

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In Re: Protest of AnyTransactions, Inc.

CASE NO.: 2012-211

Protest of Intent to Award to Fieldware,
LLC

POSTING DATE: August 7, 2012

Solicitation No. 5400004212
Offender Monitoring Equipment and
Services for Multiple South Carolina
Public Procurement Units

MAILING DATE: August 7, 2012

The South Carolina Consolidated Procurement Code (the Code) grants the right to protest to any actual bidder who is aggrieved in connection with the intended award of a contract. S.C. Code Ann. § 11-35-4210(1)(b). This solicitation, 5400004212, was issued by the Information Technology Management Office (ITMO) on behalf of multiple South Carolina Public Procurement Units for a contractor to furnish Offender Monitoring Equipment and Services. AnyTransactions, Inc. protests the intended award of this contract to Fieldware, LLC. [Attachment 1] The Chief Procurement Officer for Information Technology (CPO) held a hearing of this matter on July 31, 2012. Present at the hearing were representatives from AnyTransactions, Inc. (AnyTrax), Fieldware, LLC (Fieldware), and ITMO.

Findings of Fact

Solicitation Issued	April 6, 2012
Amendment One Issued	April 18, 2012
Amendment Two Issued	May 3, 2012
Amendment Three Issued	May 16, 2012
Bids Received	May 24, 2012
Intent to Award Issued	June 11, 2012
Protest Received	June 20, 2012
Award Suspended	June 21, 2012

Background

The following background is taken from the letter of protest from AnyTrax.

This solicitation sought a vendor to provide offender monitoring services for high and low risk offenders in South Carolina. The IFB sought bids on two Lots – the first lot included Voice Verification/Telephone Reporting and the second lot included GPS Monitoring and Radio-Frequency electronic monitoring. The award of GPS Monitoring and Radio Frequency electronic monitoring is not being protested here.

The award for Lot 1: Voice Verification/Telephone Reporting is the subject of this protest. Within Lot 1, there are two items:

- Item 1 “Random/Scheduled Voice Verification” is for the “high risk” population of offenders, and requires a specialized program and telephone system to schedule random calls, up to five times per day, to verify through biometric voice verification that the offender has been reached and to verify that the offender is in the proper location. This Item is by far the largest component of the award by dollar value, and requires a greater degree of operational precision than Item 2 since it relies on management of much more time-sensitive and complex events, for offender interaction, telephone network fault resolution, and officer recognition and resolution of these events.
- Item 2 “Automated Offender Reporting with Voice Verification” is for low risk offenders to check in by phone once per month with up to 10 inquiries per call, including voice authentication to assure offenders are reporting themselves and that an imposter is not reporting for them.

Fieldware does not have any experience providing Random/Scheduled Voice Verification (Item 1) and has limited (if any) experience providing Voice Verification with any of its services – both are mandatory and essential requirements of the Lot 1 items on which Fieldware bid.

Most importantly, here, the State specifically required “Qualifications” to include contracts where *all of the items* on which the bidder submitted a bid were *being performed*. Fieldware could not and did not list Qualifications where its offerings met the mandatory requirements.

.... Fieldware’s bid should have been rejected as non-responsive and Fieldware should have been found to be a non-responsible bidder based on the very specific, unambiguous, governing statements set forth in the IFB itself.

In its letter AnyTrax stated three separate grounds of protest:

1. Fieldware’s bid was non-responsive to the material requirements of the IFB.

2. Fieldware should have been found non-responsible since it failed to meet the state defined specific standard of responsibility of having contract references where it was performing all of the services on which it was bidding.
3. Fieldware is non-responsible and its bid should be rejected. By including references that did not meet the State's requirement, Fieldware misrepresented its qualifications and therefore its bid should be rejected.

Discussion

The IFB required voice verification for both Item 1 and Item 2 of lot 1. The solicitation stated that in order to evaluate the offeror's responsibility, a detailed, narrative statement listing the three most recent, comparable contracts which it had performed was required. [solicitation at page 32] In Amendment 2, when asked to clarify that "comparable contracts" were defined as those for which the bidder provided *all* items in the Lot(s) on which they are bidding, the State responded "Yes, they must be similar." During the hearing, Fieldware acknowledged that it has not participated in any single contract that encompassed all the functionality required by this solicitation.

