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Protest Decision

Matter of: Jostens, Inc.
Case No.: 2022-103
Posting Date: September 17, 2021
Contracting Entity: Clemson University
Solicitation No.: 144699492
Description: Clemson Ring Contract

DIGEST

Protest alleging the evaluation process was not followed is granted. Josten's letter of protest is included by reference. [Exhibit A].

AUTHORITY

The Deputy Chief Procurement Officer¹ 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

<i>Event</i>	<i>Date</i>
Solicitation Issued	June 7, 2021
Amendment 1 Issued	June 25, 2021
Intent to Award Posted	July 29, 2021

¹ The Materials Management Officer delegated the administrative review of this protest to the Deputy Chief Procurement Officer for the State Fiscal Accountability Authority.

Intent to Protest Received
Protest Received

August 9, 2021
August 13, 2021

Clemson University issued this Request for Proposals in order to establish a contract with a single vendor/manufacture for exclusive rights to sell the Clemson University Class Ring. The solicitation required that “[t]he cost of the proposed solutions must be submitted separately from the technical proposal – i.e. as a separate file.”

On July 29, 2021, Clemon posted an Intent to Award to Palmetto Balfour, Inc.. On August 9, 2021, Jostens Inc. (Jostens) filed a Notice of Intent to Protest. On August 13, Jostens filed its formal protest alleging that the evaluation process was not followed. Jostens argues:

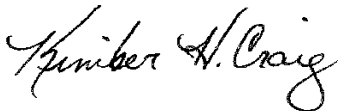
Balfour did not separate its cost proposal from its technical proposal. Balfour’s proposal supplied in response to lawful public records request shows that its technical proposal comprises pages 1 through 42 of its submission (See Exhibit 2) its “Cost Proposal” begins at page 43 of the very same document. This failure to follow instructions was material because the separate sealed proposal requirement exists to prevent explicit or implicit price bias, and recognized that “the bell cannot be unrung.” It appears that other vendors may have inadvertently overlooked this requirement as well. A new process should ensure that issue is corrected.

On August 17, 2021, Clemson agreed that they did not fully separate the technical and cost proposals from the evaluation [Exhibit B]. Clemson also acknowledged that this was an issue with other vendors during the evaluation process. Therefore, the best remedy is re-solicitation.

DECISION

For the reasons stated above, the protest of Jostens, Inc. is granted.

For the Materials Management Office



Kimber H. Craig
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August 13, 2021

Via Electronic Delivery to: protest-mmo@mmo.state.sc.us

Mr. Michael B. Spicer, Chief Procurement Officer – (mbspicer@mmo.sc.gov)
SFAA
Materials Management Office
1021 Main Street, Suite 600
Columbia, SC 29201

Re: Protest of Award– Clemson University Ring Contract RFP #144699492

Dear Mr. Spicer:

This firm represents Jostens, Inc. (“Jostens”). Please accept this Protest of the Notice of Intent to Award issued to Palmetto Balfour, Inc. (“Balfour”) in connection with Solicitation - Clemson University Ring Contract RFP #144699492. The Notice of Intent to Award was posted July 29, 2021.

This Protest is being provided to you as Chief Procurement Officer pursuant to *S.C. Code Ann. § 11-35-4210*. The grounds of this protest are set forth below. Jostens reserves the right to offer facts, evidence and argument in support of the protest at any time as may be permitted by law. Jostens requests due notice and a hearing at which it will present facts, evidence and argument on these issues and any others as may be properly raised under law. If for any reason a hearing will not be held, Jostens requests that the CPO advise of any deadlines for the submission of evidence and argument in support of this protest.

Grounds of Protest

I. Balfour’s proposal was non-responsive and must be rejected.

Balfour’s “cost proposal” is in fact no cost proposal at all. Instead, Balfour hedges in more ways than can be counted. In fact the only assurance the State has from Balfour’s proposal is that Balfour’s cost proposal is absolutely not binding on it in any way.

The RFP (*Exhibit 1*, RFP Scope of Work) stated as follows at pages 4-5:

B. Cost Proposal

- 1) The cost of the proposed solutions must be submitted separately from the technical proposal – i.e. as a separate file.
- 2) **Cost must be all inclusive of all to include any travel, lodging, and any other expenses.**
- 3) Your Cost Proposal must address the following:
 - a) Please describe how you will establish pricing for the ring. It is requested that each party submitting a proposal will state the formula(s) which will allow for the computation of the price of a particular ring at any given gold or stainless steel price, and which will outline any additional factors that will affect ring pricing. Please provide how the pricing structure is set and the timeline in which it escalates. Additionally, provide information on how fluctuations in the metals market may affect the cost to the customer, to include information on standard tools used to calculate this cost. (emphasis added)

A. Balfour's Cost Proposal Contained Numerous Impermissible Caveats and Equivocations

The RFP was clear that cost was a factor for award to be weighted at 20%. (*Exhibit 1b*, RFP Addendum 1, item 9). While the RFP did allow vendors to include a specific provision to address changes in the precious metals market, in a manner that would permit one to “calculate the cost,” it did not allow vendors to include an endless litany of incalculable caveats and equivocations that would render the proposal price a nullity. But that is what Balfour did, as shown below.

