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Protest Decision

Matter of: STAT Courier Service Inc.

Case No.: 2019-123

Posting Date: December 7, 2018

Contracting Entity: South Carolina Department of Health and Environmental Control

Solicitation No.: 5400016615

Description: Statewide Courier Services

DIGEST

Protest alleging awarded bidder was not responsive is denied. STAT Courier Service's (SCS) 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.

BACKGROUND

Solicitation Issued

October 31, 2018

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

Amendment 1 Issued
Intent to Award Posted
Protest Received

November 9, 2018
November 21, 2018
November 29, 2018

ANALYSIS

The South Carolina Department of Health and Environmental Control (DHEC) issued this Best Value Bid on October 31, 2018, to acquire statewide courier services for pick-up and delivery of packages, parcels, and laboratory samples from one DHEC Facility to another. Section 11-35-1528(8) requires that:

Award must be made to the responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the State, taking into consideration all evaluation factors set forth in the best value bid.

Section 11-35-1410(7) defines a responsive bidder as:

"Responsive bidder or offeror" means a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.

The Procurement Review Panel addressed responsiveness as follows:

A "responsive bidder or offeror" is defined in § 11-35-1410(7) as "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or requests for proposals." Section 11-35-1520(13) of the South Carolina Consolidated Procurement Code provides for the waiver or curing of minor informalities and irregularities in bids and proposals. [FN2] That section provides in relevant part:

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 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.

Section 11-35-1520 then sets forth a non-exclusive list of examples of minor informalities or irregularities.

The Panel has read these two sections of the Procurement Code together to arrive at the following conclusions:

In order to be responsive, a proposal need not conform to all of the requirements of the RFP; it must simply conform to all of the essential requirements of the RFP....[B]ecause the Code requires rejection of a proposal when it fails to meet an essential requirement but allows waiver of an immaterial variation from exact requirements, a requirement is not "essential" if variation from it has no, or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured. Waiver or correction of a variance from such a requirement is appropriate under the Code when relative standing or other rights of the bidders are not prejudiced.

Protest of National Computer Systems, Inc., Case No. 1989-13. [FN3]

In the National Computer case, the Panel determined that a requirement is not "essential" simply because the RFP states that it is mandatory. Also of relevance in this case, the Panel has determined that mere failure to follow the RFP format and organize a response under appropriate sections headings is a minor informality which can be waived. Protest of Justice Technology, Inc., Case No. 1992-4.

Thus, any analysis of what is waivable as a minor irregularity includes two parts, whether the irregularity has more than a trivial effect on price, quality, quantity, delivery or performance of the contract and whether the waiver and cure of the minor irregularity is prejudicial to the other bidders.

In re: Appeal by Coastal Rapid Public Transit Authority and Anderson-Oconee Council on Aging

Section 11-35-1410(6) defines a responsible bidder as:

"Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.

Section 11-35-1810 requires that the responsibility of the bidder or offeror shall be ascertained for each contract let by the State. The state standards of responsibility as set out in Regulation 19-445.2125(A)(1) and require a determination that the bidder has:

available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;

DHEC posted an Intent to Award to Innovative Courier Solutions, Inc. (ICS) on November 21, 2018. SCS protested on November 29, 2018, that "ICS' proposal was not responsive to Solicitation #5400016615, as it failed to conform to the material requirements of the Solicitation ..."

In its initial issue of protest, SCS alleges:

In response to 4.2.17 of the Solicitation, which asks the bidder to "[p]rovide financial reports and other proofs that the offeror is in good financial condition and has the resources to implement and maintain services", ICS merely stated that as a privately held corporation, it does not provide financial information and that its annual revenue currently sits at \$29 million.

The failure to provide financial information is specifically identified in Section 11-35-1520(13)(i) as minor informality. Consequently, it cannot be an essential requirement of the solicitation and the failure to provide these financial reports cannot be an issue of responsiveness. In addition, requirement 4.2.17 states that this information will be used to determine whether the bidder "has the resources to implement and maintain services" which is required in making the determination of responsibility. SCS makes no allegation that ICS is not a responsible bidder. This issue of protest is denied.

SCS next protests:

In response to 4.2. 12.1, which requires the bidder to " [i]dentify the key personnel available to this contract, indicating the years or experience each employee has as it relates to this type of service", ICS gave the generic response that it has "senior managers, regional managers, supervisors and lead drivers across South Carolina with decades of experience" without the specific detail requested under this section.

