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Protest Decision

Matter of: TSI, Inc.

Case No.: 2016-216

Posting Date: June 27, 2016

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400008056

Description: Statewide – IT Temporary Services

DIGEST

Protest purportedly challenging Amendment 12 to a solicitation is denied as untimely filed, where no allegations of protest pertain to the amendment.

AUTHORITY

The Chief Procurement Officer 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.

BACKGROUND

ITMO issued this Fixed Price Bid on September 2, 2015. The solicitation is designed to allow a Using Governmental Unit (UGU) to augment its information technology staff.

Event	Date
Solicitation Issued	09/02/2015
Solicitation Published in SCBO	09/02/2015
Amendment One Issued Modified solicitation and answered bidder questions.	09/17/2015
Protest by TSI, Inc. Received	10/01/2015
Amendment Two Issued Extended bid opening date.	10/02/2015
Amendment Three Issued Clarified late payment provisions.	10/14/2015
Amendment Four Issued Extended bid opening date.	10/16/2015
TSI protest denied for vagueness, untimeliness, and/ or failure to state a claim for relief	10/29/2015
Amendment Five Issued Extended bid opening date.	10/30/2015
Decision appealed to Procurement Review Panel	11/09/2015
Amendment Six Issued Extended bid opening date.	11/23/2015
Appeal rejected by Panel for lack of filing fee	11/25/2015
Amendment Seven Issued Set new bid opening date.	12/01/2015
Protest by J-Kell, Inc. Received	12/17/2015
Amendment Eight Issued Modified solicitation requirement for Supplier Personnel	12/18/2015
Amendment Nine Issued Suspended solicitation	12/21/2015
J-Kell protest denied as untimely	02/04/2016
Decision appealed to Procurement Review Panel	02/12/2016
Appeal denied by Panel as untimely	04/11/2016
Amendment 10 Issued	05/17/2016
Protest by TSI, Inc. Received	05/31/2016
Amendment 11 suspended solicitation	06/01/2016
CPO Lifted Stay of Procurement	06/16/2016
Amendment 12 Restarted Procurement	06/15/2016
TSI Protest of Amendment 12	06/23/2016
CPO Lifted Stay of Procurement	06/23/2016

This is the third protest of this solicitation by TSI. TSI's original protest included eleven numbered grounds. All pertained to the original solicitation. The CPO dismissed that protest as

untimely.¹ TSI's appeal to the Panel was denied on November 9, 2015. The solicitation was untimely protested by another potential bidder on December 17, 2015, and the Panel dismissed the appeal on April 11, 2016. *Appeal by J-Kell, Inc.*, Panel Case No. 2016-2. ITMO issued Amendment 10 to restart the solicitation on May 17, 2016. TSI filed another protest on May 31, 2016, raising the same issues that were raised in the two previous protests. This protest was ruled untimely by the CPO.² On June 10, 2016, TSI appealed that decision to the Panel, which has assigned it Panel Case No. 2016-9. On June 16, 2016, after consultation with the head of the using agency, the CPO posted a determination to lift the automatic stay. Thereafter, ITMO issued Amendment 12 setting a new opening date for responses to the solicitation. TSI now protests Amendment 12 alleging that setting a new opening date that is less than 10 days from the issuance of the Amendment and while TSI's appeal to the Panel is pending violates some unspecified provision of the Code. TSI also protests that:

To proceed to bid opening and award of this solicitation after so much controversy has surrounded it since its release in September, 2015, would be unconscionable, in that the terms and conditions of the solicitation and amendments precludes the participation of most of the incumbent and other vendors engaged in the type of services requested by the solicitation, and harms the using agencies by robbing them of their experienced and trained IT temporary staff.³

TSI's protest letter is included by reference. [Attachment 1]

¹ The CPO's decision in Case No. 2016-203 may be viewed or downloaded at: <http://procurement.sc.gov/PS/legal/decisions/Decision%20No.%202016-203.pdf> (last viewed June 1, 2016). The Panel declined to accept TSI's appeal because the filing fee was not paid.

² A copy of the October 2015, protest letter is attached to the CPO's decision referred to in the previous note. It included eleven numbered grounds (no. 10 was a "placeholder" for later-discovered issues). The 2015 protest ground 1 has been cut and pasted into the current protest as paragraph 9. 2015 paragraph 2 corresponds to "new" paragraph 12. "Old" paragraph 3 is recast as new paragraphs 16 and 17. Old paragraph 4 has been renumbered as new paragraph 19; old paragraph 5 as new paragraph 21; old paragraph 6 as new paragraph 24; old paragraph 7 as new paragraphs 23 and 25. Old no. 8 has been split into pieces and appears in the current protest as paragraphs 1 through 3 and 5 through 7. Paragraph 9 of the 2015 claim finds new life as paragraph 8, and the claims in 2015 paragraph 11 are reborn as paragraph 28. The protest ground based on cyber-liability insurance is identical to that raised by J-Kell, Inc., and dismissed by the Panel in Case No. 2016-2.

³ TSI was one of 106 bidders who submitted bids in response to this solicitation on June 24, 2016.

