STATE OF SOUTH CAROLINA	)	**BEFORE THE CHIEF PROCUREMENT OFFICER**
COUNTY OF RICHLAND	)	
	)	
	)	DECISION
In the Matter of Protest of:	)	
	)	
Modular Technologies, Inc.	)	
	)	
Department of Juvenile Justice	)	POSTING DATE:
Charleston Place Group Home	)	
State Project No. N12-9580-PM	)	December 14, 2006

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Modular Technologies, Inc. (MTI). With this invitation for bids (IFB), the Department of Juvenile Justice (DJJ) attempts to procure a new administration modular building for the Charleston Place Group Home. After receiving bids, DJJ rejected MTI's bid because MTI did not provide its bid security bond on the form required by the Office of the State Engineer's (OSE) Manual for Planning and Executing a Permanent Improvement Project, Part II (Manual). In its letter, MTI protests DJJ's rejection of its bid alleging (1) "the bond as submitted was valid at the time of the bid opening and that the bidding agency has in its possession a security of 5% as required by the solicitation in the full amount of $3,969.90"; (2) "the solicitation does not state that the bond would not be acceptable if not provided on form SE 335"; (3) "immaterial variations from the exact requirements of the bidding documents shall; not be used as a reason to disqualify a bid as non-responsive."

As the issues of law to be decided in this case are clear and well founded in precedent of the Procurement Review Panel, this matter is being decided based upon a review of the procurement file, without the benefit of a hearing.

NATURE OF PROTEST

The protest letter is attached and incorporated by reference.

CPO's FINDINGS OF FACT

1. On August 21, 2006, DJJ solicited bids for a new administrative modular for Charleston Place Group Home. Specific to the protest issues, the solicitation required:

    - 4.2 BID SECURITY
    - 4.2.1 If required as stated in the SE-310, each Bid shall be accompanied by Bid security in the dollar amount, if any, listed on the SE-330, or in an amount of not less than five percent (5%) of the Base Bid. The bid security shall be:

        4.2.1.1 Written on SE-335, Bid Bond, made payable to the Agency; or,

        4.2.1.2 An electronic Bid Bond authorization number issued by a firm or organization authorized by the surety to receive, authenticate, and issue binding electronic Bid Bonds on behalf (of) the surety; or,

        4.2.1.3 In the form of a certified cashier's check.

    - 4.2.2 By providing an electronic bid bond authorization code and signing the Bid Form, the Bidder is certifying that an electronic bid bond has been executed by a Surety meeting the standards required by the Bidding Documents and the bidder and Surety are firmly bound unto the State of South Carolina under the conditions of the SE-335 provided in the Bidding Documents.
    - 4.2.3 To be acceptable, a Bid Bond shall:

        4.2.3.1 Be issued by a surety company licensed to do business in South Carolina;

        4.2.3.2 Be issued by a surety company having, at a minimum, a "Best Rating" of "A" as stated in the most current publication of "Best's Key Rating Guide, Property-Casualty". In addition, the surety shall have a minimum "Best Financial Strength Category" of Class V, and in no case less than five (5) times the contract amount.

4.2.3.3 Be accompanied by a certified and current power of attorney by the attorney-in-fact who executes the bond on behalf of the surety company; and

4.2.3.4 Be enclosed in the bid envelope at the time of the Bid Opening, either in paper copy or as a Bid Bond authorization number provided on the bid form.

- 4.2.6 Bidders submitting a Bid Security not meeting the required amount, surety rating or financial strength rating shall have one working day from the Bid Opening to cure the deficiency or the Bid shall be considered non-responsive. The Bid Security amount submitted with the Bid must be at least 80% of the required amount to be eligible for correction.
- 4.3.5 Any other or special documents requested of the Bidder in these Bidding Documents shall be included in the Bid Envelope. If they are not included with the Bid Envelope, the Bidder shall have twenty-four (24) hours from the time of the Bid Opening to provide these documents or its Bid shall be considered non-responsive.
- ARTICLE 5 CONSIDERATION OF BIDS
- 5.1 COMPLIANCE WITH REQUIREMENTS. To be considered, Bids shall be made in accordance with these Instructions to Bidders. Failure to comply with these bidding requirements may cause a bid to be rejected.
- 5.3 REJECTION OF BIDS
- 5.3.1 The Agency shall have the right to reject any or all Bids, reject a Bid not accompanied by a required Bid security or by other data required by the Bidding Documents, or reject a Bid which is in any way incomplete or irregular.
- 5.3.2 Bids shall be rejected for any of the following reasons, which include, but are not limited to:

5.3.2.3 Failure to comply with Bid Security requirements, except as allowed herein; or,

5.3.2.10 Failure to include a properly executed Power-of –attorney with the bid bond.

- 5.3.3 Bids shall not be rejected for the following reasons, which include, but are not limited to:

  5.3.3.12 Bid Bond not signed by the bidder but only if the bond has been properly executed and signed by the bonding company or agent.