Again, a bidder's personnel resources and expertise is not an essential requirement of the solicitation and cannot be an issue of responsiveness. While this information would be useful in making the required determination of responsibility, SCS makes no allegation that ICS is not responsible. This issue of protest is denied.

SCS next protests:

In this same vein, ICS also appears to have neglected to provide responses to 4.2.13 and 4.2.13.1, both which require the bidder to give detail as to how it intends to provide sufficient staffing to carry out the services requested under this

Solicitation. This is a material aspect of the Solicitation, as it necessary for the State to evaluate whether the bidder has sufficient staffing/personnel to ensure it is capable of fulfilling the requested services.

Again, the requested information would provide information about ICS' ability to perform the contract or responsibility rather than a material and essential requirement of the contract. SCS makes no allegation that ICS is not responsible. This issue of protest is denied.

SCS next protests:

ICS also failed to provide evidence in response to 4.2.16, which requires a bidder to submit evidence that it has "at least five (5) years' experience in providing courier services to at least three (3) major facilities the size and complexity equal to or greater than those of DHEC." ICS simply listed three (3) facilities with no corresponding timeline or evidence to demonstrate five (5) years of experience in providing courier services, nor any evidence that such facilities are comparable to the size and complexity of the DHEC facilities.

This request for ICS' record of past performance goes directly to substantiating ICS' ability to perform the contract or responsibility. The failure to provide the requested information is a minor informality and is not a material and essential requirement of the contract. SCS makes no allegation that ICS is not responsible. This issue of protest is denied.

SCS next protests:

ICS failed to provide a summary of insurance in response to the request under the section entitled, "Information for Offerors to Submit - General" on page 22 of the Solicitation. In a state procurement process, it is a standard material requirement for a bidder to provide a copy of its Certificate of Insurance in its response in order for a state to assess the adequacy of a bidder's liability insurance to pay potential claims that may arise from performance of contract services. The failure of ICS to identify its insurance, again, is a fatal material flaw to the ICS bid response.

This again is an issue of responsibility rather than an issue of responsiveness. SCS makes no allegation that ICS is not responsible and this issue of protest is denied.

SCS next protests:

ICS neglected to provide much of the information requested under Section V. Qualifications, found on page 25 of the Solicitation, including the complete mailing address, email address, and period of service for its two (2) references; its

most current financial statements, as requested under subsection (b); and **all** of the information requested under the following subsections:

(c) A detailed, narrative statement listing the three most recent, comparable contracts (including information) which have been performed. For each contract, describe how the supplies or services provided are similar to those requested by this solicitation, and how they differ.

(d) A list of every business for which supplies or services substantially similar to those sought with this solicitation have been provided, at any time during the past three years.

(e) A list of every South Carolina public body for which supplies or services have been provided at any time during the past three years, if any.

(f) List of failed projects, suspensions, debarments, and signification litigation.

Again, the failure to provide this information is a minor informality and consequently not a material requirement of the solicitation. Section V of the solicitation clearly indicates that the information requested in that section is to be used to determine a bidder's "capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance." This is the definition of responsibility. SCS makes no allegation that ICS is not a responsible bidder. This issue of protest is denied.

SCS next protests:

In addition, ICS failed to return a signed copy of the Addendum as required in the Solicitation.

Return of a separately signed copy of the Amendment is not required. ICS acknowledged the Amendment on page 2 of its bid. This issue of protest is denied.

SCS' last issue of protest states:

Lastly, ICS submitted no evidence of competency in the area of statewide laboratory sample courier service which is an integral part of the services to be provided under this contract. Training/safeguarding of employees in the handling and transport of laboratory samples and understanding and complying with all State and Federal guidelines (as noted in 3.2.1.2.) is of crucial importance in addition to maintaining the integrity of the specimens being transported. ICS did not submit any reference or substantiating information indicating knowledge or experience in transporting laboratory samples on a statewide basis.

Section 3.2 of the solicitation sets out post award contractual requirements of the contractor:

3.2. Responsibilities of the Contractor:

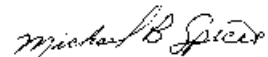
- 3.2.1. Provide statewide courier services for the pickup and delivery of packages, parcels, and laboratory samples of various sizes and weight from one DHEC location to another, using a single shipping system.
- 3.2.1.2. OSHA training for all drivers is required, to include:
 - 3.2.1.2.1 Hazard Communication
 - 3.2.1.2.2. Bloodborne Pathogens
 - 3.2.1.2.3. Hazardous Materials Regulations
 - 3.2.1.2.4. IATA Dangerous Goods Regulations

There is no requirement in the solicitation that the bidder submit evidence of competency in the area of statewide laboratory sample courier service. This issue of protest is denied.

