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THE DIVISION OF PROCUREMENT SERVICES

DELBERT H. SINGLETON, JR.
DIVISION DIRECTOR
(803) 734-8018

MICHAEL B. SPICER
INFORMATION TECHNOLOGY MANAGEMENT OFFICER
(803) 737-0600
FAX: (803) 737-0639

Decision on Remand

Matter of: TriTek Fire & Security, LLC

Case No.: 2019-144 Remand

Posting Date: October 16, 2019

Contracting Entity: South Carolina Department of Disabilities & Special Needs

Solicitation No.: 5400017543

Description: Agency Wide DDSN Owned Community Facilities Annual Fire Alarm Testing & Maintenance

DIGEST

Lack of jurisdiction decision affirmed after remand. Procurement Review Panel's order 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, a consideration of the potential value of the contract, the 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

Solicitation Issued	03/19/2019
Amendment 1 Issued	04/22/2019
Award Posted	05/15/2019
Protest Received	05/23/2019
CPO Decision Posted	05/24/2019
CPO Decision Appealed	05/29/2019
Panel Decision Posted	08/29/2019

The South Carolina Department of Disabilities & Special Needs issued this Invitation for Bids to acquire fire alarm inspection, testing, and maintenance services on March 19, 2019. The solicitation invited bids for the inspection, cleaning, testing, and field repairs of fire alarm systems in four regions. A Statement of Award was posted to Fire Control Systems of Charlotte (FCS) for three regions. TFS protested that the solicitation required bids to be submitted in hardcopy form only and alleges that the successful bidder, Fire Control Systems of Charlotte, (FCS) submitted its bid online instead of in hardcopy form and its bid should have been disqualified:

I personally attended not only the bid opening but pre-bid meeting as well. The company attended neither of these dates. I have been informed the Fire Control Systems of Charlotte submitted their bid "online". The solicitation states the front page must be signed and returned with offer. Under "Dead Line for Submission of Offer" states after the bid closing time all offers are rejected unless already delivered to the designated purchasing office or in its associated mail room. There is no mention of any "online" submission process. All of this was covered in the pre-bid meeting which the other contractor failed to attend. It is also very apparent they failed to follow the instructions in the bid package. Due to this we feel we have no other recourse but to protest this award.

Relief Requested. Due to all other offerors attending the bid opening and all bids being disclosed at the opening. The apparent failure of Fire Control Systems of Charlotte to follow the instructions in the bid package as well. TriTek Fire & Security, LLC is requesting the solicitation be awarded to TriTek.

The Statement of Award indicated that the total potential value of the awards for the three regions awarded to FCS was \$36,300.00. The Procurement Code restricts protests of awards to those greater than \$50,000.00. The CPO ruled that he lacked jurisdiction to rule on the merits of TFS' protest. TFS appealed to the Procurement Review Panel (Panel), arguing that the actual value of the contract was greater than the amount published on the Statement of Award and the

CPO erred in failing to consider the actual value in making his decision. The Panel remanded the case to the CPO for an accurate determination of the potential value of the contract and for consideration of the merits of the protest if the jurisdictional amount is satisfied.

ANALYSIS

The scope of the solicitation provides:

Services are to include one annual fire alarm system inspection per year for each of the facilities listed in **Section III, Scope of Work/Specifications** of this solicitation. In addition, Contractor is required to provide Maintenance Services when requested for fire alarm systems for all facilities in the region awarded. The Maintenance Fee will be at the hourly rate as submitted on the bidding schedule.

(emphasis added) [Solicitation, Page 5]

Section 2(D)(1) in the Scope of Work/Specifications requires the Contractor to make repairs on the systems during inspection and testing visits:

Contractor shall maintain sufficient spare parts for the systems being tested on any given day so that repairs may be accomplished during the inspection/testing visit. Prior to effecting repairs contractor shall notify the appropriate regional contact person who can approve any repairs.

[Solicitation, Page 17]

Additional clarification is provided in Section 2(D)(2):

Special Note to Contractor: The contract included minor repairs such as replacement of smoke/heat detectors and miscellaneous electrical repairs. Call backs will be compensated by cost of material plus 25%.² Labor and travel charges shall be excluded for return visits unless approved in advance by the Statewide Project Manager at DDSN Engineering and Planning. It is the intent of this contract to effect repairs at the initial visit so the system is in working condition after the inspection/testing.

[Solicitation, Page 18]

Award was to be made by Lot (Region) based on the bid price per inspection multiplied by the number of inspections to be performed over the five-year life of the contract:

² Section 11-35-2010(1) requires that the use of a cost-plus-a-percentage-of-cost contract must be approved by the appropriate chief procurement officer. Unless approved by the appropriate CPO, this provision is in violation of the Code and not enforceable.

