675 – CHEPA Solid Waste Term Contract
Response to Protest of New England Laboratory Casework Co., Inc.

Dear Mr. Shealy,

Thank you for the opportunity to respond the protest filed by New England Laboratory Casework Co., Inc.

Beginning next page, please find a timeline for the referenced solicitation. Attached separately, please find the "Determination of a Non-responsive Bid" as prepared by responsible Procurement Manager Stacy Adams.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "John R. Stevens".

John R. Stevens, CPPB, CPM
State Procurement Officer

Attachment

Cc: Stacy Adams – State Procurement Office
Kevin Casey – New England Laboratory Casework Co., Inc.
Dixon Robertson – B&CB – Office of General Counsel

Mr. R. Voight Shealy
June 10, 2013
Page 2 of 2

Solicitation No. 5400005675

Procurement Time Line

- IFB published 03/07/2013
- Pre-bid Conference at Materials Management Office 03/19/2013 10:00 AM
- Questions due by 03/19/2013 at 12:00 Noon
- Amendment 1 issued 03/21/2013.
- Opening Date: 04/05/2013
- Award Posting Date: 04/11/2013
- Initial Award Extension Posted: 04/11/2013.
- Final Award Posting Notification: 05/01/2013
- Intent to Award posted 05/02/2013
- Protest letter received from protestant on 05/10/2013 at 10:50 AM

Memorandum for Record

Determination of a Non-Responsive Bid

IFB NO. 5400005675 – Statewide Term Contract: Science Education Supplies

BID SUBMITTED BY New England Laboratory Casework Co., Inc.

The following are excerpts from the original State solicitation, SC Consolidated Procurement Code, and SC Procurement Regulations relevant to the Determination of Non-Responsiveness:

Solicitation document (Amendment #1) dated 03/21/2013, page 24:

CALCULATING THE LOW BID

Each Offeror will provide a “% Discount” off manufacturer’s published list price for all items offered. An Estimated Annual Dollar Value of \$1,100,000. has been established. A minimum discount of 10% is required. To calculate the Estimated Extended Value, the % Discount being offered will be multiplied by the Estimated Annual Dollar Value.

Example: If the Offeror is extending a 20% Discount off manufacturer’s published list price, 20% would be entered and multiplied by 1,100,000. providing an Estimated Extended Discount Value of \$220,000.

Item	Estimated Annual Dollar Value of the Contract	Unit of Measure for Vendor Discount	Unit - % Discount Being Offered	Estimated Extended Discount Value
1	\$ 1,100,000.	Percent	20%	\$ 220,000.
Product Catg.: 49063 – Natural Science Equipment and Supplies				
Item Description: GENERAL SCIENCE EDUCATION SUPPLIES				

Award will be made to the responsive and responsible Offeror with the highest Discount being offered providing the most savings for the State. [06-6050-1]

§ 11-35-1520: COMPETITIVE SEALED BIDDING:

(7) Correction or Withdrawal of Bids; Cancellation of Awards. Correction or withdrawal of inadvertently erroneous bids before bid opening, withdrawal of inadvertently erroneous bids after award, or cancellation and reward of awards or contracts, after award but prior to performance may be permitted in accordance with regulations promulgated by the board. **After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition shall be permitted.** Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards, or contracts, after award but prior to performance shall be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency.

(13) Minor Informalities and Irregularities in Bids. A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price,

quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing. Examples of minor informalities or irregularities include, but are not limited to:

NONE APPLY

R 19-445.2070: Rejection of Individual Bids.

C. Nonresponsive Bids.

Any bid which fails to conform to the delivery schedule, to permissible alternates thereto stated in the invitation for bids, or to other material requirements of the solicitation may be rejected as nonresponsive.

R 19-445.2085: Correction or Withdrawal of Bids; Cancellation of Awards.

B. Correction Creates Low Bid.

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 bidder to have the low bid unless the mistake in the judgment of the procurement officer is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.

New England Laboratory Casework Co., Inc.'s offer was submitted online and also included attachments to their online offer. An error was made when the Offeror was keying in an amount for their offered discount. The offeror keyed in 1,100,000% resulting in a Net Value of \$1,650,000,000,000.00. This was clearly a mistake; however, an attachment to their online submittal was included titled as "Discount Schedule" (attached for reference). A copy of the original Bid Schedule was not included with their response. Rather than submitting a single unit discount percent as required on the Bidding Schedule, the Discount Schedule listed a range of discount percentages dependent on the category of products being purchased. Since evaluation and award of bids are based on the percentage discount being offered, it is impossible to determine a single discount when the offeror submitted a range of percentages and a range of product lines. Submitting in this way clearly contains changes that would impact pricing. Therefore, the error cannot be classified as a "minor informality or irregularity." It would be prejudicial to other offerors for the procurement officer to wave the error or provide the offeror the opportunity to cure it. New England Laboratory Casework Co., Inc. did not attend the Pre-Bid Conference and did not surface this issue during the question and answer period. Nor did New England Laboratory Casework Co., Inc. issue a timely protest of the solicitation document. In accordance with Regulation 19-445.2085, because the offer from New England Laboratory Casework Co., Inc.'s offer did not conform to the essential requirements of the invitation for bids, it must be rejected and deemed nonresponsive.

Based on all of the above, New England Laboratory Casework Co., Inc.'s entire offer is "Non-Responsive".



Stacy Adams, CPPB
Procurement Manager