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|---|---|---|
| **STATE OF SOUTH CAROLINA**<br>**COUNTY OF RICHLAND** | )<br>)<br>)<br>)<br>) | **BEFORE THE CHIEF PROCUREMENT OFFICER** |
| **IN THE MATTER OF:**<br>**AND CANCELLATION OF AWARD** | )<br>)<br>)<br>) | **DETERMINATION**<br><br>**CASE NO. 2009-130** |
| **DEPARTMENT OF JUVENILE JUSTICE** | )<br>)<br>)<br>) | **POSTING DATE:**<br><br>**AUGUST 28, 2009** |
| **CORRECTIONAL SUPPLIES** | )<br>) | |
| **IFB No. 09-55571** | )<br>) | |

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This matter is before the Chief Procurement Officer (CPO) pursuant to a request from the Department of Juvenile Justice (DJJ) to cancel the award of Lot #2 of the solicitation to Bob Barker Company. Steve Pullie, DJJ Director of Procurement Services, wrote to the CPO, "SCDJJ has discovered that an input error on the preference calculator form led to an incorrect award. SCDJJ requests relief from this award as allowed under the SC Consolidated Procurement Code regulation 19-445.2085(C ) Cancellation of Award Prior to Performance due to an administrative error."

## CPO FINDINGS

On June 8, 2009, the Chief procurement Officer (CPO) received a protest from TBP Services, Inc. (TBP) regarding the South Carolina Department of Juvenile Justice's (DJJ) solicitation # IFB09-55571 for correctional supplies. Specifically, TBP protested DJJ's award of Lot #2 of the solicitation to Bob Barker Company alleging:

> TBP Lot#2 bid prices $37,192.36 -TBP claimed SC in state vendor preference/no US end product/no SC end product
>
> Award went to BOB Barker Co. lot #2 bid price $34,859.44 did not claim vendor preference/no US end product/no SC end product
>
> TBP has discussed with the DJJ a possible misapplication or miscalculation of the vendor preferences regarding the calculations of award for the solicitation listed above.
>
> One of our employees has tried to apply the preference as written in the sol and we have come up with TBP with SC Vendor preference to have won the lot#2 group of items by $107.24. (Copy attached)

Upon review of the award, on June 9, 2009, Steve Pullie, DJJ Director of Procurement Services, wrote to the CPO, "SCDJJ has discovered that an input error on the preference calculator for led to an incorrect award. SCDJJ requests relief from this award as allowed under the SC Consolidated Procurement Code regulation 19-445.2085(C ) Cancellation of Award Prior to Performance due to an administrative error."

According to Mr. Pullie, the raw bids for Lot # 2 were as follows:

| Bidder | Bid Amount | Preferences Requested |
|---|---|---|
| TBP | $37,192.36 | SC Resident Vendor |
| Bob Barker | 34,859.44 | None |
| Murray Co. | 40,126.60 | US End Product |

SCDJJ applied the preferences requested to derive the adjusted bid amounts for comparison, as follows:

| Bidder | Bid Amount | Preferences Requested | Adjusted Bids |
|---|---|---|---|
| TBP | $37,192.36 | SC Resident Vendor | $37,936.21 |
| Bob Barker | 34,859.44 | None | 37,299.60 |
| Murray Co. | 40,126.60 | US End Product | 42,935.46 |

**DETERMINATION**

After award but before performance, upon a written determination by the appropriate chief procurement officer (CPO) that under the facts cancellation of award is clearly in the best interest of the State, an award may be cancelled prior to performance. SC Code Ann § 11-35-1520(7); SC Regulation 19-445.2085(A) and (C)(8).

Section 11-35-1520(7) states in part that:

> Except as otherwise provided by regulation, all decisions to permit . . . cancel(lation) of awards or contracts, after award but before performance, must be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency.

The regulations authorize the CPO to cancel an award prior to performance. They read:

> After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:
>
> (7) Administrative error of the purchasing agency discovered prior to performance
> [19-445.2085(C )]

In this case, the application of the preferences was flawed in the following ways. First, SCDJJ imposed a penalty against TBP, the only bidder who requested the SC resident vendor preference. The Consolidated Procurement Code reads: "A preference of seven

percent must be provided to vendors who are residents of South Carolina or whose products are made, manufactured, or grown in South Carolina as set forth in this section." [11-35-1524(A)] The Code establishes two means to gain a SC preference of seven percent; first, that a SC resident bidder is bidding against a bidder who cannot claim such distinction and, second, when a bidder is bidding a product made, manufactured, or grown in SC is bidding against a bidder who cannot claim such a distinction. TBP was the only bidder to claim the SC resident bidder preference. Therefore, a seven percent preference cannot be cannot be applied against TBP.

