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| STATE OF SOUTH CAROLINA |) | BEFORE THE SOUTH CAROLINA |
| |) | PROCUREMENT REVIEW PANEL |
| COUNTY OF RICHLAND |) | |
| |) | |
| |) | ORDER |
| IN RE: |) | |
| |) | Case No. 2008-1 |
| Protest of Capital City Catering |) | |
| Appeal of Capital City Catering |) | |

This matter came before the South Carolina Procurement Review Panel (Panel) by way of an appeal letter from Capital City Catering (Capital City) dated April 7, 2008, requesting administrative review of the Chief Procurement Officer's (CPO's) denial of its protest in a March 27, 2008, decision. The CPO's decision upheld the Materials Management Office's (MMO's) intent to award a contract to Catering by Dupre (Dupre) for cafeteria/restaurant and day catering services at the South Carolina State Museum (the Museum). The Panel received a motion for summary judgment from the CPO on May 14, 2008. The CPO also requested that the Panel dismiss the protest without the necessity of a hearing. After allowing the other parties opportunity to file briefs in response to the CPO's motion, the Panel decided the matter without oral argument on June 9, 2008.¹ The Panel issues this decision based on the initial record; the motion and responses; applicable statutory and case law; and the Panel's established procedures.

Findings of Fact

On October 10, 2007, MMO issued a request for proposals (RFP) for the procurement of cafeteria/restaurant and day catering services at the Museum. Under the terms of the RFP, bidders were to submit their price proposals separately from their

¹ The Panel has previously dispensed with oral argument where the facts of a protest are not in dispute and the only issues to be decided are legal ones. *In re: Protest of Accent Contracting, Inc.*, Case No. 2002-2; *In re: Protest of Koch Industries, Inc.*, Case No. 1999-4.

technical proposals in a sealed envelope. Bidders were also instructed to submit electronic copies of their proposals on designated magnetic media. The magnetic media requirement was in addition to the submission of the original hard copy of the proposal. The bid opening was set for 2:30 p.m. on November 9, 2007.

On November 9, 2007, shortly before the 2:30 p.m. deadline, a Dupre representative hand-delivered its price and technical proposals to Edna Sims, an Administrative Specialist for MMO who coordinates bid openings. Dupre's representative submitted its price proposal in a sealed white envelope and its technical proposal in a large manila envelope.² Ms. Sims accepted Dupre's proposal and stamped both envelopes with the following date and time: "2007 Nov 9 PM 2 29." After time-stamping the envelopes, Ms. Sims handed the white envelope back to Dupre's representative and asked her to write Dupre's mailing address on the outside of it.³ Dupre's representative did so in full view of all of those present for the bid opening. Once Dupre's representative finished writing the address, Ms. Sims declared that the time for bid opening had arrived and that no more proposals would be accepted.⁴

Capital City has not disputed these essential facts in its request for review letter or in its response to the CPO's motion for summary judgment.

² In the hearing before the CPO, Capital City alleged that the manila envelope containing Dupre's technical proposal was not sealed and "had papers sticking out." Ms. Sims acknowledged that she could not recall whether the manila envelope had been closed with the metal clasp. Unfortunately, no one else who was present at the bid opening testified before the CPO. For the purposes of this decision, the Panel finds that the manila envelope was not sealed by glue or metal clasp.

³ Capital City has not alleged that anything other than Dupre's mailing address was added to the sealed white envelope.

⁴ Capital City has argued that this declaration occurred 15 seconds past 2:30 p.m. However, Capital City did not present any evidence supporting this allegation at the hearing before the CPO. Furthermore, Capital City did not offer any evidence in support of this allegation in its response to the CPO's motion for summary judgment before the Panel.

Conclusions of Law

The Panel has considered and ruled on summary judgment motions in the past. *In re: Appeal of Triad Mechanical Contractors*, Case No. 2006-7. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). In determining whether any genuine issues of material fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Osbourne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). Summary judgment should be granted “when plain, palpable and undisputed facts exist on which reasonable minds cannot differ.” *Bayle v. South Carolina Dep’t of Transportation*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001).

Because the parties agree that the facts are undisputed and that the issues to be decided are questions of law, the Panel finds summary judgment is appropriate and will address Capital City’s three primary grounds of protest separately.