ANALYSIS

TSI, Inc. (TSI), protests as follows:

TSI hereby protests this solicitation that sets a new opening date for this solicitation for June 24, 2016, less than ten (10) days from the notice of Amendment, and while there is an active, open challenge of a protest decision. Less than seven (7) business days will likely prohibit all but the largest of companies from adequately responding to this solicitation, and this vendor's request for review by the Procurement Review Panel was timely filed on Friday, June 10, 2016 and remains unresolved.

TSI's letter alleges no specific violations of the Code, but the CPO will attempt to address the issues raised in a light most favorable to TSI. TSI's protests fails to explain the significance of the reference to an opening date within 10 days of notice of the Amendment and the CPO is at a loss to attach any significance to the ten day time frame with regard to a solicitation or amendment. Regulation 19-445.2030(5) provides:

Bidding time will be set to provide bidders a reasonable time to prepare their bids. The date of opening may not be less than seven (7) days after notice of the solicitation is provided as required by Section 11-35-1520(3), unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Chief Procurement Officer or the head of the purchasing agency or his designee. (emphasis added)

This solicitation was initially published on September 2, 2015 and advertised in South Carolina Business Opportunities on September 2, 2015, in accordance with Section 11-35-1520(3). Amendment 12 was issued on June 16, 2016, with an opening date of June 24, 2016, eight days after issuance of the amendment. There is no violation of the Code and this aspect of the protest is dismissed.

TSI also seems to find fault with receiving bids while its appeal is pending before the Panel. Section 11-35-4210(7) provides for a stay of the procurement pending an appeal to the Panel, unless the CPO, after consultation with the head of the purchasing agency, determines to lift the stay as follows:

(7) Automatic Stay of Procurement During Protests. In the event of a timely protest pursuant to subsection (1), the State shall not proceed further with the solicitation or award of the contract until ten days after a decision is posted by the appropriate chief procurement officer, or, in the event of timely appeal to the Procurement Review Panel, until a decision is rendered by the panel except that solicitation or award of a protested contract is not stayed if the appropriate chief procurement officer, after consultation with the head of the using agency, makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the best interests of the State.

Since the CPO lifted the automatic stay, there is no violation of the Code and this aspect of TSI's protest is denied.

DECISION

For the reasons stated above, the protest of TSI, Inc. is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1



Technology Solutions, Inc.

June 23, 2016

Mike Spicer, Chief Procurement Officer
SFAA, Div. of Procurement Services, ITMO
1201 Main Street, Suite 601
Columbia, SC 29201

RE: Protest of Amendment 12 to Solicitation 5400008056, IT Temporary Services

Dear Mr. Spicer:

I am respectfully advising you of Technology Solutions, Inc.'s Protest of Solicitation number 5400008056, IT Temporary Services, Amendment 12 and the underlying solicitation and remaining amendments (incorporated here as if attached). According to the date of the Amendment, it was issued on June 16, 2016. Pursuant to S.C. Code of Laws, my calculations make the notification of protest due on or before June 30, 2016. Please consider this our notice of protest.

TSI hereby protests this solicitation that sets a new opening date for this solicitation for June 24, 2016, less than ten (10) days from the notice of Amendment, and while there is an active, open challenge of a protest decision. Less than seven (7) business days will likely prohibit all but the largest of companies from adequately responding to this solicitation, and this vendor's request for review by the Procurement Review Panel was timely filed on Friday, June 10, 2016 and remains unresolved.

Additionally, it is apparent that ITMO contemplated problems with this solicitation, necessitating a Contract Modification to the existing contract this solicitation will replace. Contract Modification 8 (Exhibit A) extends the current contract through August 25, 2016, therefore the rushed bid opening date of June 24 is not necessary. In fact, it would be more advantageous to the State to leave the current contract in place, given that the new terms and conditions of a contract that might be awarded as a result of the current solicitation, would result in lost talent and missed deadlines for many critical IT projects ongoing. There is nothing prohibiting another Contract Modification extending the current contract past August 25, 2016, and this will cause harm to no one, least of all the using agencies, who would actually benefit from such extension.

To proceed to bid opening and award of this solicitation after so much controversy has surrounded it since its release in September, 2015, would be unconscionable, in that the terms and conditions of the solicitation and amendments precludes the participation of most of the incumbent and other vendors engaged in the type of services requested by the solicitation, and harms the using agencies by robbing them of their experienced and trained IT temporary staff.

Remedies Requested:

1. Cancel Solicitation and amendments 5400008056, as allowed by §11-35-4310(a), and convene an advisory committee to rewrite a solicitation that eliminates restrictive terms and conditions in the current solicitation and amendments that would repeat the problems (anti-

competitive practices, chilling of competition, bad faith and unfair dealings, etc.) small, minority and ethical businesses have experienced in the past.