At page 43 of its proposal (*Exhibit 2*), Balfour stated:

a. Please describe how you will establish pricing for the ring. It is requested that each party submitting a proposal will state the formula(s) which will allow for the computation of the price of a particular ring at any given gold or stainless steel price, and which will outline any additional factors that will affect ring pricing. Please provide how the pricing structure is set and the timeline in which it escalates. Additionally, provide information on how fluctuations in the metals market may affect the cost to the customer, to include information on standard tools used to calculate this cost.

The pricing given in Appendix C – Bidding Schedule is retail pricing and includes the following:

- A choice of Yellow or White gold in karat qualities
- Full name engraving inside the ring (two lines for men's rings and one line for women's rings)
- A choice of finishes on gold
- A commission rate as indicated in Appendix C
- A minimum guarantee as indicated in Appendix C
- The expenses to support the marketing plan and on-campus dates presented in Section II 3 a-c,

Marketing and Promotions (including a \$50,000 ceremony fund paid semi-annually during the term of the agreement and funding

- for a student intern at \$2,500 per year)
- Six 10K gratis rings per year
- Late fees are not assessed on orders with back (past graduating classes) year dates.
- Interest-Free Credit Card Payment Plan
- Balfour's Lifetime Warranty
- Four Year Ring Loss Protection Program
- A 14% royalty for use of the licensed marks
- Shipping and handling fees
- Pricing includes encrusting Palmetto tree and grad date on all rings.
- **Pricing shown in Appendix C excludes:**
- Sales tax (paid by the consumer)
- Extended Ring Loss Protection Plan (optional) \$34.95
- **\$30 Greek option fee (subject to change during term of the agreement)**
- **A nominal gold carrying cost will be added to the annual gold basis cost determined by Balfour and Clemson as has been the practice.**

(Exhibit 2 at 43)(emphasis added).

The Procurement Review Panel has stated:

The Procurement Code defines a "responsive offeror" as one "who has submitted a[n] . . . offer which conforms to all material aspects to the . . . request for proposals." S.C. Code Ann. § 11-35-1410(7) (2011). Under the provisions governing RFPs, a proposal must be responsive in order to be evaluated, ranked, and considered for award. S.C. Code Ann. § 11-35-1530(7) (2011). Generally speaking, responsiveness is determined at the time an offer is opened and, unless discussions are conducted under section 11-35-1530(6), is based on the information included in an offeror's proposal.

Appeal by Excent Corporation, Panel Case No. 2013-2; *Appeal by Heritage Community Services*, Panel Case No. 2013-1 (May 6, 2013, Order on Reconsideration). *See also Appeal by Blue Cross and Blue Shield*, 2019 SC CPO LEXIS 67, Panel Case No. 2019-2.

True, Balfour has (remarkably) enjoyed a monopoly on the Clemson ring contract for more than ten years, as they noted in their proposal at page 2. But there is simply nothing in the RFP that invites *all vendors* to add an unevaluated "gold carrying cost" to the price that is evaluated in the cost proposal "as has been the practice." Only Balfour, the longtime incumbent, took this liberty. That choice renders its proposal non-responsive.

Balfour's cost proposal also goes on to state at page 44:

Retail prices will also be adjusted with any modifications to commission or trademark licensing fees at any time during the initial term or any renewal periods. A nominal gold carrying cost will be added to the annual gold basis cost determined by Balfour and Clemson as has been the practice.

(Exhibit 2 at 44).

Nothing in the RFP invited *all vendors* to protect themselves against “modifications to commission or trademark licensing fees,” or to add an unevaluated “nominal gold carrying cost” to be added “as has been the practice.” Only Balfour, the longtime incumbent, took that liberty. Again, this renders its proposal nonresponsive.

B. Balfour Refused to offer the Annual Commission Guarantee for Each Year of the Contract, Violating the RFP.

The RFP also required vendors to commit to an “annual guarantee commission for each year of the contract.” (Exhibit 1, RFP at page 4, item B.3.b). Balfour’s proposal, again, was non-responsive and subject to numerous impermissible caveats.