I. Timeliness of Dupre’s Proposal

Capital City’s first protest ground is that Dupre’s proposal should have been rejected because it was submitted after the 2:30 p.m. deadline. Capital City also asserts that Ms. Sims acted improperly when she allowed Dupre’s representative the opportunity to add Dupre’s mailing address to the outside of the sealed white envelope containing Dupre’s price proposal.

Under the Procurement Code, proposals “must be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids and in

the manner prescribed by regulation of the board.” S.C. Code Ann. §11-35-1520(5) (Supp. 2007).⁵ The regulation governing bid openings states: “The procurement officer . . . or his designee shall decide when the time set for bid opening has arrived, and shall so declare to those present.” S.C. Code Ann. Regs. 19-445.2050(A) (Supp. 2007). Another applicable regulation additionally provides: “Proposals . . . shall be time-stamped upon receipt and held in a secure place until the established due date.” S.C. Code Ann. Regs. 19-445.2095(C)(1) (Supp. 2007).

The envelopes containing Dupre’s price and technical proposals are clearly time-stamped at 2:29 p.m., indicating that they were submitted to Ms. Sims before the established deadline of 2:30 p.m. However, Capital City argues that Ms. Sims allowed Dupre additional time to complete its proposal when she asked Dupre’s representative to write Dupre’s mailing address on the outside of the sealed white envelope. In its original protest letter, Capital City alleged that one of its representatives present at the time of the bid opening noted that the world clock in the bid room read 15 seconds past 2:30 p.m. when Ms. Sims announced that the time for bid opening had arrived. As noted above, Capital City failed to prove this allegation before the CPO. Nonetheless, the Panel finds that even if Dupre’s proposal was 15 seconds late, it was still timely because it was received by Ms. Sims and in her control when she announced the time for bid opening had arrived.⁶ Furthermore, the Panel finds that allowing Dupre’s representative time to

⁵ This statutory section and its regulations are made applicable to competitive sealed proposals by S.C. Code Ann. section 11-35-1530(1) (Supp. 2007).

⁶ See *Matter of: Reliable Builders, Inc.*, 93-1 CPD P 116, 1993 WL 41179, *2 (Comp. Gen. 1993) (“The time a bid is submitted is determined by the time that the bidder relinquishes control of the bid. (citation omitted). Thus, the dispositive question is when Reliable relinquished control of its bid in relation to the bid officer’s declaration of the time for receipt of bids, *since bids are timely submitted up to the time the bid opening officer announces that the time set for bid opening has arrived.*” (emphasis added) (citation omitted)).

write the mailing address on the outside of the sealed white envelope in full view of all those present did not compromise the procurement process or cause prejudice to Capital City or any other bidder.

II. Responsiveness of Dupre's Proposal

Capital City's remaining two grounds of protest both relate to responsiveness. First, Capital City asserts that Dupre's technical proposal was non-responsive because it was submitted in an unsealed manila envelope. Second, Capital City argues that Dupre's proposal was non-responsive because it did not include the electronic copies as specified by the RFP.

A "responsive bidder or offeror" is defined as "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals." S.C. Code Ann. § 11-35-1410(7) (Supp. 2007). Proposals must be responsive in order to be ranked and considered for award. S.C. Code Ann. §11-35-1530(7) (Supp. 2007). However, a failure to conform with the exact requirements of an RFP may be waived if it is "[a] minor informality or irregularity . . . which is merely a matter of form" that "[has] no effect or merely a trivial or negligible effect on total bid price . . . and the correction or waiver of which would not be prejudicial to bidders." S.C. Code Ann. § 11-35-1520(13) (Supp. 2007).⁷ Section 11-35-1520(13) also provides a non-exclusive list of examples of minor informalities or irregularities, including the "failure of a bidder to return the number of copies of signed bids required by the solicitation." S.C. Code Ann. §11-35-1520(13)(a). The Panel has previously noted that an RFP requirement is not material or essential "if variation from it has no, or merely a

⁷ This provision is made applicable to competitive sealed proposals by S.C. Code Ann. section 11-35-1530(1) (Supp. 2007).

trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured.” *In re: Protest of National Computer Systems, Inc.*, Case No. 1989-13. The Panel finds that the irregularities alleged by Capital City were minor and properly waived by MMO, as explained below.