2. Issue a Contract Amendment to the existing contract, extending the contract through December 31, 2016, or a date allowing enough time to resolve the problems with the current solicitation via the Procurement Review Panel review or Circuit Court, if necessary. This is in the best interest of the state, in that it leaves incumbent vendors and their personnel in place, and does not unnecessarily disrupt ongoing SC State IT projects. It also provides for the addition of personnel by the using agencies, as they see fit.
3. Demand a report to the Attorney General and a request for an investigation into possible anti-competitive practices taking place under the existing contract. Use that investigation to inform the implementation of a new and improved contract vehicle for the procurement of IT Temporary Services.
4. Ensure that the new solicitation and any resulting contract is dictated by state statutes that give preferences for SC based, Certified as Small and Minority firms that are given preferences in pricing and other criteria allowed by law.
5. Change the type of solicitation to reflect the RFP-like criteria used in the selection of candidates for open positions and make it a services contract that will not have the same liabilities to the state as a personnel contract. Then, scoring would be based on vendor qualifications, cost and resource proposed, rather than focusing on individual consultants. Scoring criteria would then be available to vendors, making the process much more transparent, and better informing our selection process to be successful under this contract.

Thank you for your assistance in this matter. It is the sincere goal of TSI to work with ITMO to resolve these issues so that business can continue as usual. However, historically there has been little, if any, movement to improve the administration and practices of this contract vehicle, therefore this protest and others were necessitated. The same VMS that is in use now has been selected for the new process, and business is currently continuing as usual, therefore no harm will come to any participant in this process. Therefore, we rely on the auto stay guaranteed by § 11-34-4210(7). There is no compelling reason to rush the award of a new contract, as it is in the best interest of the state to review this process more thoroughly before launching another five-year period of anti-competitive practices and bad faith on the part of the State.

TSI also utilizes this letter to provide notice to the CPO of potential tampering with the SCEIS vendor notification system. This vendor has now five (5) times visited the SCEIS system, logged in with appropriate credentials, and elected to participate in notifications for this solicitation, or finding that the participation option has already been selected, verified that. Two of the five visits were accompanied by help desk personnel by telephone to ensure that all that was required so that notifications related to this solicitation would be emailed to this vendor, has been done properly. This vendor is receiving emailed notifications about other solicitations and available bids from SCEIS, but nothing regarding this solicitation. Other vendors who have signed up in the same manner as this vendor, are receiving notifications related to this solicitation without problems. It appears that there is a "behind the scenes" effort to attempt to "blackball" or otherwise prevent this vendor from learning about new amendments and developments on this specific solicitation. The frequency of these activities has passed the chance of being coincidental. This vendor is requesting that the CPO review with his staff and the staff that manages the SCEIS system for the benefit of

Mr. Spicer
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State Procurement, appropriate duties and fair competition to ensure that whatever has been done to prevent this vendor from receiving notifications, is immediately corrected.

Respectfully submitted,



Cathy G. Lanier
President

Cc: Geoffrey Chambers, Attorney at Law
Christy Emanuel, SC Procurement Review Panel

**State of South Carolina****Contract Modification #8**

Solicitation Numbers: 5400000822/1129/1177/1342
Procurement Officer: Johanne M. Sullivan, CPPB
Phone: 803-737-3416
E-Mail Address: jmsullivan@mmo.sc.gov
Address: 1201 Main St, Suite 600
Columbia, SC 29201

DESCRIPTION: IT Temporary Staff Augmentation Services

USING GOVERNMENTAL UNIT: Statewide Term Contract

EXHIBIT A

CONTRACTOR'S NAME AND ADDRESS: ALL CONTRACT HOLDERS

TYPE OF CHANGE:

- Change to Contract Scope of Work
 Change to Contract Pricing Pursuant to Existing Contract Clause.
 Clause Name _____ Clause No. _____
 Administrative Change to Contract (such as changes in paying office, name of Agency Contract Administrator, etc.)
 Other Change

IMPORTANT NOTICE:

- Change Order: Contractor is required to sign this document and return _____ copies to the procurement officer named above by the following date: _____.
 Contract Modification: Contractor is required to acknowledge receipt of this document in writing by the following date: October 31, 2015. Contractor does not indicate agreement with change simply by acknowledging receipt.

DESCRIPTION OF MODIFICATION: To extend the contracts awarded until new contracts are awarded.

Whereas the contracts awarded pursuant to the above referenced solicitations are set to expire on October 31, 2015;

And a new contracts have not yet been awarded for IT Temporary Staff Augmentation;

And the State sees great value in having such contracts in place;

Therefore the contracts awarded pursuant to the above referenced solicitations are hereby extended until August 25, 2016 or until such time as new contracts are awarded pursuant to a new solicitation, whichever is first.

Except as provided herein, all terms and conditions of the Contracts referenced above remain unchanged and in full force and effect.

SIGNATURE OF PERSON AUTHORIZED TO EXECUTE / ISSUE THIS CONTRACT MODIFICATION ON BEHALF OF
USING GOVERNMENTAL ENTITY:By: Johanne M. Sullivan
(authorized signature)Johanne M. Sullivan, CPPB
(printed name of person signing above)Its: Procurement Officer
(title of person signing above)Date: October 23, 2015

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.