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Protest Decision

Matter of: Maddock Construction Equipment, LLC

Case No.: 2016-134

Posting Date: March 21, 2016

Contracting Entity: South Carolina Department of Transportation

Solicitation No.: 5400010560

Contract No.: 4400012280

Description: Extra heavy-duty, PTO-driven, Trailer type Ditchers

DIGEST

Successive protest of the intended award of a contract alleging that the successful bid was non-responsive to a material requirement of the solicitation is dismissed as untimely filed.

AUTHORITY

The Chief Procurement Officer¹ conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on the evidence and applicable law and precedents.

¹ The Interim Materials Management Officer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

DISCUSSION

Maddock Construction Equipment, LLC (Maddock), protests the Intent to Award a contract to US Ditcher (Ditcher) for extra heavy-duty, PTO-driven, Trailer type Ditchers for the South Carolina Department of Transportation (DOT). Maddock's letter of protest is incorporated by reference. [Attachment 1]

BACKGROUND

Solicitation Issued	December 8, 2015
Intent to Award Issued	January 22, 2016
Protest Received	February 1, 2016
Award Suspended	February 1, 2016
Protest Amended	February 8, 2016
CPO Decision Issued	February 16, 2016
Maddock's Second Protest Received	February 26, 2016

DOT issued this Invitation For Bids to acquire four (4) extra heavy-duty, PTO-driven, trailer type ditchers. Bids were received from L&E Management,² Maddock and Ditcher. Ditcher was the apparent lowest priced responsive and responsible bidder, and DOT posted its intent to award. Maddock protested that Ditcher should have been disqualified from competing in this solicitation for violating the prohibition on communications because of Ditcher's attempt to lobby for a sole source award or change of the specifications during the pendency of the solicitation and because Ditcher bid a prototype ditcher that is not "in current production" as required by the Solicitation. Neither the original protest nor the amendment claimed that Ditcher was not responsive to the delivery requirements of the solicitation. The CPO issued a decision on February 16, 2016, denying Maddock's protest.³ On February 26, 2016, Maddock filed an appeal of the CPO's decision and separately filed this second protest of the original intent to award.

² The procurement officer determined that the equipment proposed by L&E did not meet the agency's specifications.

³ Matter of Maddock Construction Equipment, LLC, CPO Case No. 2016-128, available at http://procurement.sc.gov/webfiles/MMO_spo/Protest%20Decisions/2016-128.pdf(.)

ANALYSIS

Maddock protests that Ditcher's bid was non-responsive for failure to meet the required 120 day delivery deadline in the solicitation. The Code grants actual bidders the right to protest the award of a contract:

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; 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).

The Intent to Award was issued on January 22, 2016, and Maddock had ten (10) days to timely file a protest which it did on February 1, 2016. In accordance with the Code, Maddock was automatically granted an additional five (5) days to amend its initial protest which it did on February 8, 2016⁴. Attached to the February 8 amendment as Exhibit B was a copy of Ditcher's bid, including the delivery language upon which Maddock bases its current complaint. In other words, Maddock had all the information it needed to challenge Ditcher's delivery terms by February 8, and it failed to do so. Maddock's complaint that its disqualification for failure to meet the required delivery date was not provided in response to a Freedom of Information request is immaterial. Its claim that the failure to disqualify Ditcher for the same reason resulted in "Unlawful Decisions, Unlawful Actions and Arbitrary, Capricious and Unlawful Unequal Processes," was not raised in its original or amended protest and is untimely filed.

DECISION

For the reasons stated above, this protest of Maddock Construction Equipment, LLC is dismissed.

⁴ The 15th day fell on Saturday, February 6, 2016, and in accordance with Section 11-35-310(13), the final day to timely file the amended protest fell to the end of the next business day or February 8, 2016.

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Case No. 2016-134

March 21, 2016

For the Materials Management Office

A handwritten signature in cursive script that reads "Michael B. Spicer".