- 5.3.4 Bidders shall have one (1) working day from the time of Bid opening to correct the following deficiencies:

  5.3.4.1 Failure to provide five percent (5%) Bid Security when required, provided that the Bidder did furnish Bid Security in the proper form equal to at least eighty (80) percent of that required in the SE-310; and

  5.3.4.2 Failure to provide a Bid Bond with the proper surety rating and financial strength, provided that the Bidder did furnish Bid Security in the proper form equal to at least eighty (80) percent of that required in the SE-310

2. On September 19, 2006, DJJ opened the following bids:

Bidder	Bid Amount
MTI	$79,398
Charles Blanchard Construction	93,999
Comark Building Systems	94,669
L.A. Smith General Contracting	124,720

NOTE: All bids except that of L.A. Smith were rejected as non-responsive.

3. On September 22, 2006, DJJ posted a Notice of Intent to Award to L.A. Smith.

4. On September 25, 2006, the CPO received the protest.

CONCLUSIONS OF LAW

MTI responded to the IFB submitting a bid. As its bid bond, MTI submitted American Institute of Architects (AIA) Document A310, Bid Bond. DJJ rejected MTI's bid as nonresponsive because MTI did not submit its bid bond on form SE-335, the State's required bid bond form.

As noted above, the IFB required that the bid bond be submitted as either (a) Written on SE-335, Bid Bond, made payable to the Agency; or, (b) an electronic Bid Bond authorization number issued by a firm or organization authorized by the surety to receive, authenticate, and issue binding electronic Bid Bonds on behalf (of) the surety; or, (c) in the form of a certified cashier's check. The bid bond form that MTI submitted met none of these required options.

MTI argues that "the solicitation does not state that the bond would not be accepted if not provided on form SE-335." The CPO disagrees. Regarding the form of the bond, the IFB reads, "The bid security shall be . . . written on SE-335, Bid Bond, made payable to the Agency." (4.2.1.1) (Emphasis added)

MTI argues that "in accordance with 4.2.6, 5.3.4.1 and 5.3.4.2, we should have been allowed one (1) day to rectify this situation." MTI makes reference to the IFB's (and the Code's) allowance for correction of bid bonds in some cases, which reads that a bid shall be rejected "except that a bidder who fails to provide bid security in the proper amount or a bid bond with the proper rating shall be given one working day from bid opening to cure such deficiencies. If the bidder cannot cure these deficiencies within one working day of bid opening, his bid shall be rejected." [11-35-3030(1)(c)] Regarding correction or "cure" of defective bid bonds, the IFB reads as follows:

- 4.2.6 Bidders submitting a Bid Security not meeting the required amount, surety rating or financial strength rating shall have one working day from the Bid Opening to cure the deficiency or the Bid shall be considered non-responsive. The Bid Security amount submitted with the Bid must be at least 80% of the required amount to be eligible for correction. (4.2.6)

As this section clearly reads, a bidder may cure certain bid bond deficiencies including "a Bid Security not meeting the required amount, surety rating or financial strength rating" within 24 hours. (Emphasis added)

However, in MTI's case, the deficiencies of its bid bond did not fall into the categories where a 24 hour cure period was offered by the code or the IFB. Its bid bond met the required amount. There is no evidence or even an assertion by the State that the firm offering the bond did not meet the surety rating and financial strength rating requirements. MTI's bid bond did not offer the required terms. MTI's bid bond offered "...the Principal shall pay the Obligee the difference not to exceed the penalty hereof between the amount specified in said bid and such larger amount for which the Obligee may in good faith contract with another party to perform the Work covered by said bid..." (Emphasis added) In contrast, the SE-335 requires ""Payment under this Bond shall be due and payable in full upon default of Principal and within 30 calendar days after receipt by Principal and Surety of written notice of default from Obligee, which notice will be given with reasonable promptness, identifying this Bond and Project and including a statement of the amount due." (Emphasis added) MTI's bid bond was deficient in its value to the State. If the state had offered MTI the contract and MTI refused acceptance, the state would have filed claim against MTI's bid bond. The State's claim would have been limited (capped) at the lesser of the actual difference of between MTI's bid and the awarded bid or the face

value of the bid bond (5%). Under the State's bid bond, the State could seek the full 5% bond amount regardless of the difference between MTI's bid and the award amount.[1]

Additionally, the SE-335 requires concessions to the State not offered by MTI's bid bond. The concessions are covered in the SE-335 form, which reads:

> Surety waives notice of and any and all defenses based on or arising out of any time extension to issue the Notice of Intended Award (a requirement of the Code) agreed to in writing by Obligee and Principal. Any dispute, suit, action or proceeding arising out of or relating to this Bond shall be governed by the Dispute Resolution process defined in the Bidding Documents and the laws of the State of South Carolina.