At page 45 of its proposal, Balfour admits that its guarantee was only for, in its own words “*the first three years of the contract*” when it stated:

Balfour will guarantee per ring commissions at 3,250 ring units for the first three years of the contract at a per-ring-commission of \$210.00 per ring unit. This guarantee represents \$682,500.00 per year, and it is subject to the following conditions, during the initial Contract period:

- Clemson University is able to provide the requisite student/parent mail/email lists for each planned marketing event cycle during the contract period.
- Policy changes or on-campus incidents do not occur at Clemson that would materially affect student demand for rings during the Contract period.
- Extraordinary external incidents do not occur which would materially affect student demand for rings during the Contract period

Please refer to Appendix C per the bidding instruction above see B item 1

(Exhibit 2 at 45.)(emphasis added) The other vendors offered minimum guarantees for every year of the contract. (See *other vendor proposals, Exhibits 3, 3a, 4 and 4a*). Balfour’s proposal language shows that even it understood that its offer fell short of the requirement for a minimum guaranteed commission for every year of the contract when it limited the guarantee to the “*first three years of the contract*.” This is a materially non-responsive proposal that must be rejected.

C. Balfour’s Minimum Guaranteed Commissions are Not Even Guarantees, Violating the RFP

Balfour not only failed to provide an “annual guarantee commission for each year of the contract” by limiting its guarantee to three years; it also unilaterally hedged the guarantee to the point of rendering it a nullity.

Nothing in the RFP permitted *all vendors* to carve out protections for “policy changes” or “on-campus incidents” that would “materially affect student demand for rings.” But Balfour alone

took this unique advantage. (*Exhibit 2* at 45.) Nothing in the RFP allowed *all vendors* to protect themselves against “extraordinary external incidents” that “would materially affect student demand for rings during the Contract period.” But Balfour alone took that unique advantage. (*Exhibit 2* at 45.)

Such terms limiting a vendor’s risk, liability and commitment in a cost proposal demand that it be rejected. *In re Appeal of Blue Cross and Blue Shield of South Carolina*, 2019 SC CPO LEXIS 67.

Because Balfour’s Cost Proposal violated every mandatory and essential requirement of submission, Balfour’s proposal was required to be rejected as non-responsive.

II. Jostens Also Protests the Evaluation Process

A. The Cost Proposals were not Scored in Accordance with the RFP

The RFP was clear that cost was a 20% factor for award to be weighted at 20%. A “Bidding Schedule” spreadsheet was provided by the State as Appendix C for vendors to fill out. It states that “Clemson intends to score your cost proposal based on a 50%/50% weighting for Ring Pricing and Commission.” (*See Exhibit 1 a*, RFP, Appendix C, Bidding Schedule.) This contract is a revenue contract to Clemson – commissions in two forms (guaranteed minimum annual, and per ring sale); but it was also a contract for sale of merchandise – ring prices to be paid to the vendor. The materials received from Clemson under public records request show that this method was not used. A 50%/50% weighting between the “Ring Pricing” (payments to vendor) and “Commission” (payments made to Clemson) would have yielded ten points of twenty to the lowest “Ring Cost” and ten points of twenty to the highest “Commission” paid to Clemson. The records show this was not done. (*Exhibit 5*, Calculations RFP Comparison.) Nevertheless, this error is of little consequence given that Balfour’s proposal was non-responsive in numerous ways.

B. The Evaluation was Arbitrary and Capricious.

The defects in Balfour’s proposal fully warrant the relief requested herein. But in addition, Jostens is compelled to point out process errors that prevented the “level playing field” that is the key objective of the RFP process, an objective which Clemson surely desired to meet. While Jostens believes that these process errors may have been inadvertent, they are nonetheless important to consider. In the end, Jostens desires as a remedy the ring contract be issued pursuant to a truly fair and objective process that does not favor the longtime incumbent. The failures in this process resulted in Clemson forgoing significant advantages offered by other competitors, including hundreds of thousands of dollars in revenue.

1. Evaluators Improperly Relied on False Information from Jostens’ Competitor or from Outside the Process.

The Evaluation was arbitrary and capricious and relied on information from Jostens competitor or from other, impermissible information outside the process. Documented remarks in the evaluation

reflect that evaluators considered “facts” about Jostens that were simply not true and not contained in any way in Jostens’ proposal. (*See, e.g., Exhibit 6, Determinations and Findings, as well as individual evaluations.*) Jostens notes that Balfour, the ten year incumbent, took the liberty to make unfounded assertions (i.e. “potshots”) about Jostens in Balfour’s own proposal. (*see, e.g. Exhibit 2 at 14 and 16*). It is unclear whether the evaluators gained the false information about Jostens from Balfour, or from information received outside the process (all of which would be improper) but either way, evaluator reliance on false information from outside the vendor’s own proposal or the process is arbitrary and capricious. *Cf. Appeal by Excent Corporation, Panel Case No. 2013-2.*

