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Protest Decision

Matter of: Flemington Aluminum & Brass, Inc.

Case No.: 2018-164

Posting Date: May 7, 2018

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400014791

Description: Pedestrian Signal Equipment

DIGEST

Protest of non-responsive determination and alleging unbalanced bidding is denied. Flemington Aluminum & Brass' (FAB) letter of protest is included by reference. [Attachment 1]

AUTHORITY

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

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

BACKGROUND

Event	Date
Solicitation Issued	02/06/2018
Amendment One Issued	03/05/2018
Intent to Award Issued	03/27/2018
Protest Received	04/03/2018

ANALYSIS

The State Fiscal Accountability Authority issued this Invitation for Bids on February 6, 2018 to establish a state-term contract for Pedestrian Signal Heads with LED modules and associated mounting hardware and supplies. The solicitation included an attached spreadsheet listing descriptions and estimated quantities for 24 items. The bidding schedule was comprised of a single line item reflecting the total from the attached spreadsheet. FAB only bid 8 of the 24 items, and its bid was determined non-responsive for failure to submit an offer on all 24 line items. (Attachment 2) FAB protests the determination that its bid was non-responsive arguing that: “Nowhere in the solicitation does it say that all items must be bid in order for a bid to be considered.”

The solicitation included the following statement:

CALCULATING THE LOW BID

The low bid(s) will be calculated by the sum total of lines 1-24.

[Amendment 1, Page 25]

In addition the solicitation included the following bidding instructions:

BIDDING SCHEDULE (NOV 2007)

All Offerors are required to complete the “Pedestrian Signal Equipment Bid Schedule Amend 1” spreadsheet and attach it to their offer in SCEIS. SCEIS requires that you enter a Unit Price with your offer before it will permit you to submit it. Enter the “Total Estimated Extended Price” from the spreadsheet as the Unit Price for your offer.

The “Total Estimated Extended Price” on the spreadsheet must match the “Unit Price” offer entered into SCEIS.

If the low bidder's numbers do not match (meaning the unit prices for each line item multiplied by the quantity do not equal the Total Estimated Extended Price) as the Unit Price placed in SCEIS, their bid will be invalid and we will begin with the next lowest bid.

Failure to provide the "Pedestrian Signal Equipment Bid Schedule Amend 1" with your offer could deem your offer as non-responsive. It is preferred that the spreadsheet is submitted in the original MS Excel format.

Line Number	Quantity	Unit of Measure	Unit Price	Estimated Extended Price
0001	1	Each		
Product Catg.: 55080 - Traffic Controls and Equipment Electric Systems				
Item Description: Pedestrian Signal Equipment				
Tendering Text: Enter the "Total Estimated Extended Price" from the "Pedestrian Signal Equipment Bid Schedule Amend 1" spreadsheet. Attach the spreadsheet to your offer in SCEIS.				
Internal Item Number: 1				

[Amendment 1, Page 38](Highlighting in original)

Clearly the solicitation required the bidders to complete spreadsheet "Pedestrian Signal Equipment Bid Schedule Amend 1." The solicitation stated that the "Total Estimated Extended Price" on the spreadsheet must match the "Unit Price" offer entered into SCEIS. And the solicitation clearly stated that the low bid would be calculated by the sum total of lines 1-24. FAB's reading of the solicitation would allow a bidder to bid on one or more line items and win the award simply because it bid on the fewest line items. Thus, because FAB submitted a bid on only 8 of the 24 items, its bid was properly declared non-responsive. This issue of protest is denied.

FAAB next protests that the bid of J.Q. & G. Inc. Company should have been disqualified for unbalanced bidding.

They are unlikely to be able to sell an identical 10' pole for \$115.71 less than their 8' pole. That is less than half the price for a pole which is identical 10' pole for \$115.71 less than their 8" pole. That is less than half the price for a pole which is identical but 2' longer. Their single post top slipfitter and dual post top slipfitter are the same price, which is impossible. In fact, pursuant to Section II, Part A of

the bid under RESPONSIVENESS/IMPROPER OFFERS, I would argue that their bid is unbalanced as described in part (e). Their "prices are materially unbalanced between line items." The prices are "significantly less than cost for some work" and "significantly overstated in relation to cost for other work". I question why JQ&G Company's bid failed to be deemed non-responsive when it engaged in behavior explicitly prohibited in the bid documents, but Flemington Aluminum & Brass, Inc.'s bid was deemed non-responsive based upon an unarticulated offense?

The solicitation prohibits unbalanced bidding as follows:

(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.

