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Protest Decision

Matter of: United Chemical & Supply Co., Inc.

Case No.: 2022-117

Posting Date: November 30, 2021

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400021900

Description: STC Paper Towels, Toilet Paper, Dispensers

DIGEST

Protest is dismissed in part as untimely and granted in part. The protest letter of United Chemical & Supply Co (UCS) is included by reference. (Attachments 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.

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

BACKGROUND

Solicitation Issued:	08/18/2021
Amendment 1 Issued	10/04/2021
Amendment 2 Issued	10/19/2021
Intent to Award Posted	11/10/2021
Intent to Protest Received	11/10/2021

The State Fiscal Accountability Authority (SFAA) issued this Invitation for Bids (IFB) on August 8, 2021, to establish a state term contract for paper towels, toilet paper, and dispensers. Amendment 1 was issued on October 4, 2021. Amendment 2 was issued on October 19, 2021. Eight bidders responded, and Intents to Award were posted on November 10, 2021 to Dade Paper and Bag, LLC, and Veritiv Operating Company. UCS filed an Intent to Protest on November 10, 2021 followed by its protest on November 15, 2021.

ANALYSIS

The solicitation was accompanied by a spreadsheet which was amended with Amendment 1 and includes the following explanation:

CALCULATING THE LOW BID

Attached to this solicitation is a spreadsheet entitled “Attachment A Pricing Worksheet” “Attachment A Pricing Worksheet Amend” Within that spreadsheet there are Items that comprise the one Lot:

In Attachment A Pricing Worksheet Attachment A Pricing Worksheet Amend, offerors will provide responses in the cost template. The low bid shall be calculated for the complete lot once a Unit Price is entered by the offeror for each item within the Lot. The Pricing Worksheet will calculate the Estimated Extended Price by multiplying the Estimated Quantity Over Life of Contract by the offered Unit Price. The Total Estimated Extended Price for the Lot will be calculated by the worksheet to establish the Market Basket Total.

The worksheet also includes a discount off of list price for remaining Paper Product catalog price calculation. Enter the discount offered off list price for the remainder (non-market basket items) of the paper product catalog. The spreadsheet will calculate the percent discount against the Estimated Dollar Value of Non-Market Basket Items to establish the Estimated Catalog Discounted Total.

The Lot Grand Total Amount, highlighted on the spreadsheet in yellow, is to be entered into SCEIS as the associated Lot Total Line item.

Low bid shall be established based on the complete lot’s Lot Grand Total.

(emphasis added)

UCS protests:

I assert that it is not a "reasonable commercial standard of fair dealing" to assume that all vendor's "list prices" will be the same when using this to measure financial value of a solicitation response. Because catalog list prices are *subjective* to each vendor and not *objective*, they should not be used as an intangible, objective variable in a bid's financial formula.

The Result: Because only \$900,000~ of the total \$3M~ bid value is derived from actual line item price responses and usage volumes, the bid is heavily weighted on each bidder's response to the discount percentage off of "list price", and therefore the bidders' responses do not conform to "reasonable commercial standards of fair dealing" for the purpose of comparing responses equitably.

The method to be used to calculate the low bidder was explained in Amendment 1 and the amended spreadsheet. Section 11-35-4210(1)(b) grants an actual bidder the right to protest the award or intent to award:

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall notify the appropriate chief procurement officer in writing of its intent to protest within seven business days of the date that award or notification of intent to award, whichever is earlier, is posted and sent in accordance with this code. Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract and has timely notified the appropriate chief procurement officer of its intent to protest, may protest to the appropriate chief procurement officer in the manner stated in subsection (2) within fifteen days of the date award or notification of intent to award, whichever is earlier, is posted and sent in accordance with this code; except that a matter that could have been raised pursuant to subitem (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(emphasis added)

Regardless of any validity in this issue of protest, it could have been raised as a protest of Amendment 1 but cannot be raised as a protest of the award and must be dismissed as untimely.

UCS next alleges:

2.) Too few vendors being awarded./Too few paper brands being represented in the award. This is a sourcing risk for the state's end-users given recent product shortages and supply chain issues.

Eight bids were received, and awards were made to two Offerors. Bidders were advised that award would be made to multiple lowest responsible and responsive bidder(s):

The South Carolina State Fiscal Accountability Authority (SFAA) is soliciting a Statewide Term contract for **Toilet Paper, Paper Towels and Dispensers** to include new or recycled products. An award will be issued to multiple lowest responsive and responsible bidder(s). There is only one (1) lot on which to bid. **Failure to offer on all items within this lot will be reason for rejection.**

[Amendment 1, Page 4] (emphasis added)

AWARD CRITERIA -- BIDS (JAN 2006)

Award will be made to the lowest responsible and responsive bidder(s). [06-6020-1]

AWARD TO MULTIPLE OFFERORS (JAN 2006)

Award may be made to more than one Offeror. [06-6035-1]

[Amendment 1, Page 19] (emphasis added)

Neither the solicitation, amendments, nor the spreadsheet provide any additional insight into how the award will be made. There is nothing to indicate how many awards would be made or what criteria would be used to limit the award.