NOTE: The Unit Price is the bidder's price to complete 1 fire alarm inspection at any one facility in the region that you are bidding. The Quantity is the number of facilities in each region times 5 which is the number of inspections required for the region over a 5 year period. The Extended Price is the Quantity times the Unit Price which is the expected 5 year cost for these services.

Example: Coastal Region has 13 facilities. Over a 5 year contract period, Coastal Region will need a total of 65 fire alarm inspections. The Bidder will provide a price for 1 fire alarm inspection and then multiply by 65 to get the Extended Price.

[Amendment 1, Page 3] (Highlighting in original)

The bidding schedule included the following note:

***NOTE: Bidder must also submit hourly rate for Maintenance Fee when requested for any facility in the region awarded**

[Amendment 1, Page 3] (Highlighting in original)

Each Lot (Region) included space for bidders to provide their hourly rate:

***Lot A - Hourly Rate for Maintenance Fee for Coastal Region facilities. \$ _____**
(emphasis in original)

The Statement of Award indicates that Regions 1, 2, and 3 were awarded to Fire Control Systems of Charlotte (FCS) at a unit price of \$220.00 per inspection. Lot A, the Coastal Region, required a total of 65 inspections at \$220.00 per inspection for a total award amount of \$14,300.00.³ Lot B, the Pee Dee Region, required a total of 75 inspections at \$220.00 per inspection for a total award amount of \$16,500.00. Lot C, the Midlands Region, required 45 inspections at \$220.00 per inspection for a total award amount of \$9,900.00. Lot D, the Piedmont Region, was awarded to different contractor and was not included in this protest.

An Invitation for Bids is an invitation to potential offerors to submit a bid for the specified goods or services under the specified terms and conditions. The bid is an offer to provide the specified goods or services under the specified terms and conditions at the price submitted in the bid. Fair competition requires that all bidders provide a price for the same goods and services specified in

³ The Statement of Award reflects a mathematically erroneous total of \$9,900 for Lot A.

the IFB under the terms and conditions specified in the IFB. Each bid must be accepted unconditionally without alteration or correction. S.C. Code § 11-35-1520(6). The bids must be evaluated using only on the criteria published in the IFB. *Id.* A bid that is not responsive as defined in Section 11-35-1410(9) must be rejected. A bid that takes exception to the terms and conditions published in the IFB must be rejected. Regulation 19-445.2070(D) Once the lowest responsive and responsible bidder is determined, the State accepts that offer by issuing a statement of award, Intent to Award, or Purchase Order. There is an offer and acceptance and a contract is formed.

In this case, the solicitation clearly indicated that the award would be determined by multiplying the price per inspection by the required number of inspections for a particular region. While the solicitation asked for an hourly rate for requested maintenance, there is no indication how the hourly rate would be evaluated, and the hourly rate was not a factor in determining the award. This was confirmed by the procurement officer, who told the CPO that “[t]he service price that we asked for in the bid documents is just for information purposes only. ... Nothing regarding the hourly service cost was considered when awarding this bid.” The hourly rate for maintenance was not included on the statement of award meaning the hourly rate for maintenance was not accepted by the State. Further, the contract did not obligate the State to use the winning bidder for maintenance work. The hourly rate for maintenance was not awarded as part of this contract.

Likewise, the contractor was required to have replacement parts available but prior authorization was required before repairs are made. There is no indication how the cost of replacement parts used during the inspection visit would be evaluated. Further, the cost of replacement parts was not a factor in the award determination, the cost for the replacement parts was not included on the statement of award, and the State was not obligated to buy replacement parts from the winning bidder. Consequently, replacement parts were not accepted by the State and not awarded as part of this contract. In fact, including an hourly maintenance rate or replacement parts in the award without including them in the evaluation is an open invitation for unbalanced bidding or other more serious mischief.

While it is clear that the hourly maintenance rate and replacement parts were not included in the evaluation or award, the following specifications make it less than clear that the parts and services were not intended to be included in the contract:

Contractor shall maintain sufficient spare parts for the systems being tested on any given day so that repairs may be accomplished during the inspection/testing visit.

Special Note to Contractor: The contract included (sic) minor repairs such as replacement of smoke/heat detectors and miscellaneous electrical repairs. Call backs will be compensated by cost of material plus 25%. Labor and travel charges shall be excluded for return visits unless approved in advance by the Statewide Project Manager at DDSN Engineering and Planning. It is the intent of this contract to effect repairs at the initial visit so the system is in working condition after the inspection/testing.

In addition, Contractor is required to provide Maintenance Services when requested for fire alarm systems for all facilities in the region awarded.

NOTE: Bidder must also submit hourly rate for Maintenance Fee when requested for any facility in the region awarded.