[Amendment 1, Page10]

The Procurement Review Panel set a three-part test as the standard for review of allegations of unbalanced bidding as follows:

Looking again at the language of the IFB clause quoted above, the Panel finds that the following elements must be proven in the instant case to establish a materially unbalanced bid: (1) there must be evidence showing that some prices are significantly less than cost for some line items; (2) there must be evidence showing that some prices are significantly more than cost for some line items; and (3) there is a reasonable doubt that the bid will result in the lowest overall cost to the State despite being the low evaluated bid.

Appeal by Advanced Imaging Systems, Inc., Panel Case 2013-7.

A comparison of the line item pricing from the Intent to Award (Attachment 2) for items 9, 13-15, and 17-23 is shown below:

		J.Q.&G.	WM	Quantity
00009	Visor Attachment W/Screws	\$ 18.70	\$ 30.00	250
00013	Sign R10-3 Push Button for Green Light	\$ 249.22	\$ 20.00	30
00014	Sign R10-3B To Cross Push Button	\$ 332.20	\$ 22.00	30
00015	Sign R10-3E To Cross Push Button	\$ 75.63	\$ 27.00	400

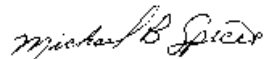
00016	8' Spun Aluminum Pedestrian Pole	\$ 205.36	\$ 165.00	50
00017	10' Spun Aluminum Pedestrian Pole	\$ 89.65	\$ 205.00	50
00018	12' Spun Aluminum Pedestrian Pole	\$ 161.98	\$ 240.00	50
00019	15' Spun Aluminum Pedestrian Pole	\$ 175.66	\$ 300.00	50
00020	20' Spun Aluminum Pedestrian Pole	\$ 115.50	\$ 390.00	50
00021	Mounting Hardware-Single Post-Top Mount	\$ 20.63	\$ 90.00	150
00022	Mounting Hardware-Dual Post-Top Mount	\$ 20.63	\$ 240.00	150
0023	Mounting Hardware-Side of Pole Mount	\$ 41.46	\$115.00	200

It is apparent that the bid prices received varied drastically from bidder to bidder and indicates that some prices are significantly less than cost for some line items and significantly more than cost for some line items.² However, the test for unbalanced bidding is a three-part test that must include a reasonable doubt that the bid will result in the lowest overall cost to the State despite being the lowest evaluated bid. The total potential value of J.Q. & G.'s low bid was \$1,676,843.40 and the total potential value of WM's bid was \$1,737,160.00 or a 3.5% difference. The 3.5% difference in overall pricing and the difference in item pricing coupled with the anticipated quantities do not create a reasonable doubt that J.Q. & G.'s bid will result in the lowest overall cost to the State.

DECISION

For the reasons stated above, the protest of Flemington Aluminum & Brass, Inc. is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

² One way for procurement managers to avoid unbalanced bidding is to ensure estimated quantities of line items are reasonably accurate based on historical data or reasonable estimates of anticipated purchases. This is exactly what the procurement manager did in this case. Further, if FAB reasonably believed that the estimated quantities were inaccurate, it should have protested the solicitation.

Attachment 1



Flemington Aluminum & Brass, Inc.

24 Junction Rd., Flemington NJ 08822
908-782-6317

Fax 908-782-8078
www.fabonline.net
timothy@fabonline.net

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

4/3/18

Re: Award Protest, Solicitation # 5400014971

Chief Procurement Officer,

I am writing pursuant to Section II, Part B of the above referenced solicitation to formally protest the award. I will be delivering this letter via email to protest-mmo@mmo.state.sc.us per the instructions in the bid.

I am protesting the bid award, as my company was determined to be non-responsive on March 21, 2018. Regulation 19-445.2070 was cited as the reason for non-responsiveness, stating that our company "fail[ed] to conform to the essential requirements of the invitation for bids..." The next line on the determination of non-responsiveness indicated that we did not submit an offer on all 24 line items of the solicitation. This remark is supported by the highlighting of the word "and" in the scope of solicitation.

Nowhere in the solicitation does it say that all items must be bid in order for a bid to be considered. We have done business with many governmental entities who have included such a specification. Had our company had proper notice that a price for every item was required, we would have done so. As there was no requirement, we included only the items which we manufacture ourselves, assuming that this would be the best way to provide value to SCDOT.

Frankly, highlighting the word "and" in the solicitation scope is a very weak form of proof for the point being made in the determination of non-responsiveness. If the State of South Carolina believed that entering a bid for every single item was an "essential requirement" for this bid, wouldn't that have been included in the "RESPONSIVENESS/IMPROPER OFFERS" clause found in Section II, Part A? The bid specifically states in section VI that award may be made to up to two offerors. The stated goal of purchasing signal heads **and** associated mounting hardware could easily be accomplished by award to two different bidders, both of whom did not bid every item.

