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Protest Decision

Matter of: South Carolina Rural Water Association
File No.: 2023-122
Posting Date: April 24, 2023
Contracting Entity: SC Department of Health and Environmental Control
Solicitation No.: 5400024702
Description: Lead Service Line (LSL) Inventories

DIGEST

Protest alleging improper cure of a minor informality or irregularity is denied. South Carolina Rural Water Association's (RWA) letter of protest is attached and 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.

BACKGROUND

Request for Proposals Issued	01/20/2023
Amendment 1 Issued	02/07/2023
Intent to Award Posted	03/20/2023
Intent to Protest Received	03/28/2023
Amended Protest Received	03/31/2023

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

The SC Department of Health and Environmental Control (DHEC) issued this Request for Proposals (RFP) on January 20, 2023, to acquire lead service-line inventories for small public-water systems for DHEC Bureau of Water. Amendment 1 was published on February 7, 2023. Proposals were received on February 21, 2023. DHEC posted an Intent to Award to Truepani, Inc. (Truepani) on March 20, 2023. RWA timely filed an Intent to Protest on March 28, 2023, followed by a formal protest on March 31, 2023.

DISCUSSION

RWA protests:

The protest is being issued on the basis that Truepani, Inc. failed to submit the required information under the qualifications section outlined in the solicitation.

Section 5 Qualification requires the submittal of current financial statements, as well as a list of the three most comparable contracts which have been performed that are similar or contrast from the solicitation.

Page 22 of the solicitation indicates that failure to provide information requested above will result in Offeror being determined non-responsive. Truepani, Inc failed to provide this information as part of the original submittal of their proposal, therefore constituting a non-response.

RWA argues:

The Procurement Office under Section 11-35-1520 (13) Minor Informalities and Irregularities in Bids provided Truepani, Inc the opportunity to cure the non-responsiveness of required information in their proposal. Section 11-35-1520 (13) states that “The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. SCRWA is filing this protest based on the findings of the 5 panelists that participated as the Technical Review Committee. The technical rankings of the 4 bidders can be reviewed on the Technical Review Committee’s final score sheet. Upon review of the Technical Review Committee’s scoring of the 4 proposals, Truepani’s scope of work, qualifications and experience ranking came in as one of the bottom two rankings with 267 points, versus the top two ranking proposals at 328 and 315 points respectively. Based on the Technical Review Committee’s findings that Truepani’s scope of work, experience and qualifications were significantly less comprehensive than the two top bidders, the award of the contract by the Procurement Office following the instatement of Section 11-35-1520 (13) to cure deficiencies was conducted to the disadvantage of the State and in direct conflict of the intent of the Statute.

This solicitation followed the Uniform Solicitation Format adopted by the State Fiscal Accountability Authority’s (SFAA) Procurement Services Division (PSD) to standardize the organization of solicitation

documents. Section V is titled Qualifications, and the first paragraph explains that the information requested therein is for the purpose of determining the Offeror's responsibility:

- (1) To be eligible for award, you must have the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance.²

[Solicitation, Page 22]

A determination of responsibility is required for all contracts awarded by the State under Section 11-35-1810(1):

Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts.

The second paragraph in Section V is titled Qualifications – Required Information. This section describes the type of information the bidder is requested to submit to facilitate a determination of the bidder's responsibility:

Submit the following information or documentation for you and for any subcontractor (at any tier level) that you identify pursuant to the clause titled Subcontractor – Identification. Err on the side of inclusion. You represent that the information provided is complete.

- (a) The general history and experience of the business in providing work of similar size and scope.
- (b) Information reflecting the current financial position. Include the most current financial statement and financial statements for the last two fiscal years. If the financial statements have been audited in accordance with the following requirements, provide the audited version of those statements. [Reference Statement of Financial Accounting Concepts No. 5 (FASB, December 1984), as amended.]
- (c) A detailed, narrative statement listing the three most recent, comparable contracts (including contact information) which have been performed. For each contract, describe how the supplies or services provided are similar to those requested by this solicitation, and how they differ.
- (d) A list of every business for which supplies or services substantially similar to those sought with this solicitation have been provided, at any time during the past three years.
- (e) A list of every South Carolina public body for which supplies, or services have been provided at any time during the past three years, if any.
- (f) List of failed projects, suspensions, debarments, and significant litigation.

[Solicitation, Page 22]

² This statement is taken directly from the definition of a responsible bidder found in Section 11-35-1410(8)

While the title of this paragraph states that this information is “Required,”³ Regulation 19-445.2125(B) authorizes the collection of this, and any other information necessary to determine the Offeror’s responsibility, at any time prior to award:

At any time prior to award, the prospective contractor shall supply information requested by the procurement officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the procurement officer shall base the determination of responsibility upon any available information or may find the prospective contractor non responsible if such failure is unreasonable. In determining responsibility, the procurement officer may obtain and rely on any sources of information, including but not limited to the prospective contractor; knowledge of personnel within the using or purchasing agency; commercial sources of supplier information; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; government agencies; and business and trade associations.