In response to a request from the CPO for a copy of the bid tabulation and historical data on parts and maintenance usage under the previous contract, the procurement officer stated:

Also, as I mentioned on the phone yesterday, the purpose of this solicitation is annual inspections. The service price that we asked for in the bid documents is just for information purposes only. Nothing in the documents or in the contract requires us to use the low bidder of this solicitation for service calls. In fact, I encourage our facilities around the state to use local contractors because pricing is better than having to send one contractor all over the state. Nothing regarding the hourly service cost was considered when awarding this bid. I'm not sure how that impacts the protest, but I will leave that decision to MMO.

The procurement officer also supplied certain historical cost data from the time period of the previous contract. This data corroborates the procurement officer's statement that the requested service price was for informational purposes only and not meant to be part of the award. For example, at one facility in the Coastal Region, four contractors—Liberty Fire Protection, Inc., Precision Fire Solutions, Liberty Fire Protection, Inc., and TFS—provided either maintenance and repair services, supplies, or both.

As the incumbent, TFS knew the significance of the requested hourly maintenance rate and repair parts. In response to a motion by the CPO TFS stated:

TriTek would show the panel that the Agency records should reflect that in the last contract, the total costs for Inspections in the Midlands, PeeDee, and Piedmont regions was \$72,000.00. The total paid in those regions in revenue and service calls was \$151,404.82. This is more than a two to one ratio.

TFS argues:

It was error for the CPO not to inquire about the value of the repairs typically performed in assessing the contract value for jurisdictional purposes. It was also improper not to consider the hourly maintenance rate and expected maintenance to be performed in both evaluating the contract award and in the CPO's analysis for jurisdictional purposes.

TFS was on notice that these items were not included in the award calculation at the time the IFB was published. TFS could have requested inclusion of these costs in the evaluation during the question and answer period or as a protest of the solicitation. TFS did not ask the agency to include these costs in the evaluation.

The Panel remanded this case to the CPO for an accurate determination of the potential value of the contract. Having interviewed the procurement officer and reviewed the historical maintenance data during the period of the previous contract, the CPO affirms that this contract fails to meet the \$50,000 jurisdictional threshold.

Finally, while the CPO lacks jurisdiction to rule on the merits of incumbent TFS' protest, the Panel should be aware that TFS' protest raises a technicality without materiality. TFS alleges that the State accepted an online bid despite instructions to submit a paper offer. (See Solicitation, p. 12). The South Carolina Enterprise Information System (SCEIS), through which this solicitation was published, allowed FCS to submit its otherwise compliant bid online. Further, the solicitation states "[i]f you submit your offer *electronically*, you must upload an image of a signed Cover Page and Page Two." *Id.*, p. 25 (emphasis added).

In any event, this is a matter of form over substance which is waivable under Section 11-35-1520(13) which provides:

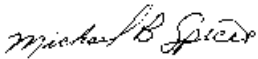
A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance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

FCS's submission of an online bid in no way affects bid price, quality, quantity, or delivery of the supplies or performance of the contract; nor does the submission of an online bid prejudice the other bidders. *See, e.g., Appeal of Capital City Catering*, Panel Case No. 2008-1 (finding that the submission of an unsealed technical proposal and the failure to provide electronic copies were waivable minor informalities).

DECISION

For the reasons stated above, the protest of TriTek Fire & Security, LLC is dismissed for lack of jurisdiction.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)
)
) ORDER
IN RE:)
Appeal by TriTek Fire & Security, LLC) Case No. 2019-3
)
Sol. No. 5400017543)
Agency Wide DDSN Owned Community)
Facilities Annual Fire Alarm Testing and)
Maintenance)

This matter came before the South Carolina Procurement Review Panel (the Panel) for a motion hearing by conference call on August 22, 2019, pursuant to a request for review by TriTek Fire & Security, LLC (TriTek) under sections 11-35-4210(6) and 11-35-4410(1)(a) of the Consolidated Procurement Code (the Procurement Code). TriTek protested the South Carolina Department of Disabilities and Special Needs' (DDSN's) award of a contract to Fire Control Systems of Charlotte (Fire Control) in connection with DDSN's solicitation for annual fire alarm testing and maintenance at its community facilities. On May 24, 2019, the Chief Procurement Officer (the CPO) dismissed TriTek's protest for lack of jurisdiction. TriTek timely appealed that written determination to the Panel.

On August 22, 2019, the Panel convened via conference call to entertain legal argument on the CPO's motion to dismiss TriTek's appeal. On the conference call, TriTek was represented by Michael H. Montgomery, Esquire. Manton M. Grier, Jr., Esquire, represented the CPO. The Panel now issues this order based on the threshold issue of jurisdiction as determined from the limited administrative record before it; the written submissions and oral arguments of the parties; and the applicable law and precedents.

