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Protest Decision

Matter of: Public Works Equipment and Supply, Inc.

Case No.: 2019-134

Posting Date: April 4, 2019

Contracting Entity: Clemson University

Solicitation No.: 112732561

Description: Pot Hole Patcher Truck

DIGEST

Protest alleging non responsiveness is denied. Public Works Equipment and Supply's (PWE) letter of protest is included by reference. (Attachment 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	January 30, 2019
Amendment 1 Issued	February 6, 2019
Bids Received	February 13, 2019
Intent to Award Posted	February 18, 2019
Protest Received	February 18, 2019

Clemson University issued this Invitation for Bids on January 30, 2019 to acquire a Pot Hole Patcher truck. Bids were received from Thermo-Lay Manufacturing, LLC (\$161,500.00) and PWE (\$187,399.75). Clemson posted an intent to awarded to Thermo-Lay on February 18, 2019. PWE protested that same day that Thermo-Lay's bid was non responsive in three instances.

ANALYSIS

PWE first alleges:

The method for providing heat to the asphalt specified in the bid is not available in the competitors line which was awarded the contract. Our bid was as per the bid specs and we could have provided a lower bid had we went with a less effective system.

Thermo-Lay responds:

Our bid price reflects the build with the dry radiant system as outlined in the scope of work. Our most common system (or "standard") is the heat transfer oil system, however, we are building this patch body with dry system as outlined in the scope of work.

PWE next alleges:

The asphalt delivery system called for a dual auger conveyor and our bid spec included that requirement which is a superior design. The competitors unit has a single auger system. Again, we could have provided a quote with a lesser price had it not been specified as dual auger.

Thermo-Lay responds:

Our bid price reflects the build with the dual auger system as outlined in the scope of work. It is true that we offer the single auger system as "standard", but we are

building this patch body with the dual auger system as outlined in the scope of work.

PWE's next issue alleges other issues of non-responsibility but does not any specificity as required by the Code.

While the aforementioned are the two major items, there are others which collectively add cost as well. And in the final analysis, while the offered price from our competitor may be less, the spirit of the bid process in which a true apples to apples comparison to determine real value offered has not been met in our estimation.

Thermo-Lay responds:

Our bid price includes all requests outlined in the scope of work, therefore we are comparing apples to apples although suggested otherwise.

The last issue raised by PWE suggests that Thermo-Lay will not be able to service the equipment:

Lastly since our competitor does not have a service facility close enough to be able to provide adequate care after the sale, the overall value of the offered unit is greatly diminished as well.

Thermo-Lay responds:

We have been selling Thermo-Lay machines all over the US and Canada for 41 years and have always been able to successfully service or facilitate service on our machines no matter what geographical location our customer is in.

There is no requirement in the solicitation that the bidder have a service facility in close proximity to Clemson.

The determination that a bid is responsive must be made from the four corners of the bid itself at the time of bid opening. Thermo-Lay's bid indicated that its truck met or exceeded all specifications. Erring on the side of caution, the procurement officer confirmed in writing that Thermo-Lay intended to provide all "non-standard" features for its bid price. She thus determined the bid was responsive to the material and essential requirements of the solicitation. The burden is on the protestant to demonstrate that Thermo-Lay bid products that do not meet

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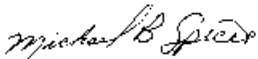
April 4, 2019

the requirements of the solicitation. PWE provides only speculation that the products bid do not meet the requirements of the solicitation. PWE's allegations that Thermo-Lay bid non-conforming products or that Thermo-Lay will not be able to fully perform the contract because of its pricing is based upon speculation and conjecture. This is matter of contract administration and there is no basis for rejecting Thermo-Lay's bid based on a belief that it may violate the contract. *See, e.g., Appeal by Otis Elevator Company, Panel Case No. 2017-1; Appeal by Catamaran, Panel Case No. 2015-2*

DECISION

For the reasons stated above, the protest of Public Works Equipment and Supply, Inc. is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1

From: [Loyd Pennington](#)
To: [Protest-MMQ](#); [April Pitts](#)
Cc: [Lamy Davis](#); [Scott Laney](#)
Subject: Bid Protest For Solicitation # 112732561
Date: Monday, February 18, 2019 2:01:18 PM

We are protesting the award of Solicitation # 112732561 for a Pot Hole Patcher Truck.

Our reasons for protesting this award are as follows.

1. The method for providing heat to the asphalt specified in the bid is not available in the competitors line which was awarded the contract. Our bid was as per the bid specs and we could have provided a lower bid had we went with a less effective system.
2. The asphalt delivery system called for a dual auger conveyor and our bid spec included that requirement which is a superior design. The competitors unit has a single auger system. Again, we could have provided a quote with a lesser price had it not been specified as dual auger.
3. While the aforementioned are the two major items, there are others which collectively add cost as well. And in the final analysis, while the offered price from our competitor may be less, the spirit of the bid process in which a true apples to apples comparison to determine real value offered has not been met in our estimation.

Lastly since our competitor does not have a service facility close enough to be able to provide adequate care after the sale, the overall value of the offered unit is greatly diminished as well.

We sincerely appreciate your consideration and fully understand the arduous task involved in the purchasing process but simply must be sure we have exhausted all means to try and earn your business in the right and proper way.

Please let us know if this is sufficient to meet the protest requirements or if further action on our part is necessary.

With Kind Regards,
Loyd

www.pweasi.com

Loyd Pennington
Public Works Equipment and Supply
Sales Director
704-575-0544

Every day is a new opportunity to become all we are capable of being. It is simply a choice to understand that we will never be perfect, but we should never stop pursuing perfection.
Giddyup!



STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2018)

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 2018 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.