AnyTrax interprets the requirement for three comparable contracts as meaning that the bidder has performed at least three contracts that encompass all the requirements stated in the State's IFB in each contract. It essentially contends the solicitation requirement for references of "comparable" or "similar" contracts, means references of contracts where the scope of work was identical to this solicitation. Alternatively, AnyTrax believes this requirement to be a special standard of responsibility as defined in Budget and Control Board Regulation 19-445.2125.F, making it a mandatory requirement of the IFB and protests that Fieldware does not meet this mandatory requirement and should be deemed nonresponsive. Finally, since none of the references Fieldware provided includes every function described in the solicitation, AnyTrax argues that Fieldware misrepresented its qualifications.

In its first protest ground AnyTrax asks the CPO to read into the solicitation a requirement that is not there. Comparable and similar simply do not mean identical. Fieldware furnished references from five customers with "recent contracts of similar scope." In its proposal Fieldware clearly described the services it provided under each of the five contracts, including services called for in the South Carolina solicitation. The reference section of Fieldware's proposal is detailed; it is in narrative form; it includes contact information for the references; and it lists five, not just

three, recent contracts. The proposal responded to the plain requirements of the solicitation. The first ground of protest is denied.

The second and third grounds of protest allege that Fieldware is not a responsible bidder because it does not have the “required” reference contracts and that by including references that did not meet the State’s requirement, Fieldware misrepresented its qualifications. AnyTrax must first establish that the reference requirement was, in fact, a special standard of responsibility. Regulation 19-445.2125.F stipulates that a special standard of responsibility be identified as such in the solicitation.

Regulation 19-445.2125.F Special Standards of Responsibility

When it is necessary for a particular acquisition or class of acquisitions, the procurement officer may develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards shall be set forth in the solicitation (and so identified) and shall apply to all offerors. A valid special standard of responsibility must be specific, objective and mandatory. (emphasis added)

There is no such designation in the solicitation so the requirement for comparable contracts cannot be a special standard of responsibility. Even if Fieldware’s references were insufficient, it cannot be considered *nonresponsive* in this regard. The solicitation does state that the offerors *shall* provide the requested information, however the solicitation clearly states that this information is to be used in evaluating the offeror’s responsibility. There is no “special standard” of responsibility, and the three requested reference contracts were clearly intended for use in determining a bidder’s responsibility.

Moreover, AnyTrax provided no evidence that Fieldware furnished any false information in its proposal. There was likewise no proof that the reference listings misled anyone involved in the procurement. When contacted, each reference confirmed Fieldware’s satisfactory performance.

To the extent that AnyTrax protests the procurement officer’s implicit determination that Fieldware was responsible, it also fails. Under the Procurement Code, a responsible offeror is one “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

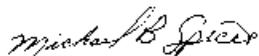
past performance.” S.C. Code Ann. § 11-35-1410(6) (2011). The State must determine responsibility prior to award. S.C. Code Ann. § 11-35-1810(1) (2011). In this case, the finding of responsibility is implied by the issuance of an intent to award. *In re: Protest of College Source, Inc.*, Panel Case No. 2008-4 (January 8, 2009). Debbie Lemmon, the ITMO Procurement Manager responsible for this procurement and the person ultimately responsible for the determination of responsibility testified that the references supplied by Fieldware were more than satisfactory and she was comfortable with her determination.

The Procurement Review Panel has held that if a bidder's responsibility is challenged, “[t]he protesting bidder must prove the determination of responsibility is clearly erroneous, arbitrary, capricious, or contrary to law.” *In re: Protest of Brantley Construction Co., Inc.*, Case No. 1999-3 (June 25, 1999) (citing S.C. Code Ann. § 11-35-2410). The only contention by AnyTrax is that Fieldware has not performed contracts that encompass all the functionality requested in this IFB. AnyTrax has failed to meet its burden of proof that the Fieldware responsibility determination is in violation of the Code.

Determination

For the reasons state above, protest is denied.

For the Information Technology Management Office



Michael B. Spicer
Chief

Procurement

Officer

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2012)

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 83.1 of the 2012 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, an incorporated 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).