Michael B. Spicer

Chief Procurement Officer

Attachment 1



John E. Schmidt, III
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Melissa J. Copeland
803.309.4686
Missy.Copeland@TheSCLawfirm.com

February 26, 2016

BY E-MAIL AND HAND DELIVERY

protest-mmo@mmo.sc.gov

mspicer@mmo.sc.gov

Michael B. Spicer
Chief Procurement Officer
State of South Carolina
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: Protest of Unlawful Decisions, Unlawful Actions and Unequal Process -
Solicitation 5400010560 (PTO-Driven, Trailer Type Ditchers) -
Department of Transportation

Dear Mr. Spicer:

This Firm represents Maddock Construction Equipment, LLC ("Maddock")¹ and files this protest of the Unlawful Decisions, Unlawful Actions and Arbitrary, Capricious and Unlawful Unequal Processes described herein, as first disclosed in the CPO's posted Decision on January 22, 2016 for Solicitation 5400010560 (PTO-Driven, Trailer Type Ditchers) - Department of Transportation.² The actions at issue first made evident the CPO's Decision that Maddocks' bid was not in compliance with the requirements of the solicitation in regard to delivery time/date, and that the bid of US Ditcher was not likewise found to be non-complying under the exact same standard. Such unequal treatment of vendors is absolutely contrary to the law and the terms of the Solicitation. ***The information on which this protest is based was requested and should have been produced in response to the Freedom of Information Act request that Maddock sent on February 1, 2016 (see Exhibit E hereto), but this***

¹ Maddock's corporate office address is 239 West Grimes Lane, Bloomington, Indiana 47403.

² A copy of the CPO Decision in which the protested matters were first made public is attached hereto as Exhibit A.

information was not produced, as stated, until it was disclosed as a part of the CPO's Decision on Maddock's initial protest.

Maddock has standing to file this protest because it is an actual bidder who is aggrieved in connection with these actions and the intended award to US Ditcher. This protest is timely filed because it is filed within ten days of the date that these decisions at issue were first posted or made known, and were within ten days of the date that Maddock first became aware of such actions and the grounds to file this protest.

Pursuant to S.C. Code Ann. § 11-35-4210(d)(7), Maddock respectfully requests that any contract or award should be stayed while this protest remains pending and for ten days after any decision is issued in response to this protest.

Maddock respectfully requests that US Ditcher be found to be non-responsive to the Solicitation, the Intent to Award to US Ditcher should be rescinded, in the same way that Maddock's bid was found to be non-responsive.

Finally, Maddock requests that the Chief Procurement Officer hold a hearing on this protest and afford Maddock an opportunity to present evidence and testimony.

Factual and Procedural Background

Maddock has been supplying ditchers to the State of South Carolina Department of Transportation for the last seven years. The ditchers that Maddock has been supplying to the Department of Transportation have met the Department's requirements during this time.

On December 8, 2015, the current Solicitation was issued.³ See Exhibit B hereto. As stated in the Solicitation, the Department of Transportation seeks to buy "trailer type ditchers" that are "extra heavy-duty, PTO-driven, trailer type units designed for highway ditch construction and cleaning operations." See Exhibit B, p. 8. Of significant importance to this protest, the Solicitation mandated that "All items shall be delivered within 120 days after receipt of the purchase order." (See Exhibit B, p. 20).

On January 5, 2016, Maddock, US Ditchers, and L&E Management submitted bids in response to the Solicitation.⁴ On January 22, 2016, the Procurement Office issued the Intent to Award, which stated that US Ditcher was the apparent winning bidder with ditchers offered at a unit price of \$89,650.00 for a total contract value of \$358,600. See Exhibit C.

³ See <http://webprod.cio.sc.gov/SCSolicitationWeb/contractSearch.do?solicitnumber=5400010560>.

⁴ See Exhibit A. L&E Management was deemed non-responsive for not meeting the Solicitation requirements.