2. Evaluators Demonstrated Evidence of Improper Bias and Conflict of Interest.

In addition, it appears that the evaluation was subject to improper bias or conflict of interest. Contrary to the purchasing officers’ assertion that “[e]ach member scored fairly consistent with one another” (*Exhibit 6, Determination and Findings*), on the “Manufacturing and Workmanship” factor, for example, several evaluators scored Jostens’ quality relatively high – 20 and 18 out of 20 points; but one evaluator scored Jostens’ quality a 7.¹ On the relatively objective “Warranty Process and Policy” factor, for example, two evaluators awarded Jostens 20 out of 20 points, but another evaluator awarded Jostens only ten points. Similar irrational inconsistencies exist in the other scoring factors such as “Marketing and Promotion.” (*See Exhibit 5, Calculations RFP Comparison.*)

Other evidence of improper bias and conflict of interest exist as well. While the evaluators signed the required ethics documents, Jostens believes (and has requested documentation to establish) that the evaluators had a bias or conflict of interest. Existence of bias or conflict of interest are obviously grounds for cancelling an award. Jostens purpose in raising this issue is to impart to Clemson the seriousness and importance of selecting unbiased and impartial evaluators. This is especially crucial in a circumstance involving an incumbent of ten years.

3. Jostens requested relevant information in the process that was conspicuously refused.

Jostens is aware that a protest of the RFP itself is untimely. But it is important to call out that in this process, Jostens properly requested relevant data such as the number of rings sold in the past 5 years, broken down by style, during the Question and Answer period. (*See, e.g., Exhibit 1 b, Questions 1 and 2*). In response, bidders were incorrectly told that the information had already been provided, when in fact it had not been provided. (*Id.*) But when Jostens further responded that the data was in fact not provided, Clemson ignored the request and never provided it.

¹ Jostens notes that the high quality of its rings and its service are objectively beyond dispute. Clemson Athletics has relied on Jostens to produce rings for athletics for years due to ring quality and excellent service. All the evaluators had to do was to ask within Clemson itself to confirm this. It is questionable why the evaluation team did not simply inquire of Clemson Athletics, instead relying on Jostens’ competitor or information outside the process in scoring.

Further peculiarities exist in the responses to bidder questions, including Clemson “responses” to questions that *refer bidders to the incumbent’s website* for answers, and Clemson “responses” that reply merely that bidders should “submit a FOIA request.” (*Id.* at Questions 3, 4, 7, 11 and 12.)

This information requested by competitors was material to pricing, and Clemson’s “responses” left material information solely in the hands of the incumbent, Balfour, unfairly. A new process should assure that this type of unfair circumstance does not recur.

4. Balfour Claimed its Rings were USA Made, but Negotiated to Supply Foreign Made Rings.

The Record of Negotiations raises questions about whether the negotiations were conducted properly. (*See Exhibit 7.*) It appears that Balfour may have been improperly “coached” with information from competitors’ proposals, in regard to pricing and commissions. Balfour was actually permitted or coached to modify pricing and commissions in a manner disadvantageous to Clemson. *Id.*

But more significantly, it appears that Balfour was afforded in negotiations the right to shift its manufacturing site from US made to foreign made, despite the fact that Balfour claimed the US Product Preference, in which it represented that its supplied goods will be made in the USA. (*See Exhibit 2 b* page 7. Naturally, the ability to supply foreign made goods affects price (and quality) significantly.) Due to the statutory importance of US Made Products, Jostens believes that this negotiation represents a cardinal change that cannot be permitted.

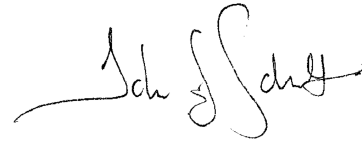
C. The Rules Regarding Separate Cost and Technical Proposals Were Not Followed

Balfour did not separate its cost proposal from its technical proposal. Balfour’s proposal supplied in response to lawful public records request shows that its technical proposal comprises pages 1 through 42 of its submission (*See Exhibit 2*) its “Cost Proposal” begins at page 43 of the very same document. This failure to follow instructions was material because the separate sealed proposal requirement exists to prevent explicit or implicit price bias, and recognized that “the bell cannot be unrung.” It appears that other vendors may have inadvertently overlooked this requirement as well. A new process should ensure that issue is corrected.

III. Conclusion

For these reasons, and based on further evidence to be supplied from further records requested and testimony to be received, Jostens requests a hearing, a continued stay, prompt release of evaluator related records requested, and that the award to Balfour be cancelled and that Jostens be awarded the contract or in the alternative, that the solicitation be cancelled and re-solicited in a manner that assures fairness and a level playing field for all competitors.

Very truly yours,



John E. Schmidt, III

Cc: Manton Grier, Esquire, mgrier@ogc.sc.gov
Beth Perry, kbperry@clemson.edu
Mike Nebesky, mnebesk@clemson.edu

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised May 2020)

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 2020 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.