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Protest Decision

Matter of: Thyssenkrupp Elevator Corporation

Case No.: 2019-149

Posting Date: July 10, 2019

Contracting Entity: University of South Carolina

Solicitation No.: 5400017449

Description: PM and Repair Vertical Transportation

DIGEST

Protest alleging that solicitation should have allowed a walkthrough is denied as untimely. Thyssenkrupp's 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	03/28/2019
Amendment 1 Issued	03/29/2019
Amendment 2 Issued	04/02/2019
Amendment 3 Issued	04/16/2019
Amendment 4 Issued	04/25/2019
Intent to Award Issued	06/14/2019
Protest Received	06/17/2019
Last Day to Amend Protest	07/01/2019

ANALYSIS

Thyssenkrupp protests:

Due to the size and scope of the solicitation, awarding maintenance without any formal walkthrough or presentation of units gives a clear, and unfair advantage to the incumbent, Otis Elevator, to which the award was given. Because Otis Elevator was the current maintenance provider they had a distinct understanding of all available units on a far more in-depth and technical level. This demonstrates an advantage that provides an unfair and un-competitive edge to the incumbent that allows them to price individual units more precisely based on the history of service and technician recommendations. By having an extensive background knowledge of all available units, Otis was better suited to price maintenance in a way that would reflect more favorably on them.

By not allowing an official walkthrough of the elevators, Thyssenkrupp Elevator was not able to price units as competitively as possible. Without being able to survey and examine units onsite, Thyssenkrupp was forced to make best guesses as to pricing and predicting maintenance. It is far easier to price units when one knows the temperament of all units and what is needed to maintain them based on past experience. In an effort to maintain the competitive integrity of a state-wide bid, Thyssenkrupp Elevator contests this award on the grounds of demonstrably unfair advantage given to Otis Elevator as shown by the lack of necessary information and thoroughness as provided in this solicitation.

The State responded to the following bidder question through Amendment 3 on April 16, 2019:

1. Is there going to be a scheduled walkthrough to look at all the units? **No. The awarded contractor will have the opportunity to inspect all equipment prior to starting contract.**

[Amendment 3]

Section 11-35-4210(1)(b) grants any actual bidder, offeror, contractor, or subcontractor that is aggrieved by the award of a contract the right to protest that decision except that an issue that could have been raised as a protest of the solicitation or amendment to the solicitation cannot be raised as a protest of the award:

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

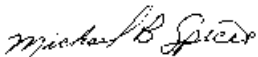
(emphasis added)

Thyssenkrupp could have raised this issue as a protest of the solicitation amendment within fifteen days of the publishing of the amendment but is barred from raising this issue as a protest of the award. Thyssenkrupp's protest was not filed within the statutory time limit.

DECISION

For the reasons stated above, the protest of Thyssenkrupp Elevator Corporation is dismissed.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Elevator Maintenance Bid Protest



Thyssenkrupp elevator elects to protest the award for elevator maintenance of the University of South Carolina, solicitation number 5400017449. Due to the size and scope of the solicitation, awarding maintenance without any formal walkthrough or presentation of units gives a clear, and unfair advantage to the incumbent, Otis Elevator, to which the award was given. Because Otis Elevator was the current maintenance provider they had a distinct understanding of all available units on a far more in-depth and technical level. This demonstrates an advantage that provides an unfair and un-competitive edge to the incumbent that allows them to price individual units more precisely based on the history of service and technician recommendations. By having an extensive background knowledge of all available units, Otis was better suited to price maintenance in a way that would reflect more favorably on them.

By not allowing an official walkthrough of the elevators, Thyssenkrupp Elevator was not able to price units as competitively as possible. Without being able to survey and examine units onsite, Thyssenkrupp was forced to make best guesses as to pricing and predicting maintenance. It is far easier to price units when one knows the temperament of all units and what is needed to maintain them based on past experience. In an effort to maintain the competitive integrity of a state-wide bid, Thyssenkrupp Elevator contests this award on the grounds of demonstrably unfair advantage given to Otis Elevator as shown by the lack of necessary information and thoroughness as provided in this solicitation.

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.