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W. BRIAN WHITE
CHAIRMAN, HOUSE WAYS AND MEANS

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

Protest Decision

Matter of: Protest of Calypso Caribbean Grill, LLC

Case No.: 2016-123

Posting Date: February 3, 2016

Contracting Entity: Materials Management Office

Solicitation No.: 5400009801

Description: Food Services – Midlands Tech

DIGEST

Protest of procurement officer's determination of non-responsibility denied where protester failed to demonstrate that the determination was clearly erroneous, arbitrary, capricious, or contrary to law.

AUTHORITY

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

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

DISCUSSION

Calypso Caribbean Grill, LLC (Calypso) protests the Intent to Award a contract to Arrington-Parker-Brown LLC d/b/a Subway for food services at Midlands Technical College, and the procurement officer's determination that Calypso was non-responsible. Calypso's letter of protest is incorporated by reference. [Attachment 1]

The Request for Proposals was issued to secure food services for Midlands Technical College. Responses were received from Calypso and Subway. The solicitation included four evaluation criteria: Technical Quality, Organizational Experience and Capabilities, Commission on gross sales tax returned to the College, and up to 5 Bonus Points for a financial offer of Scholarships.

Three evaluators reviewed and scored the proposals. The evaluators scored the Technical, Experience and Scholarships after which Calypso was the highest ranked offeror by one point. Subway received the most points for the Technical and Experience criteria. However, Subway did not offer a scholarship.

After adding the points awarded for the commission, Calypso was the highest ranked offeror by 2.7 points. Section 11-35-1530(9) requires that:

Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors set forth in the request for proposals, unless the procurement officer determines to utilize one of the options provided in Section 11 35 1530(8).

Section 11-35-1810 (1) requires:

Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts. The board shall by regulation establish standards of responsibility that shall be enforced in all state contracts.

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

(6) "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.

Calypso was determined to be a non-responsible bidder by the procurement officer for the following reasons:

During the reference check, Calypso received excellent references from 3 of their previous contracts. However, the references were all for catering services and not for operating a storefront business similar to that required by the RFP. When requested by the procurement officer, Calypso did provide additional information on 4 other locations with storefront operations similar to Midlands Technical College. In the last 5 years, the contracts for 3 of those 4 locations were terminated or not renewed by the contractor based on low sales (1 after 3 years and the other 2 within the first 6 months of operations). The College's student population varies each term and experiences a significant drop in sales during the summer time. This causes an uneven revenue stream and a significant period of lower sales. In addition, analysis of submitted financials shows Calypso's debt to equity ratio is high and they are highly leveraged.

In its letter of protest, Calypso responds:

Calypso has a storefront business that has been in operations for over 3 years located at the above address and has been successful. We are qualified! Like other businesses, including the awarded Offeror (Subway Corporation), Calypso has experienced operation closings due to poor location and sales. That is the nature of the restaurant business and it doesn't mean that your company doesn't know how to manage or is not responsible. Keep in mind, not one of our closed operations was percentage based with rent and utilities provided. With such a contractual formula combined with Calypso's excellent management of food and labor costs, will almost guarantee instant success for the duration of the contract.

S. C. Code Ann. Section 11-35-2410 provides for the finality of determinations under the RFP process unless "clearly erroneous, arbitrary, capricious, or contrary to law." Calypso has the burden to prove by a preponderance of the evidence that the procurement officer's determination is clearly erroneous, arbitrary, capricious, or contrary to law. Calypso does not deny the finding that 3 of the 4 storefront locations were not renewed or terminated. Calypso does not address the finding that its debt to equity ratio is high or that it is highly leveraged.