The bid bond offered by MTI did not offer these concessions. It did not meet these terms required of the bid bonds submitted to the State of South Carolina and therefore it was not eligible to be "cured."

MTI argues that "in accordance with section 5.3.3.13 immaterial variations from the exact requirements of the biding documents shall not be used as a reason to disqualify a bid." This clause in the IFB originates in the Code, which reads:

> Minor Informalities and Irregularities in Bids. 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. Such communication or determination shall be in writing. [11-35-1520(13)]

MTI argues that the deficiencies of its bid bond are immaterial variations from the exact requirements of the bidding document. That simply is not the case. The bid bond offered by MTI to the State

[1] As the actual bid of MTI and the accepted bid were more than 5% apart, this scenario did not take affect. However, had it occurred that the difference between MTI's bid and the accepted bid had been less than 5%; the state would have been injured by this deficiency. At the time the bids were submitted, when MTI purchased the bid bond, when they purchased the coverage required to protect the state, the outcome of the bidding was not known.

contains actual deficiencies that could have harmed the State in that the protection offered to the State under the terms of MTI's bid bond were less than those required by the IFB. These deficiencies affect the total bid price and delivery of the supplies or performance of the contract. They are not minor informalities or irregularities.

DETERMINATION

The Procurement Review Panel has addressed the issue of a bidder offering the State a deficient bid bond. In that case, the protestant submitted a bid bond on Department of Transportation bid bond form 674, which is applicable to bids for road construction contracts, instead of form SE-335 required by the IFB. The Panel determined that the bid bond submitted by the protestant met the requirements regarding the amount (5%), surety rating and financial strength, but it determined that the bid bond was deficient in other requirements of the SE-335, primarily the terms of coverage. The Panel denied the protest writing, "South Carolina Consolidated Procurement Code Section 11-35-3030(1) (c) did not entitle Accent to submit a corrected bid bond because the exceptions set forth therein are not applicable to the facts of this case." (Case No. 2002-2, Protest of Accent Contracting, Inc.) While the deficiencies of Accent's bid bond exceeded the deficiencies of MTI's bid bond, the facts of the two cases are similar. The result is the same.

For the reasons enumerated above, the protest is denied.

Voight Shealy

R. Voight Shealy
Interim Acting Chief Procurement Officer
for Construction

12/14/06
Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILING FEE: Pursuant to Proviso 66.1 of the 2005 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(4). . . . . 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 hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2005 S.C. Act No. 115, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain 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). Copies of the Panel's decisions are available at www.state.sc.us/mmo/legal/paneldec.htm

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September 25, 2006

Mark Cotter
South Carolina Department of Juvenile Justice
1720 Shivers Rd.
Colombia, SC 29210

RE: Project # N12-9580

Dear Mr. Cotter,

Please use this letter as an official notification of protest of the above project. After communicating with our legal division and bond company they are both in agreement that the bond as submitted was valid at the time of the bid opening and that the bidding agency has in its possession a security of 5% as required by the solicitation in the full amount of $3,969.90 in the event of default by Modular Technologies, Inc. The solicitation does not state that the bond would not be acceptable if not provided on form SE 335. Furthermore in accordance with sections 4.2.6, 5.3.4.1, and 5.3.4.2 we should have been allowed one (1) day to rectify this situation if it was a problem. Also in accordance with section 5.3.3.13 immaterial variations from the exact requirements of the bidding documents shall not be used as a reason to disqualify a bid as non-responsive. If allowed and in accordance with sections 4.2.6, 5.3.4.1, and 5.3.4.2 with one days notice we will provide to the Department of Juvenile Justice a bid bond on form SE 335 and / or documentation from our bonding company that the bid bond in your possession that was submitted with the bid will provide in full 5% security on our bid amount of $79,398.00 or the sum of $3,969.90. Our bid was submitted with a 5% bid security with no exceptions and no material variations. It appears that our bid is approximately $45,322.00 or 38% lower than our competitor. Our bid was responsive and is clearly in the best interest of the bidding agency to be accepted. If this matter is not properly resolved in accordance with the solicitation, it is our intent to appeal the protest to the South Carolina Procurement Review Panel.

If you have any questions please feel free to contract me.

Sincerely,

Terry Andrews
Modular Technologies, Inc.

Cc: Gary Gallo, Legal Division
CC: Arthur Frazier, Rutherford Bonding Company, Inc.

IN GOD WE TRUST