

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

South Carolina Safety Company, Inc.

Materials Management Office
IFB # 5400006063

Purchase & Service of Fire
Extinguishers
Statewide Term Contract

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2013-123

POSTING DATE: AUGUST 26, 2013
MAILING DATE: AUGUST 26, 2013

This matter is before the Chief Procurement Officer (CPO) pursuant to a protest filed by South Carolina Safety Company, Inc. (SCSC) under authority of South Carolina Code Section 11-35-4210. With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to a statewide term contract for the purchase and service of fire extinguishers. After evaluating the bids received, on July 18, 2013, MMO posted its intent to award to SimplexGrinnell (Simplex). On July 22, 2013, Patrick Black of SCSC protested MMO's intent to award.

In order to resolve the matter, the CPO conducted a hearing August 15, 2013. Appearing before the CPO were: Mr. Black of SCSC, Matt Burtnett of Simplex, and John Stevens, State Procurement Officer.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On April 18, 2013, MMO published IFB #5400005770, the original solicitation for purchase and service of fire extinguishers.

2. On May 7, 2013, MMO issued Amendment #1 to IFB #5400005770.
3. On May 8, 2013, MMO issued Amendment #2 to IFB #5400005770.
4. On May 15, 2013, MMO published IFB # 5400006063¹. [Ex. 1] The IFB allowed for questions to be raised by prospective bidders by May 22, 2013.
5. On May 15, 2013, MMO modified the IFB with Amendment #1. [Ex. 2] Amendment #1 announced, "Solicitation number 5400005770 has been replaced with solicitation 5400006063" and "The bid schedule has been completely modified under solicitation 5400006063." It also provided answers to a few residual questions from IFB #5400005770. [Ex. 2, p. 2]
6. On May 24, 2013, MMO issued Amendment #2. The only material adjustment made in Amendment #2 was to move the bid opening date to June 13, 2013, which is not material to the protest. [Ex. 3]
7. On June 16, 2013, MMO issued Amendment #3 moving the bid opening date to June 28, 2013 and answered a few questions from prospective bidders. Neither the questions nor the answers are relevant to the protest. [Ex. 4]
8. On June 28, 2013, MMO opened the bids received.
9. On July 18, 2013, MMO posted its Intent to Award. [Ex. 6]
10. The CPO received the protest letter from SCSC on July 22, 2013.
11. On July 24, 2013, the CPO initiated an administrative review by requesting Simplex's response to the protest.

DISCUSSION

Under Scope of the Solicitation, MMO wrote, in relevant part:

The State of South Carolina, Materials Management Office is soliciting a statewide term contract for the service and purchase of new portable fire extinguishers that meet the criteria listed in the Scope of Work. The solicitation has been separated into 5 regions (lots) as indicated under the bid schedule, which will enable the solicitation to be awarded by varying regions in the State.

[Ex. 1, p. 4]

The bidding schedule was exhaustive. Lot #1 asked bidders to bid itemized prices for twenty-two different types of fire extinguishers. [Lines 3-24] Lot 2 asked bidders to bid itemized

¹ IFB 5400006063 replaced IFB 5400005770 due to a system failure.

prices for servicing fire extinguishers in the Coastal Region, including: inspection (2 line items for inspecting all types of extinguishers); recharging (25 line items for certain types of extinguishers), and hydrostatic testing (25 line items for certain types of extinguishers). [Line items 29-80] Lots 3-6 repeated the line items for servicing fire extinguishers as listed in Lot 2 for the Piedmont Region [Lines 82-133], the Sandhills Region [Lines 135-186], the Pee Dee Region [Lines 188-239], and the Columbia Region. [Lines 241 – 292].

Regarding award, the IFB read, “Award will be made by complete lot(s).” [Ex. 1, p. 21, Award by Lots] “Lot one will be awarded to one contractor for the purchase of fire extinguishers. The remaining lots will be awarded to one contractor for servicing of fire extinguishers per lot.” [Ex. 1, p. 21, Calculating the Low Bid]

After evaluating the bids received, MMO posted an Intent to Award all lots to Simplex. [Ex. 6] On the Intent to Award, MMO listed Simplex’s awarded contract prices for:

- Each type fire extinguisher [Lines 3-24]
- \$18.00 each for inspecting fire extinguishers [Lines 29 and 30] and zero for maintaining and recharging fire extinguishers [Lines 31-80] in the Coastal Region
- \$18.00 each for inspecting fire extinguishers [Lines 82 and 83] and zero for maintaining and recharging fire extinguishers [Lines 84-133] in the Piedmont Region
- \$18.00 each for inspecting fire extinguishers [Lines 135 and 136] and zero for maintaining and recharging fire extinguishers [Lines 137-186] in the Sandhill Region
- \$18.00 each for inspecting fire extinguishers [Lines 188 and 189] and zero for maintaining and recharging fire extinguishers [Lines 190-239] in the Columbia Region
- \$18.00 each for inspecting fire extinguishers [Lines 241 and 242] and zero for maintaining and recharging fire extinguishers [Lines 243-292] in the Pee Dee Region

SCSC protests the intent to award alleging:

In reference to solicitation # 5400006063, Purchase & Service of Fire Extinguishers, you are awarding to Simplex Grinnell LP on an incomplete bid package.