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, 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.

Attachment 1



Attorneys and Counselors at Law

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June 20, 2012

Via Email to protest-itmo@itmo.sc.gov and Hand Delivery

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
1201 Main Street, Suite 601
Columbia, South Carolina 29201

RE: Protest of Notice of Intent to Award to Fieldware LLC
Solicitation: 5400004212
Description: Offender Monitoring Equipment & Services

Dear Mr. Spicer:

This firm represents AnyTransactions, Inc., doing business as AnyTrax, (“AnyTransactions, Inc.”) in connection with the above matter and provides this protest of the notice of intent to award a contract in connection with the above procurement to Fieldware LLC (“Fieldware”). The grounds of this protest are set forth below.

Background

This solicitation sought a vendor to provide offender monitoring services for high and low risk offenders in South Carolina. The IFB sought bids on two Lots – the first lot included Voice Verification/Telephone Reporting and the second lot included GPS Monitoring and Radio-Frequency. The award of GPS Monitoring and Radio Frequency is not being protested here.

The award for Lot 1: Voice Verification/Telephone Reporting is the subject of this protest. Within Lot 1, there are two items:

- Item 1 “Random/Scheduled Voice Verification” is for the “high risk” population of offenders, and requires a specialized program and telephone system to schedule random calls, up to five times per day, to verify through biometric voice verification that the offender has been reached and to verify that the offender is in the proper location. This Item is by far the largest component of the award by dollar value, and requires a greater degree of operational precision than Item 2 since it relies on management of much more

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time-sensitive and complex events, for offender interaction, telephone network fault resolution, and officer recognition and resolution of these events.

- Item 2 “Automated Offender Reporting with Voice Verification” is for low risk offenders to check in by phone once per month with up to 10 inquiries per call, including voice authentication to assure offenders are reporting themselves and that an imposter is not reporting for them.

South Carolina is currently using an experienced vendor to provide services similar to Item 1 in Lot 1 – the most expensive and complex component of the intended award.

Fieldware does not have any experience providing Random/Scheduled Voice Verification (Item 1) and has limited (if any) experience providing Voice Verification with any of its services – both are mandatory and essential requirements of the Lot 1 items on which Fieldware bid.

Most importantly, here, the State specifically required “Qualifications” to include contracts where *all of the items* on which the bidder submitted a bid were *being performed*. Fieldware could not and did not list Qualifications where its offerings met the mandatory requirements.

In fact, Fieldware’s response to this solicitation is the first time Fieldware has ever even mentioned its Biometric Voice Curfew component in a solicitation response. Therefore, if this award is allowed to go forward, South Carolina will be the first customer, the first state, where Fieldware has ever performed the mandatory Random/Scheduled Voice Verification services – services that have been available in the market from other vendors for well over 15 years. South Carolina will be in the position of having its high risk offenders monitored by a system and vendor that is completely untested, inexperienced and not qualified – in effect, a beta system experience for South Carolina -- which could lead to substantial administrative and technical difficulties and potential public safety risks. If the State intended to conduct a pilot or beta test of a new offering, it could have issued a solicitation reflecting this; however the State required vendors to provide multiple qualifications where they are already providing these services, so a pilot or beta test of a new offering was clearly not the State’s intent.

As shown below, the State should not be in such a situation because Fieldware’s bid should have been rejected as non-responsive and Fieldware should have been found to be a non-responsible bidder based on the very specific, unambiguous, governing statements set forth in the IFB itself.

1. Fieldware’s bid was non-responsive to the material requirements of the IFB.

The IFB contained the following requirement for Lot 1:

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1. A biometric voiceprint template established for voice verification by the offender for purposes of curfew/schedule monitoring as a special condition or graduated sanction with an estimated impact up to 300 offenders at one time; telephone reporting for the management of low risk offenders. However, the State recognizes that a telephone reporting system can also be used to enhance the management of high-risk offenders and be used for the Administrative Monitoring population. The estimated impact is up to 10,000 offenders.

IFB, p. 17.

