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Protest Decision

Matter of: IVS, Inc. dba AngelTrax

Case No.: 2017-208

Posting Date: May 23, 2017

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400012134

Description: In-Car/In-Bus Digital Recording Systems

DIGEST

Protest alleging an improper determination of non-responsibility is denied. IVS, Inc. dba AngelTrax's (AngelTrax) letter of protest is included by reference. [Attachment 1]

AUTHORITY

The Chief Procurement Officer (CPO) conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on the protest letter, papers in the procurement file, and applicable law and precedents.

BACKGROUND

<i>Event</i>	<i>Date</i>
Solicitation Issued	09/29/2016
Amendment 1 Issued	10/17/2016
Amendment 2 Issued	10/28/2016

<i>Event</i>	<i>Date</i>
Intent to Award Posted	04/07/2017
Protest Received	10/17/2016
Protest Amended	10/21/2016

ANALYSIS

This Invitation For Bids was issued by the State Fiscal Accountability Authority (SFAA) to establish a state term contract for In-Car/In-Bus Digital Recording Systems. Angeltrax protests the disqualification of its bid as non-responsive. The procurement officer's determination (Attachment 2) was provided to AngelTrax as follows:

(c) Responsiveness . Any Offer which fails to conform to the material requirements of the Solicitation may be rejected as nonresponsive. Offers which impose conditions that modify material requirements of the Solicitation may be rejected. If a fixed price is required, an Offer will be rejected if the total possible cost to the State cannot be determined. Offerors will not be given an opportunity to correct any material nonconformity. Any deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer. [R.19-445.2070 and Section 11-35-1520(13)]

On page 15 of the IFB, Part III, Scope of Work states in pertinent part:

RESTOCKING FEE

If a product(s) is returned to contractor within thirty (30) days after acceptance, returned product will be accepted by Contractor and no restocking fee will be charged to the Using Governmental Unit. Contractor shall accepted product(s) beyond 30 days after acceptance, however, a 10% fee can be charged by the Contractor to the Using Governmental Unit.

In reviewing the bid response submitted by IVS, Inc. dba AngelTrax on page 27, states in pertinent part:

No returns will be accepted after 30 days from invoice date. If a return is received within 30 days of the invoice date, a 15% restocking fee will be added to all returned items.

The solicitation is clear that Offers, which impose conditions that modify material requirements of the Solicitation, may be rejected.

IVS, Inc. dba AngelTrax has conditioned their offer by stating a return policy that conflicts with the Restocking Fee clause in the solicitation. This modifies the

requirements of the solicitation and as such attempts to limit IVS, Inc. dba AngelTrax's liability to the State.

Per South Carolina Regulation 19-445.2070(D), IVS, Inc. dba AngelTrax is deemed as nonresponsive.

In its protest letter AngelTrax argues that the offending language is contained in a footer automatically added to all AngelTrax quotes and is overridden by the following language found on the cover page of the solicitation:

You must submit a signed copy of this form with Your Offer. **By signing, You agree to be bound by the terms of the Solicitation.** You agree to hold Your Offer open for a minimum of thirty (30) calendar days after the Opening Date.

(emphasis in the original)

A contract is comprised of an offer and an acceptance. The State's Invitation for Bids is an "invitation" for vendors to "offer" a price for the goods or services as specified in the invitation. The vendor's bid is the "offer." The State's award statement or purchase order is the acceptance of the vendor's offer. The purpose of the invitation is to insure that all the vendors are offering the same goods or services under the same terms and conditions. The unsolicited quote submitted with AngelTrax's bid was part of its offer. That offer significantly changed the restocking requirements stated in the invitation. The procurement officer correctly rejected the offer because it did not conform to the conditions of the invitation. *See Appeal by Blue Bird Corp.*, Panel Case No. 1994-15 ("The Panel acknowledges that the IFB requires a bidder to agree that its product meets or exceeds the bid requirements as detailed in the IFB. However, the broad statement by a bidder that it will meet the specifications does not necessarily cover any specific deficiencies in its response to the IFB.").

In the alternative AngelTrax argues that the footnote should be considered a minor informality or irregularity as defined in Section 11-35-1520(13) that could be waived or cured by the procurement officer. The invitation required no restocking fee if the product was returned within the first 30 days and a 10% restocking fee if returned after 30 days. AngelTrax's footnote

modified the requirement to a 15% restocking fee if the product was returned within 30 days and no returns after 30 days. Section 11-35-1530(13) defines a minor informality or irregularity as:

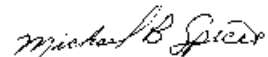
A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance 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.

AngelTrax's modification had more than a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract and thus could not be waived or cured. *E.g., Appeal by Transportation Management Services, Inc., Panel Case No. 1992-15.*

DECISION

For the reasons stated above, the protest of IVS, Inc. dba AngelTrax is denied.

For the Information Technology Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1



Reliable Digital Mobile Video Surveillance Solutions

April 10, 2017

Mr. Mike Spicer
Chief Procurement Officer for Information Technology
State of South Carolina
1201 Main Street, Suite 601
Columbia, SC 29201

Via email to: protest-itmo@itmo.sc.gov

Re: Award Protest
Solicitation: 540012134
Description: In-Car/In-Bus Digital Recording Systems
Agency: Statewide Term Contract

Dear Mr. Spicer:

Please accept this letter from IVS, Inc. dba AngelTrax as notification of our formal protest of the final award selection of the aforementioned solicitation.