I will be comparing my company's pricing for the items we manufacture to the WM Roebuck Inc. bid, as the JQ&G award indicates to me obvious pricing mistakes. They are unlikely to be able to sell an



Flemington Aluminum & Brass, Inc.

Fax 908-782-8078
www.fabonline.net
timothy@fabonline.net

identical 10' pole for \$115.71 less than their 8' pole. That is less than half the price for a pole which is identical but 2' longer. Their single post top slipfitter and dual post top slipfitter are the same price, which is impossible. In fact, pursuant to Section II, Part A of the bid under RESPONSIVENESS/IMPROPER OFFERS, I would argue that their bid is unbalanced as described in part (e). Their "prices are materially unbalanced between line items." The prices are "significantly less than cost for some work" and "significantly overstated in relation to cost for other work". I question why JQ&G Company's bid failed to be deemed non-responsive when it engaged in behavior explicitly prohibited in the bid documents, but Flemington Aluminum & Brass, Inc's bid was deemed non-responsive based upon an unarticulated offense?

Comparing the items that my company bid in relation to what we view as the only other responsive bid, WM Roebuck, Inc. it becomes clear that Flemington Aluminum & Brass can provide value to the State of South Carolina. For those eight items, (provided the annual usage is used for these comparative purposes) my company would charge \$45,350 less per year. This would lead to over a quarter of a million dollars difference over the course of this 5 year contract. We believe that this difference is understated, given that these are parts which are greatly underestimated in quantity for other governmental entities who bid them.

In short, we ask for the opportunity to have our bid accepted along with WM Roebuck, or alternatively the opportunity to bid all of the items on the bid. Given that the bid is replacing two different contracts in two different timelines, I would assume in that instance there would only be a need to bid items 10-24, but I also thought we could bid the items where I can contribute value only, upon a plain reading of the bid document.

Sincerely,

Timothy Kozicki

FAB

Attachment 2

STATE OF SOUTH CAROLINA
SFAA, DIV. OF PROCUREMENT SERVICES, MMO
1201 MAIN STREET, SUITE 600
COLUMBIA SC 29201

Intent to Award

Posting Date: March 27, 2018

Solicitation: 5400014971
Description: PEDESTRIAN SIGNAL EQUIPMENT
Agency: Statewide Term Contract

The State intends to award contract(s) noted below. Unless otherwise suspended or canceled, this document becomes the final Statement of Award effective **8:00 A.M., April 09, 2018**. Unless otherwise provided in the solicitation, the final statement of award serves as acceptance of your offer.

Contractor should not perform work on or incur any costs associated with the contract prior to the effective date of the contract. Contractor should not perform any work prior to the receipt of a purchase order from the using governmental unit. The State assumes no liability for any expenses incurred prior to the effective date of the contract and issuance of a purchase order.

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest within ten days of the date notification of award is posted in accordance with this code. A protest shall be in writing, shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided, and must be received by the appropriate Chief Procurement Officer within the time provided. [Section 11-35- 4210]

PROTEST - CPO ADDRESS - MMO: Any protest must be addressed to the Chief Procurement Officer, Materials Management Office, and submitted in writing

(a) by email to protest-mmo@mmo.sc.gov.

(b) by post or delivery to 1201 Main Street, Suite 600, Columbia, SC 29201.

Contract Number: 4400018372
Awarded To: JQ&G INC COMPANY (7000234139)
3451 BRANDON AVENUE SW
ROANOKE VA 24018

Total Potential Value: \$ 1,676,843.40
Initial Contract Period: April 09, 2018 through April 08, 2019
Maximum Contract Period: April 09, 2018 through April 08, 2023

NOTE: Items one (1) through nine (9) are not effective until October 22, 2018 (with an Initial Term of October 22, 2018, through April 8, 2019) to permit contracts already in place time to fulfill their final term. Items 10-24 are effective as of the effective date of the contract.

Item	Description	Unit Price	Total
00001	1-Way, 1-Section Ped Sig Head (Left)	\$ 218.90	\$ 21,890.00
00002	1-Way, 1-Section Ped Sig Head (Right)	\$ 218.90	\$ 21,890.00
00003	1-Way, 1-Section Ped Sig Count (Left)	\$ 218.90	\$ 328,350.00
00004	1-Way, 1-Section Ped Sig Count (Right)	\$ 218.90	\$ 328,350.00
00005	1-Way, 1-Section Ped Sig-No Hardware	\$ 182.60	\$ 18,260.00
00006	1-Way, 1-Section Ped Count-No Hardware	\$ 189.20	\$ 378,400.00
00007	1-Section Hand/Man Weathertight	\$ 125.13	\$ 12,513.00