The IFB defined exactly what information bidders were required to submit in order for the State to conduct a determination of responsibility, including as follows:

QUALIFICATIONS -- REQUIRED INFORMATION (JAN 2006)
In order to evaluate your responsibility, offeror shall submit the following information or documentation for the offeror

... c. A detailed, narrative statement listing the three most recent, *comparable contracts* (including contact information) which you have performed and the general history and experience of your organization.

IFB, p. 32 (emphasis added.)

In Amendment 2, the State specifically and unambiguously defined "*comparable contracts*" to mean contracts in which the bidder provided *all* of the items contained in the Lots on which they are bidding:

37. V. Qualifications (c): Please clarify that for a bidder to meet the State Standards of Responsibility as applicable to this RFP, "*comparable contracts*" are defined as those for which the bidder provided *all* items in the Lot(s) on which they are bidding, including the definition of those as described on page 17 under Lot #1, requirement 1.

State Response: Yes, they must be similar.

IFB, Amendment 2, Question 37, p. 11 of 46.

There can be no dispute or doubt of two key points regarding this answer: (1) "Yes" means "Yes," and (2) "similar" never means "not at all." As a result, there can be no doubt that being

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true to what vendors were told in the IFB, the intent to award cannot stand. It is important to bear in mind that Fieldware had a right to protest the specification, as confirmed in the amendment, if it could not meet it. Fieldware does not have the right to ignore the specification.

It is undisputed that BOTH items in Lot 1 on which Fieldware bid contain the requirement for voice verification. Yet, Fieldware did not include in its references three contracts in which they provided EITHER Random/Scheduled Voice Verification as required for Item 1, OR Voice Verification as required for Item 2. Therefore, Fieldware's bid should be rejected as non-responsive.

2. **Fieldware should have been found non-responsible since it failed to meet the state defined specific standard of responsibility of having contract references where it was performing all of the services on which it was bidding.**

As shown above, the State *defined* a specific standard of responsibility when in this IFB it required bidders to submit three references where the bidder *was performing all of the services on which it was bidding*. The requirement was mandatory – “offeror shall submit” and was specific and objective – “‘comparable contracts’ are defined as those for which the bidder provided *all items in the Lot(s)* on which are bidding.”

Fieldware failed to meet this specific standard of responsibility in that it did not include three references of contracts where it had provided *all items* in Lot 1. Fieldware did not provide Random/Scheduled Voice Verification services for any of the entities that it listed as references. Further, if Fieldware has any experience providing Voice Verification, it did not cite this in any of the reference contracts that it cites as Qualifications for this IFB.

In fact, two other agencies (Pennsylvania Board of Probation and Parole, and Orange County Florida Department of Corrections) have overturned awards to Fieldware in the past year based on protests by AnyTransactions regarding misrepresentations by Fieldware and/or improper evaluation by those agencies of Fieldware's capabilities and experience to perform voice verification.

Therefore, Fieldware is non-responsible and its bid should be rejected.

3. **By including references that did not meet the State's requirement, Fieldware misrepresented its qualifications and therefore its bid should be rejected.**

As held by the Panel in *In Re: Protest of PS Energy*, Case No. 2002-9 and as has been recently recognized by the CPO in other matters, where a misrepresentation is made in bad faith or materially influences a determination or evaluation, the proposal should be rejected. Here, Fieldware knew the requirement was to list references where they have provided Random/Scheduled Voice Verification as required for Item 1, and also Voice Verification as

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required for Item 2. In spite of that clear specific requirement, Fieldware listed reference contracts that do not include these components – without saying so. The State relied on Fieldware’s good faith compliance with this requirement and representation that these were references where Fieldware performed all of the functions on which it was bidding. By listing five references where they had not performed all of the functions on which they were bidding (rather than the truthful answer of none), Fieldware misrepresented its qualifications to the State. That misrepresentation materially influenced the State’s determination of responsibility and therefore Fieldware’s bid should be rejected.

Conclusion

Based on the grounds set forth in this protest, AnyTransactions, Inc. requests a hearing and requests that the award to Fieldware be rescinded and that Fieldware’s bid be rejected and that an award be made to the remaining responsive and responsible bidder, AnyTransactions, Inc. for Lot 1, Items 1 and 2.

Very truly yours,



Melissa J. Copeland