The Code established a hierarchy for application of preference: First, the SC resident bidder and SC end product preference must be applied against bidders not eligible to claim such preference. Second, the US end product preference must be applied against bidders not eligible to claim such preference. Although TBP was the only bidder requesting SC resident vendor preference, SCDJJ penalized TBP by two percent because Murray requested the US end product preference. However, regarding application of the US end product preference, the Code reads, "the cost of an end-product made, manufactured, or grown in other states of the United States is unreasonable <u>if the bid exceeds by more than two percent the lowest qualified bid on the same or similar end-product which is made, manufactured, or grown in a foreign country or territory.</u>" [11-35-1524(B)(5)(b)] [Emphasis added] The US end product preference applies only when a US bidder bids against a bidder offering products made, manufactured, or grown in a foreign country. In this case, there was evidence TBP bid a product made, manufactured, or grown in a foreign country.

In his letter of June 9, 2009, Mr. Pullie acknowledged SCDJJ's error in the application of the preference and asked the CPO to cancel the award to Bob Barker prior to award due to an administrative error.

The CPO agrees. The correct application of the preferences in this case should have been as follows:

| Bidder | Bid Amount | Preferences Requested | Adjusted Bids |
|---|---|---|---|
| TBP | $37,192.36 | SC Resident Vendor | $37,192.36 |
| Bob Barker | 34,859.44 | None | 37,299.60 |
| Murray Co. | 40,126.60 | US End Product | 42,935.46 |

TBP was the actual low bidder, not Bob Barker.

The CPO finds that an error in determining the award for Lot #2 of solicitation # IFB09-55571 amounting to a violation of law has occurred and must be corrected. For the foregoing reasons, the CPO hereby determines that it is appropriate to cancel the award to Bob Barker for Lot # 2 for SCDJJ solicitation # IFB09-55571 due to an administrative error. The procurement is returned to SCDJJ for further award determination in accordance with the Code.

Voight Shealy

R. Voight Shealy
Chief Procurement Officer
For Supplies and Services

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

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.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.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 2009-2010 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(4). . . . . 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 hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2009 S.C. Act No. 23, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a 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).

**Shealy, Voight**

**From:** Protest-MMO
**Sent:** Monday, June 08, 2009 4:10 PM
**To:** _MMO - Procurement; Shealy, Voight
**Subject:** FW: Intent to Protest DJJ Solicitation IFB09-55571

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**From:** Tbpirmo@aol.com[SMTP:TBPIRMO@AOL.COM]
**Sent:** Monday, June 08, 2009 4:09:03 PM
**To:** Protest-MMO
**Cc:** slpull@scdjj.net; tbpservicesinc@starband.net
**Subject:** Intent to Protest DJJ Solicitation IFB09-55571
**Auto forwarded by a Rule**

Chief Procurement Officer
MMO
6-08-09
TBP Services Inc. wishes to issue a protest to the intent to award notice of a Dept. of Juvenile Justice Sol # IFB09-5557 for correctional supplies. More specifically for lot #2 of the solicitation

TBP Lot#2 bid prices $37,192.36 -TBP claimed SC in state vendor preference/no US end product/no SC end product

Award went to BOB Barker Co. lot #2 bid price $34,859.44 did not claim vendor preference/no US end product/no SC end product

TBP has discussed with the DJJ a possible misapplication or miscalculation of the vendor preferences regarding the calculations of award for the solicitation listed above.

One of our employees has tried to apply the preference as written in the sol and we have come up with TBP with SC Vendor preference to have won the lot#2 group of items by $107.24

We do understand now after talking with the Mr. Pulle that there may be some additional consideration with regard to alternate vendors in a bid tab and are seeking some additional explanation in that regard before the award of this solicitations has been made.

Thank you for your consideration and look for ward to your comments.

Best Regards,
Michelle Novak

***TBP Services Inc.***
***447 BAKER MILL LAKE LN***
***GASTON, SC 29053***
**Direct line Tel: 803-407-2661**
**Direct Fax: 803-407-0623**
**Personal Cell: 803-917-9277**

**Main Office Tel: 803-739-2243**
**Main Office Fax: 803-739-2249**

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South Carolina Department of Juvenile Justice
Bill Byars, Director

P.O. Box 21069
Columbia, SC 29221-1069
www.state.sc.us/djj

Mark Sanford
Governor
State of South Carolina

June 9, 2009

Materials Management Office
C/o Voight Shealy
Materials Management Officer
1201 Main Street
Suite 600
Columbia, SC 29210

Mr. Shealy:

I am writing with regard to the attached protest filed by TBP Services Incorporated with regard to SCDJJ solicitation IFB09-55571. The protest is filed for the award made on Lot 2 to Bob Barker Company. In researching this protest; SCDJJ has discovered that an input error on the preference calculator form led to an incorrect award being made on this lot. I have attached both the original calculation of preference and the corrected one. SCDJJ concurs with the protestant that the award of Lot 2 should have been made to TBP Services.

SCDJJ requests relief from this award as allowed under the SC Consolidated Procurement Code regulation 19.445.2085(C) (7) Cancellation of Award Prior to Performance due to an administrative error. We appreciate your assistance in this matter.

Regards,

Stephen Pullie, CPPB
Director of Procurement Services

Procurement Services-Santee Building-Suite 210-Synergy Business Park
Post Office Box 21069 - Columbia, South Carolina 29221-1069
Telephone: (803) 896-5649 Fax: (803) 896-5655