According to an attachment to the February 16, 2016 Protest Decision issued by the Chief Procurement Officer in a previously filed protest of the Intent to Award in this Solicitation, the Department of Transportation determined that Maddock's bid was non-responsive because Maddock "took exception to the Delivery Terms of 120 Days," which was purportedly "contrary to" a "material requirement of the solicitation." See Exhibit D, Attachment 5 ("Determination for award for Solicitation 5400010560"). Maddock was never notified that the Department of Transportation deemed Maddock's bid to be non-responsive, nor did Maddock have any indication, prior to receiving the CPO's Protest Decision, that Maddock's bid was purportedly non-responsive for taking exception to the delivery deadline. Such determination was never posted and as stated, no notice of it was ever given to Maddock at all until the Decision was posted. ***Indeed, this information was requested and should have been produced in response to the Freedom of Information Act request that Maddock sent on February 1, 2016 (see Exhibit E hereto), but this information was not produced.***

US Ditcher's Bid Was Non-Responsive for Failing to Meet the Required Delivery Date, and the Competitors were Not Treated Equally in Regard to this Provision

The procurement process at issue was materially flawed because US Ditcher should have been deemed non-responsive for failing to meet the 120-day delivery deadline that the Solicitation required, and it is obvious that the competitors were not treated equally. The Solicitation mandated that "All items shall be delivered within 120 days after receipt of the purchase order." (See Exhibit B, p. 20). The Intent to Award was issued on January 22, 2016. Absent a protest, 120 days from the Intent to Award would have been May 19, 2016. Despite the 120 day deadline for delivery, US Ditchers stated that it would deliver its ditchers on July 15, 2016 and August 15, 2016. See US Ditcher's Bid, which is attached hereto as Exhibit F, page 3. US Ditcher's bid included the following handwritten delivery deadline:

DELIVERY: 7/15/2016 AND 8/15/2016.

See US Ditcher's Bid, which is attached hereto as Exhibit F, page 3. US Ditcher's delivery schedule would have been almost 180 days and 210 days after the Intent to Award. As such, US Ditcher's delivery date exceeded the 120 day deadline that the Solicitation required. Unbeknownst to Maddock (until the CPO Decision was posted) this matter was the basis for disqualifying Maddock's bid. This delay is consistent with the evident fact that US Ditcher bid a product not yet in production.

The 120-day delivery deadline was treated by the State as mandatory and essential and non-waiveable as evidenced by the Solicitation's use of the requirement that the ditchers "shall be delivered" within 120 days after receipt of the purchase order. Indeed, Maddock was purportedly deemed to be non-responsive for taking exception to

the 120 day delivery deadline. See Exhibit D, Attachment 5 (stating that Maddock's bid was non-responsive because Maddock "took exception to the Delivery Terms of 120 Days"). It is a clear violation of law for the State to treat US Ditcher in a totally different manner in this regard. The overt failure of the State to treat vendors equally is a most serious violation of law, and renders the process a nullity.

The posting of the Decision was also the first point at which it became at all apparent that the selection process was specifically unequal and biased, in that Maddock was disqualified over the delivery deadline, while US Ditcher was not held to the same requirement or standard, in violation of law. It is fundamental that all vendors are to be treated equally and here, by the previously issued Protest Decision, it has first become apparent that was not the case at all in this process.

Because Maddock was deemed non-responsive for failing to meet the 120-day deadline, US Ditcher's bid also should have been deemed non-responsive because US Ditcher far exceeded the 120 day deadline and instead offered to deliver its ditchers almost 180 days and 210 days after the Intent to Award. Therefore, Maddock respectfully requests a hearing and that the Chief Procurement officer deem US Ditcher non-responsive and thus ineligible for contract award, and all relief allowed by law.

Very truly yours,



John E. Schmidt, III

Enclosures

cc: Maddock Construction Equipment, LLC
Jeremy Berry, Esq.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised September 2015)

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 111.1 of the 2015 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 209, 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.