(emphasis added)

TruePani did not initially include the information requested items (b) and (c) in the second paragraph. The procurement officer afforded TruePani the opportunity to cure this deficiency as a minor informality under Section 11-35-1520(13) Minor Informalities and Irregularities in Bids.⁴ One of the minor informalities listed in this section is the “failure of a bidder to furnish financial statements.”

RWA argues that it was not in the best interest of the State for the procurement officer to allow TruePani to cure its deficiency because RWA scored higher on the first two published evaluation criteria. Since a determination of responsibility is required by law, it is in the best interest of the state to collect the information necessary to make that determination. In addition, the documents TruePani was allowed to submit were listed in Section V for use in determining responsibility and not Section IV to be considered as part of the evaluation.

Finally, there were three evaluation criteria were published in the solicitation:

Experience/Resources/Knowledge Points - 40%
Approach to Work/Methodology Points - 35%
Price Points - 25%

³ The Procurement Review Panel has held that “a requirement is not ‘essential’ simply because it is stated in mandatory terms.” *Appeal by 3M Company*, Panel Case No. 2022-3.

⁴ This procurement was issued under Section 11-35-1530 and Regulation 19-445.2095. Regulation 19-445.2905(E) provides: The provisions of Section 11-35-1520(13) shall apply to competitive sealed proposals.

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When the scores for all three criteria are considered, TruePani is the highest ranked offeror. The procurement officer's actions were consistent with the Code and Regulations.

DECISION

For the reasons stated above, the protest of South Carolina Rural Water Association is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Columbia, South Carolina

Attachment 1



South Carolina Rural Water Association
128 Stonemark Lane
Columbia, SC 29210

March 31, 2023

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600, Columbia, SC 29201
protest-mmo@mmo.sc.gov

RE: Protest of Contract Award - Contract Number: 4400031350

SCRWA is writing the SC Department of Health and Environmental Control (SCDHEC) Procurement Office to file an official protest related to the SCDHEC award of Contract Number: 4400031350 under Section 11-35-4210(1)(b) that grants to any "actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract" a right to protest.

The protest is being issued on the basis that Trupani, Inc. failed to submit the required information under the qualifications section outlined in the solicitation.

Section 5 Qualification requires the submittal of current financial statements, as well as a list of the three most comparable contracts which have been performed that are similar or contrast from the solicitation. Page 22 of the solicitation indicates that failure to provide information requested above will result in Offeror being determined non-responsive. Trupani, Inc failed to provide this information as part of the original submittal of their proposal, therefore constituting a non-response.

The Procurement Office under Section 11-35-1520 (13) Minor Informalities and Irregularities in Bids provided Trupani, Inc the opportunity to cure the non-responsiveness of required information in their proposal. Section 11-35-1520 (13) states that "The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State". SCRWA is filing this protest based on the findings of the 5 panelists that participated as the Technical Review Committee. The technical rankings of the 4 bidders can be reviewed on the Technical Review Committee's final score sheet. Upon review of the Technical Review Committee's scoring of the 4 proposals, Trupani's scope of work, qualifications and experience ranking came in as one of the bottom two rankings with 267 points, versus the top two ranking proposals at 328 and 315 points respectively. Based on the Technical Review Committee's findings that Trupani's scope of work, experience and qualifications were significantly less comprehensive than the two top bidders, the award of the contract by the Procurement Office following the instatement of Section 11-35-1520 (13) to cure deficiencies was conducted to the disadvantage of the State and in direct conflict of the intent of the Statute.

South Carolina Rural Water Association
128 Stonemark Lane ❖ Columbia, SC 29210
P: 803.667.9699 ❖ F: 803.728.0215
www.SCRWA.org

As is described under Section 11-35-1520 (7) Correction or Withdrawal of Bids; Cancellation of Awards. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted. After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations promulgated pursuant to it. The Section allows for correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation and re-award of awards or contracts, after award but before performance, in accordance with regulations promulgated by the board.

SCRWA requests that remedies be set forth under Section 11-35-4310 Solicitations or awards in violation of the law, by the chief procurement officer following an Administrative Review of the contract award. Should the Administrative Review find that the contract was awarded in violation of law, by allowing a bid to be corrected following opening, resulting in an award that is to the disadvantage of the State, based on the ranking of the Technical Review Committee, it is requested that the violation of the law be remedied by the termination of the award and the re-award of the contract, in a manner that complies with the provisions of the Code.

Thank you in advance for your time and attention to this appeal.
If there are questions or if any additional information is needed, please contact me accordingly.

Sincerely,

A handwritten signature in black ink, appearing to read "Jill Miller", with a stylized flourish at the end.

Jill Miller
Executive Director
SCRWA

864-238-0505
jill@scrwa.org

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2022)

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 2022 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
1105 Pendleton Street, Suite 209, 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.