DECISION

For the reasons stated above, the protest of STAT Courier Service Inc. is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer



888-592-STAT (7828)
16 Hawk Ridge Drive
Lake St. Louis, MO 63367

Via Federal Express and Email (protest-mmo@mmo.state.sc.gov)

November 29, 2018

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

RE: Bid Protest by STAT Courier Service, Inc.
Solicitation Number 5400016615
Statewide Courier Services – South Carolina Department of Health and Environmental Control

Dear Sir or Madam:

Please be advised that this letter constitutes STAT Courier Service, Inc. (“STAT”)’s official protest to the award of the contract resulting from Best Value Bid Solicitation #5400016615 (the “Solicitation”) to Innovative Courier Solutions, Inc. (“ICS”). The contract is for statewide courier services for pick-up and delivery of packages, parcels, and laboratory samples from one South Carolina Department of Health and Environmental Control (“DHEC”) facility to another, using a single shipping system with a list of facilities. STAT submitted a proposal in response to Solicitation #5400016615 on November 15, 2018 and therefore has standing to bring the present protest as an actual bidder and aggrieved party under South Carolina ST § 11-35-4210. The award of the contract resulting from Solicitation #5400016615 was announced on November 21, 2018, and this timely-filed protested is submitted within ten (10) calendar days of that date (SC ST § 11-35-4210(1)(b)).

STAT’s primary basis for this protest is that ICS’ proposal was not responsive to Solicitation #5400016615, as it failed to conform to the material requirements of the Solicitation (see subsection (c) of the section entitled, “Responsiveness/Improper Offers” on page 14 of the Solicitation). ICS’ proposal is nonresponsive in the following respects:

ICS’ Failure to Provide Audited Financial Statements.

In response to 4.2.17 of the Solicitation, which asks the bidder to “[p]rovide financial reports and other proofs that the offeror is in good financial condition and has the resources to implement and maintain services”, ICS merely stated that as a privately held corporation, it does not provide financial information and that its annual revenue currently sits at \$29 million. This a non-compliant response, as STAT is also a privately held corporation, yet provided its financial records per this requirement. Simply stating that a company’s annual revenue is \$29 million without any audited financial records to substantiate any such claim does not constitute sufficient proof that the company is in good financial condition.

The State can only make a determination of a bidder’s financial condition by review of a bidder’s audited financial statement of Assets and Liabilities, along with a bidder’s Statement of Income and Expenses. In the situation of ICS, which chose not to provide the financial information requested in the Solicitation, the State only knows that ICS had annual revenue of \$29 million. Without a full financial balance sheet and

income & expense disclosures, however, the State would not know whether ICS has expenses of \$30 million or some other expense number exceeding the company's revenue, which would clearly demonstrate that ICS is not in good financial standing. Similarly, the State has no information on the Balance Sheet of ICS as to how much cash and other liquid assets ICS has, which would be necessary to ensure ICS can pay for its drivers, vehicles, and operational expenses. Further, without complete financials from ICS, the State has no way of knowing whether ICS has taken on an excessive amount of bank debt that would impair ICS' ability to pay all expenses and provide the services requested under this Solicitation uninterrupted. Had ICS complied with the Solicitation requirement and disclosed its financials, ICS could have marked its financials as confidential and proprietary trade secrets, which would have been protected from disclosure under South Carolina law SC ST § 30-4-40.

Whether a bidder is in fact in good financial condition is a vitally important consideration and is material to whether the bidder ultimately has the financial means to fulfill the services requested under this Solicitation, and therefore, whether its bid is responsive to the Solicitation. The failure of ICS to provide its audited financials is a fatal flaw that requires the State to reject its bid and deem ICS as nonresponsive. No public services contract should ever be awarded on the basis of a bidder's revenue alone without full disclosure of its Balance Sheet and Income and Expense Statement.

ICS' Failure to Provide Information Regarding Key Personnel and Staffing.

In response to 4.2.12.1, which requires the bidder to "[i]dentify the key personnel available to this contract, indicating the years or experience each employee has as it relates to this type of service", ICS gave the generic response that it has "senior managers, regional managers, supervisors and lead drivers across South Carolina with decades of experience" without the specific detail requested under this section. The State has a right to ask and know, at least with respect to management personnel, the names of a bidder's managers who will be assigned to carry out contract services, and the background experience of those managers. ICS' unresponsive response that it has experienced managers and supervisors is simply unresponsive to the Solicitation requirement. An employer, for instance, would never hire a job applicant who simply claims to be qualified for a job without requesting detailed information about that applicant's past job experience. And coupled with ICS' failure to provide financial records, what ultimately is the purpose of the State's formal procurement process if all a bidder must do to win the contract is to claim it has \$29 million in annual revenue, and has experienced, yet unnamed, personnel to manage the contract services without submitting the necessary substantiating documentation?