An award must be made to the lowest responsive and responsible bidder² based on the criteria published in the solicitation³. In this case an unpublished award criterion was used to limit the award to two Offerors. The result was an arbitrary number of awards based on no published criteria. The award was not made in accordance with the Code. This issue of protest is granted.

² Section 11-35-1520(10): Unless there is a compelling reason to reject bids as prescribed by regulation of the board, notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids...

³ Section 11-35-1520(6): The invitation for bids must set forth the evaluation criteria to be used. Criteria must not be used in bid evaluation that are not in the invitation for bids. Bids must be evaluated based on the requirements in the invitation for bids and in accordance with the regulations of the board....

DECISION

For the reasons stated above the protest of the calculation of the low bid is dismissed as untimely. The protest of an improper award is granted. The awards to Dade Paper and Bag, LLC, and Veritiv Operating Company are cancelled. The procurement is remanded to the State Fiscal Accountability Authority for processing in accordance with the Code.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1

From: Sam Broyles

Sent: Monday, November 15, 2021 10:52 AM

To: protest-mmo@mmo.state.sc.us,

Cc: drsharpe@mmo.sc.gov

Subject: RE: Solicitation Number 54000021900 SC Award: STC PAPER TOWELS,TOILET PAPER,DISPENSERS

To Whom It May Concern:

Thank you for taking the time to consider my detailed protest of this solicitation. This email serves as my full explanation of my protest.

I feel that this protest will shed light on the notion that the solicitation and intent to award as they stand right now are not providing the best value to the state nor the most fair bidding process for vendor participants.

I have 2 reasons for protesting this solicitation:

1.) The method used to measure the financial value(s) of the responses is not equitable, nor is it a fair/equitable/"apples to apples" measurement.

Explanation: The excel worksheet that accompanied this solicitation had the goal of determining a total cost or total bid value from each participant. It did this by requiring bidders to provide responses on 2 categories of pricing data:

A. A specific line itemed list of products with the state's estimated usages of each item that

ended up totaling around \$900,000~

AND

- B. Asking the bidder to provide a guaranteed, flat-rate percentage discount off of "list price" on an unspecified list of additional products given as an estimated \$3.3MM in spend before the discount provided by the bidding participant.

The logic of the formula looks like this: Your bid total dollar amount will be the sum of 2 values - A.) The subtotal of line items (roughly \$900K), plus B.) The subtotal of \$3.3MM minus the percentage discount you guarantee to give off each participant's "list price".

The issue with this request's format, and therefore the formula in the worksheet, is that point "B" is based on a false assumption. It assumes that all bidders start with the same "list price" (an estimated \$3.3MM) and therefore assumes that a 40% catalog discount from "vendor A" would be an equal dollar amount value as a 40% discount from "vendor B". This, in fact, is not the case and skews the way the solicitation's worksheet values the responses. "List Price" is an ambiguous, subjective price set by each vendor on his/her own catalog offering.

South Carolina Procurement Code "SECTION 11-35-30. Obligation of good faith." states the following:

"Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty in fact in the conduct or transaction concerned and the observance of **reasonable commercial standards** of fair dealing."

I assert that it is not a "reasonable commercial standard of fair dealing" to assume that all vendor's "list prices" will be the same when using this to measure financial value of a solicitation response. Because catalog list prices are *subjective* to each vendor and not *objective*, they should not be used as an intangible, objective variable in a bid's financial formula.

The Result: Because only \$900,000~ of the total \$3M~ bid value is derived from actual line item price responses and usage volumes, the bid is heavily weighted on each bidder's response to the discount percentage off of "list price", and therefore the bidders' responses do not conform to "reasonable commercial standards of fair dealing" for the purpose of comparing responses equitably.

2.) Too few vendors being awarded./Too few paper brands being represented in the award. This is a sourcing risk for the state's end-users given recent product shortages and supply chain issues.

Explanation: In light of the past 2 years of the COVID pandemic causing product shortages, delays on delivery, backorders, etc I believe it would be in the state's best interest to award more than 2 vendors, and possibly to consider awarding 1 vendor for each major paper brand represented in the responses in an effort to give the state's end-users the opportunity to source products from multiple vendors based on how, where, and when it best suits their needs rather than being limited to only 2 specific vendors with 2 specific brands of product. I believe an internal risk assessment based on the state's past 2 years of paper usage, orders, backorders, etc would affirm the validity of my

suggestion.

My requests for resolution:

- 1.) Resolicit responses for this solicitation with a more equitable and accurate method for comparing responses.
- 2.) Award more responsive and responsible bidders – preferably for the state’s benefit, award 1 vendor for each major, American-made paper brand represented in the responses.

Thank you again for taking the time to consider my concerns and suggestions for resolution. I look forward to your response.

Sam Broyles

United Chemical & Supply Co., Inc.
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Greenville, SC 29607
Office: 864-672-9176
Cell: 864-430-1055
Fax: 864-234-5937
Sam.Broyles@unitedchemical.net
www.unitedchemical.net

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.