The way in which Simplex Grinnell bid the package, there is an \$18.00 per fire extinguisher fee for the inspection. What will they charge for any additional service? Will that service be included in the \$18.00 or will the extinguisher in need of service be replaced with a new extinguisher under the Purchase Contract.

We would have loved to have had the opportunity to submit a bid as they did but we do not operate that way.

Furthermore, we would like to think our State tax money would be handled more appropriately than leaving a huge open window for the State to be charged unnecessary fees. Why did you go through all the trouble to make an itemized bid package just to accept an incomplete one?

SCSC's ARGUMENT

In a follow up email to the CPO, dated July 25, 2013, Mr. Black of SCSC wrote, "We do not feel the bid for service from Simplex-Grinnell was complete. A complete bid would have been to bid on all service prices as requested. All bidders did have the same amount of time to ask questions and had the opportunity to attend the pre-bid meeting. During the pre-bid meeting and up until the contract was awarded we were not notified this was an all-inclusive pricing on inspections and to ignore the remainder of service prices. Simple math would indicate the State will pay more for service at the price of \$18.00 per unit (over the contract 5 years) than breaking down the service as the bid was formatted."

SIMPLEX'S RESPONSE

On July 24, 2013, Matthew Burnett of Simplex responded to the protest writing:

There were many pages and many, many line items on the bid. Fortunately there were also many weeks of opportunity for all of us to ask questions, review our costs, consider our options and make decisions on how to place our individual bids. I'm satisfied that all bidders had an equal opportunity to submit their best pricing.

We / I spent a great deal of time calculating costs specifically for this bid. I finally decided on an **"all inclusive"** price, which incorporated all line item charges for extinguisher service, maintenance and parts into one inspection price. It is clear to see, that with all inclusive pricing **there is no "open window"...each inspection is \$18.00...period, everything included, no additional charges.**

In review for the sake of clarity... **I completed every line of the bid and submitted \$0.00 for all service charges.**

Inspections are \$18.00 for each extinguisher and is “all inclusive” of required periodic service, maintenance and parts. There are no hidden charges or “open windows”.

With regard to extinguisher replacement; the only extinguishers that are ever replaced are those that are **identified as obsolete, condemned due to damage, corrosion or fail periodic testing... as required by NFPA 10 and the applicable CGA (Compressed Gas Association) Standards.**

[Emphasis Mr. Burtnett’s] Simplex also included the following text in its on-line bid, under “remarks:”

PLEASE NOTE: ALL LINE ITEMS in EVERY LOT have been priced in the SCEIS / SAP system. ALL LINE ITEMS in Every Lot that appear unpriced or are priced \$0.00 were intentionally priced at NO CHARGE. (Not to be confused with “NO BID”)

[Exhibit 8] [capitalization in original]

CONCLUSIONS OF LAW

Lots 2-6 each included 52 line items for inspection, recharging, and hydro-static testing various fire extinguishers. For Lots 2-6, Simplex submitted bids of \$18.00 each to inspect 50 or more extinguishers and \$18.00 each to inspect 50 or less extinguishers. Simplex submitted actual bids of zero (no charge) for all fifty other items each for lots 2-6. 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] SCSC alleged MMO’s intent to award was not made to the actual lowest responsive bidder in that Simplex did not actually bid all line items to service fire extinguishers and that Simplex will levy additional charges for the other services specified.

Simplex responded that its \$18.00 price for inspections was “all inclusive.”

During the hearing, SCSC accused Simplex of “unbalanced bidding”, which is prohibited by the IFB which read:

The State may reject an Offer as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the State even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

[Ex. 1, Responsiveness/Improper Offers, (e) Unbalanced Bidding, p. 10]

Simplex bid a price of \$18.00 for inspecting each fire extinguisher, zero dollars (\$0.00) for recharging each extinguisher and zero dollars (\$0.00) for hydro-static testing each extinguisher. Therefore, Simplex's bid is responsive on its face, in that Simplex actually submitted a bid for every line item. However, the prospect of unbalanced bidding is troubling.

Typically, unbalanced bidding occurs in one of two situations: (1) When a bidder attempts to frontload costs for a multi-year contract during the initial period of the contract requiring the State to overpay early or (2) On a multiple line item bid, when a bidder artificially understates the prices of items known to be seldom purchased and artificially inflates the prices of items bought most often. In both cases, absent careful analysis of the bids, one may unknowingly award the contract to an apparent low bidder who is not, in fact, low.