00008	1-Section Hand/Man Count Weathertight	\$ 125.13	\$ 250,260.00
00009	Visor Attachment W/Screws	\$ 18.70	\$ 4,675.00
00010	Pedestrian Push Button W/Tone 9x12	\$ 132.00	\$ 3,960.00
00011	Pedestrian Push Button W/Tone 9x15	\$ 153.18	\$ 122,544.00
00012	Pedestrian Push Button W/Tone No Light	\$ 199.31	\$ 35,875.80
00013	Sign R10-3 Push Button for Green Light	\$ 249.22	\$ 7,476.60
00014	Sign R10-3B To Cross Push Button	\$ 332.20	\$ 9,966.00
00015	Sign R10-3E To Cross Push Button	\$ 75.63	\$ 30,252.00
00016	8' Spun Aluminum Pedestrian Pole	\$ 205.36	\$ 10,268.00
00017	10' Spun Aluminum Pedestrian Pole	\$ 89.65	\$ 4,482.50
00018	12' Spun Aluminum Pedestrian Pole	\$ 161.98	\$ 8,099.00
00019	15' Spun Aluminum Pedestrian Pole	\$ 175.66	\$ 8,783.00
00020	20' Spun Aluminum Pedestrian Pole	\$ 115.50	\$ 5,775.00
00021	Mounting Hardware-Single Post-Top Mount	\$ 20.63	\$ 3,094.50
00022	Mounting Hardware-Dual Post-Top Mount	\$ 20.63	\$ 3,094.50
00023	Mounting Hardware-Side of Pole Mount	\$ 41.46	\$ 8,292.00
00024	Double Mounting Bracket for 9x15 Sign	\$ 201.17	\$ 50,292.50

Contract Number: 4400018371
Awarded To: WM ROEBUCK INC (7000077122)
4850 FISH HATCHERY RD
LEXINGTON SC 29073

Total Potential Value: \$ 1,737,160.00
Initial Contract Period: April 09, 2018 through April 08, 2019
Maximum Contract Period: April 09, 2018 through April 08, 2023

NOTE: Items one (1) through nine (9) are not effective until October 22, 2018 (with an Initial Term of October 22, 2018, through April 8, 2019) to permit contracts already in place time to fulfill their final term. Items 10-24 are effective as of the effective date of the contract.

Item	Description	Unit Price	Total
00001	1-Way, 1-Section Ped Sig Head (Left)	\$ 233.00	\$ 23,300.00
00002	1-Way, 1-Section Ped Sig Head (Right)	\$ 233.00	\$ 23,300.00
00003	1-Way, 1-Section Ped Sig Count (Left)	\$ 233.00	\$ 349,500.00
00004	1-Way, 1-Section Ped Sig Count (Right)	\$ 233.00	\$ 349,500.00
00005	1-Way, 1-Section Ped Sig-No Hardware	\$ 195.00	\$ 19,500.00
00006	1-Way, 1-Section Ped Count-No Hardware	\$ 205.00	\$ 410,000.00
00007	1-Section Hand/Man Weathertight	\$100.00	\$ 10,000.00
00008	1-Section Hand/Man Count Weathertight	\$ 100.00	\$ 200,000.00
00009	Visor Attachment W/Screws	\$ 30.00	\$ 7,500.00
00010	Pedestrian Push Button W/Tone 9x12	\$ 130.00	\$ 3,900.00
00011	Pedestrian Push Button W/Tone 9x15	\$ 140.00	\$ 112,000.00
00012	Pedestrian Push Button No Tone, No Light	\$ 120.00	\$ 21,600.00
00013	Sign R10-3, Push Button for Green Light	\$ 20.00	\$ 600.00
00014	Sign R10-3B, To Cross Push Button	\$ 22.00	\$ 660.00
00015	Sign R10-3E, To Cross Push Button	\$ 27.00	\$ 10,800.00
00016	8' Spun Aluminum Pedestrian Pole	\$ 165.00	\$ 8,250.00

00017	10' Spun Aluminum Pedestrian Pole	\$ 205.00	\$ 10,250.00
00018	12' Spun Aluminum Pedestrian Pole	\$ 240.00	\$ 12,000.00
00019	15' Spun Aluminum Pedestrian Pole	\$ 300.00	\$ 15,000.00
00020	20' Spun Aluminum Pedestrian Pole	\$ 390.00	\$ 19,500.00
00021	Mounting Hardware - Single Post-Top Mount	\$ 90.00	\$ 13,500.00
00022	Mounting Hardware - Dual Post-Top Mount	\$ 240.00	\$ 36,000.00
00023	Mounting Hardware - Side of Pole Mount	\$ 115.00	\$ 23,000.00
00024	Double Mounting Bracket for 9x15 Sign	\$ 230.00	\$ 57,500.00

Procurement Officer



MICHAEL SPEAKMON

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2017)

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 367, 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.