Mrs. Sullivan has forwarded us the following for the reasoning of her decision to deem our proposal response as non-responsive:

(c) Responsiveness. Any Offer which fails to conform to the material requirements of the Solicitation may be rejected as nonresponsive. Offers which impose conditions that modify material requirements of the Solicitation may be rejected. If a fixed price is required, an Offer will be rejected if the total possible cost to the State cannot be determined. Offerors will not be given an opportunity to correct any material nonconformity. Any deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer. [R.19-445.2070 and Section 11-35-1520(13)]

On page 15 of the IFB, Part III, Scope of Work states in pertinent part:

RESTOCKING FEE

If a product(s) is returned to contractor within thirty (30) days after acceptance, returned product will be accepted by Contractor and no restocking fee will be charged to the Using Governmental Unit. Contractor shall accepted product(s) beyond 30 days after acceptance, however, a 10% fee can be charged by the Contractor to the Using Governmental Unit.

In reviewing the bid response submitted by IVS, Inc. dba AngelTrax on page 27, states in pertinent part:

No returns will be accepted after 30 days from invoice date. If a return is received within 30 days of the invoice date, a 15% restocking fee will be added to all returned items.



The solicitation is clear that Offers, which impose conditions that modify material requirements of the Solicitation, may be rejected.

IVS, Inc. dba AngelTrax has conditioned their offer by stating a return policy that conflicts with the Restocking Fee clause in the solicitation. This modifies the requirements of the solicitation and as such attempts to limit IVS, Inc. dba AngelTrax's liability to the State.

Per South Carolina Regulation 19-445.2070(D), IVS, Inc. dba AngelTrax is deemed as nonresponsive.

Our protest is based on the following disagreement with Mrs. Sullivan's decision.

Page 27 of our response, to which Mrs. Sullivan is referring and upon which her decision is based, is the last page of our quote ATXQ19409. The text to which she refers is located in the "automatic footer" of our quote. Also, please note that this is the only reference to this restocking fee within our 211 page submitted response.

We have provided copies of quotes showing the same verbiage, in the same location as on quote ATXQ19409, proving that this statement is automatically generated and entered by our quoting software into each quote as a "footer."

We respectfully point out that page one of the Solicitation states the following:

*You must submit a signed copy of this form with Your Offer. **By signing, You agree to be bound by the terms of the Solicitation.** You agree to hold Your Offer open for a minimum of thirty (30) calendar days after the Opening Date.*

Our signature, which did in fact bind us to the terms of the Solicitation, would override any statement that would be contrary to the terms, without any other indication that the contrary statement would be a deviation from the Contract Terms.

Additionally, we feel that this infraction would fall under the category of "deficiency" as addressed in Mrs. Sullivan's citatory of [R.19-445.2070 and Section 11-35-1520(13)]: "Any deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer." We request that our infraction be "cured or waived" and that our proposal response be reconsidered.

We also request that our history as a contract holder with the State of South Carolina, since 2011, will be considered in your decision. Our contract produced sales in excess of \$6,000,000, which generated approximately \$63,500 in administrative fees for the State of South Carolina.

Please let me know if any additional documentation will be needed.

Best Regards,

A handwritten signature in black ink that reads 'Sally Klein'.

Sally Klein
Government and Education Senior Coordinator

Cc: jmsullivan@mmo.sc.gov

Memo For Record

Determination of a Non-Responsive Offer

**Solicitation # 5400012134
In-Car/In-Bus Digital Recording Systems**

Offer Submitted By: IVS, Inc. dba AngelTrax

The following excerpts are from the original solicitation document relevant to the Determination of Non-Responsiveness:

RFP Solicitation No. 5400012134, dated 09/29/2016, on page 10, Part IIA, states (with emphasis added):

RESPONSIVENESS/IMPROPER OFFERS (JUN 2015)

(a) Bid as Specified. Offers for supplies or services other than those specified will not be considered unless authorized by the Solicitation.

(b) Multiple Offers. Offerors may submit more than one Offer, provided that each Offer has significant differences other than price. Each separate Offer must satisfy all Solicitation requirements. If this solicitation is an Invitation for Bids, each separate offer must be submitted as a separate document. If this solicitation is a Request for Proposals, multiple offers may be submitted as one document, provided that you clearly differentiate between each offer and you submit a separate cost proposal for each offer, if applicable.

(c) Responsiveness. Any Offer which fails to conform to the material requirements of the Solicitation may be rejected as nonresponsive. Offers which impose conditions that modify material requirements of the Solicitation may be rejected. If a fixed price is required, an Offer will be rejected if the total possible cost to the State cannot be determined. Offerors will not be given an opportunity to correct any material nonconformity. Any deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer. [R.19-445.2070 and Section 11-35-1520(13)]

(d) Price Reasonableness: Any offer may be rejected if the Procurement Officer determines in writing that it is unreasonable as to price. [R. 19-445.2070].

(e) Unbalanced Bidding. 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.

(f) **Do not submit bid samples or descriptive literature unless expressly requested.** Unsolicited bid samples or descriptive literature will not be examined or tested, will not be used to determine responsiveness, and will not be deemed to vary any of the provisions of the solicitation. S.C. Code Ann. Reg. 19-445.2077(D).

[02-2A105-2]

On page 15 of the IFB, Part III, Scope of Work states in pertinent part:

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Per South Carolina Regulation 19-445.2070(D), IVS, Inc. dba AngelTrax is deemed as non-responsive.



Johanne M. Sullivan, CPPB
Procurement Manger



Date

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised November 2016)

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 2016 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
1205 Pendleton Street, Suite 473, 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.