Discussion

The sole issue before the Panel is whether or not the potential value of the contract awarded to Fire Control meets the minimum amount required for an aggrieved bidder to bring a protest under the Procurement Code. The Statement of Award indicates that the total potential value of the contract awarded to Fire Control is \$36,300.00. Record at PRP000009. In asking the Panel to dismiss TriTek's appeal, the CPO argues that this amount is below the \$50,000.00 threshold amount needed to trigger protest rights under section 11-35-4210(1)(d). In short, the CPO argues that neither he nor the Panel has jurisdiction to consider the merits of TriTek's protest.

TriTek disagrees, arguing that it was error for the CPO to base his determination on the question of jurisdiction solely on the amount listed on the award statement because that amount includes only the inspection portion of the contract to be performed. TriTek contends that the CPO should also have considered the potential value of any needed repairs which the awarded vendor would be expected to perform as required by the contract.¹ In addition, TriTek alleges that agency records should reflect that the total cost for both inspections and maintenance under the previous contract was well in excess of \$50,000.00 for the three regions awarded to Fire Control. TriTek asks the Panel to deny the motion to dismiss and to order the case remanded to the CPO for an accurate determination of the potential value of the contract.

Section 11-35-4210(1)(d) provides:

The rights and remedies granted by subsection (1) and Section 11-35-4210(1)(b) are not available for contracts with an actual or potential value of up to fifty thousand dollars.

¹ The record before the Panel does not include the solicitation documents. For the purposes of considering the motion before it, the Panel has assumed that TriTek's representations regarding the maintenance portion of the contract are accurate.

S.C. Code Ann. § 11-35-4210(1)(d) (2011). The Panel has interpreted this statutory provision on two previous occasions. The first case, *Appeal by Appraise Sell*, Panel Case No. 2010-8, involved a solicitation to acquire online auction services for the sale of unclaimed property in the State Treasurer's Office. In upholding the CPO's finding that the contract did not meet the jurisdictional threshold amount, the Panel determined that it was reasonable for the potential value of the contract to be based on the estimate listed on the award statement because the State had never acquired the services before. The second case, *Appeal by Velocitel, Inc.*, Panel Case No. 2017-6, involved a sole source contract award issued by the University of South Carolina (USC) for non-destructive bridge evaluations that had an undisputed actual value of \$35,067.00. The protestant contended that the contract award flowed out of a \$247,500.00 grant USC had received and that the CPO should have considered the entire amount of the grant in determining whether he had jurisdiction to entertain a protest. The Panel disagreed, finding that the actual amount of the contract of the protested contract was not in dispute and was well below the \$50,000.00 jurisdictional threshold.

Neither of these previous Panel decisions is dispositive of the issue presented by the instant case. Unlike the circumstances in *Appraise Sell*, DDSN has acquired fire alarm testing and maintenance services in the past and should have records of its historical spend for the three regions awarded to Fire Control. Similarly, unlike the contract in *Velocitel*, the *actual* value of this contract cannot be ascertained because of the variable presented by the anticipated additional costs for any required repairs. In the absence of an *actual* value, section 11-35-4210(1)(d) clearly requires the total *potential* value of the contract be considered here for the purposes of making a jurisdictional decision. Therefore, the Panel concludes that, in this particular case, the CPO should have considered the potential value of any required repairs in addition to the potential value of the testing in deciding whether or not the jurisdictional threshold for protest was met. Furthermore, because

the Panel cannot make a determination regarding the question of jurisdiction based on the very limited record before it, the Panel hereby remands the case to the CPO for an accurate determination of the potential value of the contract and for consideration of the merits of the protest if the jurisdictional amount is satisfied.²

Conclusion

Therefore, for the reasons set forth herein, the Panel denies the CPO's motion to dismiss TriTek's appeal and remands the case to the CPO for further consideration in accordance with this order.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 

C. BRIAN MCLANE, SR., CHAIRMAN

This 29th day of August, 2019.

Columbia, South Carolina

² The Panel is mindful that the CPOs receive a significant number of protests every year and that dismissing protests over which they clearly lack jurisdiction allows them to operate efficiently. The Panel does not wish to increase their workload unduly, but it is also concerned that non-lawyer protestants may not recognize the need to plead the jurisdictional amount in order to bring a protest. The Panel respectfully suggests that where a contract award includes both set and variable costs, the CPOs should ensure that agencies have factored in historical data when arriving at a total potential value. Alternatively, the Panel observes that the CPOs could offer protestants an opportunity to demonstrate that the total potential value of a contract does meet the jurisdictional threshold before dismissing the protest in an effort to satisfy due process concerns.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2019)

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>

FILING FEE: Pursuant to Proviso 111.1 of the 2019 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.