In decisions regarding allegations of unbalanced bidding, the U.S. Comptroller General has written:

Turning to the question of whether Peach State's bid is unbalanced, our office has recognized the two-fold aspects of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect - material unbalancing - involves an assessment of the cost impact of a mathematically unbalanced bid. **A bid is not materially unbalanced unless there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the government. Consequently, only a bid found to be materially unbalanced may not be accepted.**

Reliable Trash Service, B-194760, 79-2 CPD ¶107, 1979 WL 12196 ² (emphasis added). Whether a bid is materially unbalanced “is a factual determination which varies depending on the particular circumstances of each procurement,” *Howell Construction, Inc.*, B-225766, 87-1 CPD ¶455, 66 Comp. Gen. 413, 1987 WL 96939. “[C]omparison of a competitor's prices with one's own prices is not by itself sufficient to establish price enhancement or that a bid is unbalanced,” *OMSERV Corporation*, B-237691, 90-1 CPD ¶271, 1990 WL 277810 (internal citations omitted).

Simplex’s bids of zero [\$0.00] for recharging and hydro-testing each extinguisher are obviously less than the actual cost of the work. Therefore, there can be no dispute that Simplex’s bid is mathematically unbalanced. However, as the protestant, SCSC must also prove by the preponderance of evidence that there is a reasonable doubt Simplex’s bid will not result in the lowest cost to the state. As proof of material unbalancing, SCSC demonstrated that its price for inspection and maintenance for the Department of Transportation section shed in Sumter was barely half what Simplex would have charged, based on the Simplex bid. Simplex, on the other hand, offered a calculation of the price for 1000 hypothetical fire extinguishers’ service and inspection. That calculation purportedly shows Simplex’s price was about three-quarters what SCSC would have billed.

The Procurement Review Panel has maintained for years that the protestant bears the burden of proving its allegations. The Panel reaffirmed its position recently, writing “Heritage bears the burden of proving its claims by the preponderance of the evidence.” *Appeal by Heritage Community Services*, Panel Case No. 2013-01 (internal citations omitted).

² Decisions of the U.S. Comptroller General are not controlling in S.C. State Government protests. It does not appear the Panel has directly and definitively addressed the issue of unbalanced bidding. In cases like this, federal procurement decisions are enlightening.

SCSC offered only a comparison of its bid prices to Simplex's prices, for a single office of one agency of the State. Simplex countered with calculations showing its pricing was more favorable. On this evidence, the CPO cannot conclude there is a reasonable doubt that Simplex's bid will cost the state more money.

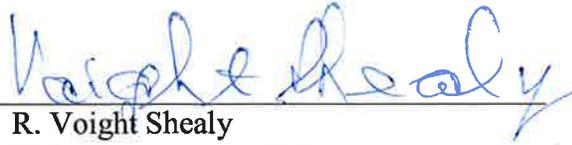
INSTRUCTIONS TO MMO

The CPO is concerned, however, that since the current procurement does not evaluate weighted individual line items to reflect the State's anticipated spend, it promotes unbalanced bidding. This weakness in the solicitation was unavoidable because the current contract did not require the contractor to report detailed usage data to MMO. As a statewide term contract, the awarded contract will be available to state agencies, as well as, political subdivisions. This IFB does require the awarded contractor to file reports with MMO of the actual work performed. Reporting of actual usage would be most useful in solving the problem and make it possible for MMO to evaluate the multiple aspects of future bids in a weighted fashion rather than merely evaluating the sum total of itemized prices. The solicitation guarantees the successful bidder a contract for a minimum term of one year. [Ex. 1, Term of Contract, Effective Date/Initial Contract Period, p. 33] Remaining years are available to the successful bidder at the state's option; they are not guaranteed.

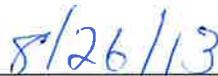
Therefore, the CPO directs MMO to review the contract actual spend after one year of performance. During that year, MMO shall require Simplex to report actual and accurate usage data in the same format specified in the IFB for all products and services it provides state and local agencies under the contract. MMO is directed to use Simplex's reports to measure the actual usage of service elements of the contract and issue a rebid that weighs the various price factors based upon actual work.

DETERMINATION

For the foregoing reasons, the protest is denied. MMO shall proceed in accordance with this decision.



R. Voight Shealy
Chief Procurement Officer
For Supplies and Services



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.



South Carolina Safety Company, Inc.

Fire Extinguishers & Systems
2535 Tahoe Drive
Sumter, South Carolina 29150

July 22, 2013

Chief Procurement Officer
Materials Management Office
protest-mmo@mimo.sc.gov

Reference: This is a protest.

In reference to solicitation # 5400006063, Purchase & Service of Fire Extinguishers, you are awarding to Simplex Grinnell LP on an incomplete bid package.

The way in which Simplex Grinnell bid the package, there is an \$18.00 per fire extinguisher fee for the inspection. What will they charge for any additional service? Will that service be included in the \$18.00 or will the extinguisher in need of service be replaced with a new extinguisher under the Purchase Contract. We would have loved to have had the opportunity to submit a bid as they did but we do not operate that way.

Further more, we would like to think our State tax money would be handled more appropriately than leaving a huge open window for the State to be charged unnecessary fees. Why did you go through all the trouble to make an itemized bid package just to accept an incomplete one?

We request a written response within 48 hours.

Thank you,

Patrick Black
Project Manager
803-905-3473
scsafety@ftc-i.net