A. Dupre’s Technical Proposal Was Submitted in an Unsealed Envelope

Although the Procurement Code allows agencies to solicit “competitive sealed proposals,” S.C. Code Ann. §11-35-1530(1) (Supp. 2007), it does not define the term “sealed,” nor has the Panel had the opportunity to define the term. After careful consideration, the Panel today adopts the reasoning of the United States Comptroller General in *Matter of: Rhoads Construction Co., Inc.*, B-242992, 91-1 CPD P 561, 1991 WL 107958, *1 (Comp. Gen. 1991), which the CPO also cited in his decision.

In *Rhoads Construction*, the Comptroller General observed that the requirement for sealed bids is “for the purpose of maintaining and protecting the integrity of the competitive procurement process” and allowed the receipt of an unsealed bid “where the circumstances surrounding the submission of the bid or offer demonstrate that the other competitors were not prejudiced.” 1991 WL 107958 at *1. Like Dupre in the case before us, the bidder in *Rhoads Construction* hand-delivered its unsealed bid to the procurement officer shortly before the bid opening deadline. *Id.* Because the bid remained in the government’s possession until the time of the bid opening and because there was no evidence that the bid had been changed or tampered with, the Comptroller General found that the other bidders could not have been prejudiced by the government’s acceptance of the unsealed bid. *Id.*

The undisputed evidence in this case is that Dupre's technical proposal, which was contained in the unsealed manila envelope, remained in Ms. Sims' possession from the time it was time-stamped until the time of bid opening. Furthermore, Capital City did not introduce any evidence showing that the proposal was changed or tampered with in any way once it was submitted to Ms. Sims. Finally, Capital City did not demonstrate any prejudice resulting from the acceptance of the unsealed manila envelope. Therefore, the Panel finds that Dupre's unsealed technical proposal was a minor informality that was properly waived by MMO.

B. Dupre Failed to Submit the Required Electronic Copies

Dupre admits that it did not include electronic copies of its proposal as required by the terms of the RFP. However, the RFP also required the proposal to be submitted in written format, and Dupre fully complied with this requirement. Capital City argues that the requirement of electronic copies was a mandatory requirement that could not be waived by MMO.

The Panel has previously addressed the distinction between "mandatory" and "essential" requirements. *See In re: Protest of National Computer Systems, Inc.*, Case No. 1989-13 (failure to include a sample photocopy of student tests to demonstrate that the offeror could supply legible copies was a minor informality, despite being mandatory); *In re: Protest of Gregory Electric Co.*, Case No. 1989-17(II) (failure to include documents regarding vendor's qualifications was a minor informality, despite being mandatory). The Panel also notes that S.C. Code Ann. section 11-35-1520(13) lists the failure to include the specified number of signed copies of a bid as an example of a minor informality which may be waived.

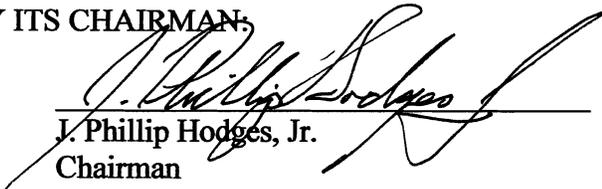
In its written proposal, Dupre fully agreed to provide cafeteria/restaurant and day catering services for the Museum in compliance with the RFP's essential specifications. Dupre's failure to include electronic copies did not affect the quality, content, or price of its proposal. Moreover, the failure to include electronic copies did not prejudice any other bidders. Finally, the Panel finds that in this instance, where both written and electronic copies of the proposals were requested, the omission of the electronic copies is analogous to the omission of the specified number of signed copies listed as an example of a minor informality under section 11-35-1520(13). Therefore, the Panel finds that Dupre's failure to include the electronic copies was a minor informality that was properly waived by MMO.

Conclusion

The parties have agreed that the facts of this matter are not in dispute. Accordingly, since no genuine issues of material fact exist, and viewing all evidence and all reasonable inferences in the light most favorable to Capital City, the CPO is entitled to an order granting summary judgment in his favor.

IT IS SO ORDERED.

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL
BY ITS CHAIRMAN:**



J. Phillip Hodges, Jr.
Chairman

Columbia, South Carolina

This 18th day of June, 2008.