The Procurement Review Panel has “observed that procurement officers are given broad discretion in making their responsibility determinations because these are a matter of business judgment.” *Appeal by Allied Waste Services*, Panel Case No. 2013-12. The Panel sets a high bar for one challenging these determinations:

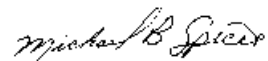
In reviewing a determination of non-responsibility, the Panel must decide whether the determination is “clearly erroneous, arbitrary, capricious, or contrary to law.” S.C. Code Ann. § 11-35-2410(A) (2011). Because Trinity 7 has not challenged the accuracy of the financial information relied upon and has not alleged a statutory or regulatory violation with regard to the non-responsibility determination, the only issue before the Panel is whether or not Ms. Langdale's determination was arbitrary or capricious. Moreover, as the appealing party, Trinity 7 bears the burden of proof before the Panel.... In addition, the Panel has noted that it will not overturn a finding of non-responsibility on the grounds that it is arbitrary or capricious unless the appellant demonstrate[s] a lack of reasonable or rational basis for the agency decision.

Appeal by Trinity 7 Security, LLC, Panel Case No. 2012-8 (internal quotations and citations omitted). Calypso has failed to offer proof that the procurement officer's findings were erroneous, arbitrary, capricious, or contrary to law.

DECISION

For the reasons stated above, the protest is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1



4760 Hard Scrabble Road
Columbia, SC 29229
(803) 865-4111
www.eatcalypso.com

January 15, 2016

Subject: Protest Letter

Dear Chief Procurement Officer:

I can't express the disappointment in not being awarded the Midlands Tech Food Services Contract. Our team worked really hard on submitting a professional responsive and responsible proposal. Calypso Caribbean Grill, under the FOIA, I requested procurement documents from Midlands Technical College regarding the above Solicitation #5400009801. I carefully reviewed the procurement file. I learned of some surprising occurrences that left me perplexed and vexed. I decided before I forward the procurement file to my attorney, I would like to express my concerns with this procurement. First of all, Calypso Caribbean Grill, LLC hereby protest the award of Solicitation # 5400009801 Midland's Tech Food Services RFP. It is clear that Calypso submitted a very professional and responsive proposal. We are baffled and confused as to why our proposal was deemed non-responsible. As referenced from the evaluator score sheets it's evident that the evaluation panel clearly scored Calypso Caribbean Grill as the successful Offeror to provide food services to Midlands Technical College. As to the reasons (please see attached memo to record) Procurement Officer Kathy Santhandreu deemed Calypso's proposal non-responsible leaves me perplexed. The reasons have no merit or validation.

We provided all the information requested by Kathy Santhandreu to prove that Calypso Caribbean Grill is qualified to provide Food Services to Midland's Technical College. By Mrs. Santhandreu's own admission, our references were excellent. When Mrs. Santhandreu requested financials, we responsively replied with the information. She simply states due to prior closings and low sales Calypso Caribbean Grill is a high risk. Also her statement of not operating a storefront business is simply false. She has not referenced where we are not responsible financially, through references or any other qualifications lack thereof.

Calypso has a storefront business that has been in operations for over 3 years located at the above address and has been successful. We are qualified! Like other businesses, including the awarded Offeror (Subway Corporation), Calypso has experienced operation closings due to poor location and sales. That is the nature of the restaurant business and it doesn't mean that your

company doesn't know how to manage or is not responsible. Keep in mind, not one of our closed operations was percentage based with rent and utilities provided. With such a contractual formula combined with Calypso's excellent management of food and labor costs, will almost guarantee instant success for the duration of the contract. Procurement officer Santhandreu's concern of high risk is simply not valid and not shared by the evaluation panel members or Calypso. Lastly, it is evident from the procurement file, that the same request for additional documents for responsibility was not required from the other Offeror (Subway). Also after review of the Subway proposal, I am not convinced they are totally responsive. I will let my attorney make that determination. Sir/Madam I hope you see the injustice here. Calypso should have never been removed from consideration.

Calypso Caribbean Grill, LLC seeks the following remedy: Deem Calypso Caribbean Grill as responsible and never should have been removed from consideration. Withdraw the current Intent to Award. Deem Calypso Caribbean Grill as the successful Offeror, as determined by the evaluators and Reissue the Award with Calypso Caribbean Grill, LLC as the awarded Offeror.

Remain

Sincerely yours,

Sean Martin
CEO, Calypso Caribbean Grill, LLC
Enclosed: Attachment

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised September 2015)

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 2015 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
1105 Pendleton Street, Suite 209, 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.