In this same vein, ICS also appears to have neglected to provide responses to 4.2.13 and 4.2.13.1, both which require the bidder to give detail as to how it intends to provide sufficient staffing to carry out the services requested under this Solicitation. This is a material aspect of the Solicitation, as it is necessary for the State to evaluate whether the bidder has sufficient staffing/personnel to ensure it is capable of fulfilling the requested services. By definition, ICS is unresponsive in this regard. The State has a legitimate concern to know how many people will be carrying out the required services in order to determine that ICS is properly staffing the contract to ensure prompt pick-up and delivery of packages, parcels, and lab samples. Proper staffing is crucial to quality performance of required services and is material to the Solicitation.

Additional Deficiencies in ICS' Proposal.

ICS also failed to provide evidence in response to 4.2.16, which requires a bidder to submit evidence that it has "at least five (5) years' experience in providing courier services to at least three (3) major facilities the size and complexity equal to or greater than those of DHEC." ICS simply listed three (3) facilities with no corresponding timeline or evidence to demonstrate five (5) years of experience in providing courier services, nor any evidence that such facilities are comparable to the size and complexity of the DHEC facilities. Without this information, the State cannot properly assess whether ICS has the requisite organizational knowledge and experience to handle a contract of this size and scope. Again, the failure of ICS to identify the size of its contracts with the three (3) named facilities and length of those contracts to prove that ICS has the required experience of providing courier services of similar size and duration to the Solicitation is also a material flaw in ICS' bid.

ICS failed to provide a summary of insurance in response to the request under the section entitled, "Information for Offerors to Submit – General" on page 22 of the Solicitation. In a state procurement process, it is a standard material requirement for a bidder to provide a copy of its Certificate of Insurance in its response in order for a state to assess the adequacy of a bidder's liability insurance to pay potential claims that may arise from performance of contract services. The failure of ICS to identify its insurance, again, is a fatal material flaw to the ICS bid response.

ICS neglected to provide much of the information requested under Section V. Qualifications, found on page 25 of the Solicitation, including the complete mailing address, email address, and period of service for its two (2) references; its most current financial statements, as requested under subsection (b); and **all** of the information requested under the following subsections:

- (c) A detailed, narrative statement listing the three most recent, comparable contracts (including information) which have been performed. For each contract, describe how the supplies or services provided are similar to those requested by this solicitation, and how they differ.
- (d) A list of every business for which supplies or services substantially similar to those sought with this solicitation have been provided, at any time during the past three years.
- (e) A list of every South Carolina public body for which supplies or services have been provided at any time during the past three years, if any.
- (f) List of failed projects, suspensions, debarments, and significant litigation.

In addition, ICS failed to return a signed copy of the Addendum as required in the Solicitation.

Lastly, ICS submitted no evidence of competency in the area of statewide laboratory sample courier service which is an integral part of the services to be provided under this contract. Training/safeguarding of employees in the handling and transport of laboratory samples and understanding and complying with all State and Federal guidelines (as noted in 3.2.1.2.) is of crucial importance in addition to maintaining the integrity of the specimens being transported. ICS did not submit any reference or substantiating information indicating knowledge or experience in transporting laboratory samples on a statewide basis.



888-592-STAT (7828)
16 Hawk Ridge Drive
Lake St. Louis, MO 63367

Summary and Relief Requested.

Given ICS' non-responsiveness to several material requests under the Solicitation, the State ought to have concluded that ICS is not a viable bidder in that it failed to provide the evidence necessary to show it meets the minimum requirements of the Solicitation. Failure to do so draws ICS' ability to perform the services of the resulting contract into question and renders their bid as unresponsive which must be rejected.

Accordingly, for the reasons stated herein, STAT requests that the State rescind the award of the contract resulting from Solicitation #5400016615 to ICS and to award it to the second highest scoring bidder, STAT. STAT reserves the right to modify this protest based on any additional information it may receive in response to its public records request.

Thank you for your prompt attention to this matter. We look forward to hearing from your office soon.

Sincerely,

A handwritten signature in blue ink that reads 'Natasha Boekholt'.

Natasha Boekholt, *President*
STAT Courier Services, Inc.
636-695-5573

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2018)

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 2018 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.