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Protest Decision

Matter of: Protest of Hills Machinery Company LLC

Case No.: 2016-122

Posting Date: January 27, 2016

Contracting Entity: Materials Management Office

Solicitation No.: 5400010280

Contract No.: 4400012165

Description: SW BACKHOES & MOTOR GRADERS

DIGEST

Protest by Hills Machinery Company, LLC (Hills) of the Intent to Award a contract for a Super Duty Backhoe to Altman Tractor & Equipment Co., Inc. (Altman) alleging that Altman's bid was non-responsive to a material and essential requirement of the solicitation. The protest is granted.

AUTHORITY

The Chief Procurement Officer¹ conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on the evidence and applicable law and precedents.

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

DECISION

The protest by Hills Machinery Company, LLC (Hills) of the Intent to Award a contract for a Super Duty Backhoe to Altman Tractor & Equipment Co., Inc. is granted. Hills' letter of protest is incorporated by reference. [Attachment 1]

DISCUSSION

The Solicitation is to secure contracts with vendors to provide the state specified Backhoes and Motor Graders of different detailed specifications. This solicitation included four (4) line items with award to a maximum of three bidders for each line item. Line item 0003 was for a Super Duty Backhoe and Intents to Award were posted to Blanchard Machinery Company, Hills, and Altman. Hills protests that the product bid by Altman is non-responsive to a material and essential requirement of the solicitation.

Specifically, paragraph 17.3.5.2 (Solicitation page 24) states the mandatory requirement as:

“A hydraulically extendable dipper (with all controls, counterweights, and unit itself installed) of at least 3ft 5 inches between the extended and retracted positions.”

Altman bid the New Holland B95C. The New Holland B95C's extendable dipper only provides 3ft 1.5 inches between the extended and retracted positions, materially and significantly short of the minimum requirement all bidders were required to meet. Altman initially claimed that the B95C could meet the 3ft 5 inches requirement with the addition of a coupler. The coupler is mentioned in paragraph 17.3.5.1 (Solicitation page 24). However, the dipper will only extend and/or retract a distance of 3ft 1.5 inches no matter what is coupled on the end. Altman has since acknowledged that its bid did not meet the solicitation requirement that the dipper extend 3ft 5 inches. [Attachment 2]

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DECISION

For the reasons stated above, the protest is granted.

For the Materials Management Office

A handwritten signature in cursive script that reads "Michael B. Spicer".

Michael B. Spicer
Chief Procurement Officer

Attachment 1



John E. Schmidt, III
803.348.2984
John.Schmidt@TheSCLawfirm.com

Melissa J. Copeland
803.309.4686
Missy.Copeland@TheSCLawfirm.com

January 11, 2016

Via Email to protest-mmo@mmo.sc.gov and protest-mmo@mmo.state.sc.us and Hand Delivery

Mr. Michael B. Spicer
Mr. John St. C. White
Chief Procurement Officers
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

RE: Protest of Notice of Intent to Award - POSTED 12/31/15 - to ALTMAN TRACTOR & EQUIPMENT CO INC., under Solicitation Number **5400010280**, **SW BACKHOES & MOTOR GRADERS, Item: Line 0003 Super-Duty Backhoe** ("Solicitation")

Dear Chief Procurement Officers:

This firm represents Hills Machinery Company LLC ("Hills"). This letter constitutes the initial Protest of Hills regarding the intent to award issued to Altman Tractor & Equipment Co Inc. ("Altman") under the above-referenced Solicitation. Hills raises this protest in the utmost respect for its customers the State of South Carolina and its Department of Transportation, whose needs Hills seeks to serve and make paramount. Indeed, the very reason that Hills brings up these points is that Hills is confident it can show, and the State and its using agency will see and agree, that the deficiencies in the Altman bid as to the item in question would result in the State having a contract for an item it was not seeking competitive bids for here, and which will not meet the users' needs for the specified equipment.

The Solicitation is to secure contracts with vendors to provide the state specified Backhoes and Motor Graders of different detailed specifications. The Solicitation was broken down into line items and vendors were allowed to bid on as many line items as they chose, but they were not required to bid on all line items.

Altman's bid was non-responsive to the mandatory, material and essential specifications and requirements of the Solicitation concerning Line Number 0003, "Super-Duty Backhoe.". The Notice of Intent to Award states that Altman was given an award for *Line 00001*, Super-Duty Backhoe. Hills believes that the Notice of Intent to Award is in error and that it may be that the Line item for which Altman was to be given a Notice of Award was *Line Number 0003*, Super-Duty Backhoe. However, regardless, this protest only relates to the Award to Altman, and such award as to the item "Super-Duty Backhoe" as to which Altman's bid was non-responsive.

A stay of award as to Altman for that item and Notice of Intent to Award thereof only is requested under the automatic stay provisions of the Consolidated Procurement Code. *Hills has requested access to the relevant bid file/contract file and the bid and related communications of and about the Altman bid, and reserves the right to augment this protest, and the support therefor, as permitted by law.*

Hills asserts the following grounds of protest, reserving all rights to amend this protest as new matters arise as permitted by law.

Hills protests that Altman's bid was non-responsive to the material and essential requirements of the Solicitation as to the Line Item 0003, "Super-Duty Backhoe" because Altman's bid did not conform to material, essential and mandatory specifications for the item in ways that seriously affect price, performance and quality. Such deviations were not waiveable for the above reasons and the reasons herein stated.

As to the Super Duty Backhoe (Bidding Schedule Line Item 3 located on page 49 of Solicitation) Altman (SC Vendor # 7000086936) is apparent low bid on this line with the New Holland B95C with options available. See Ex. 1, Email 2, page 1. Hills and Blanchard are also intended to be awarded a contract on this line item (see Bid Tab for full listing). The state intends to award up to 3 contracts per line item, (see Section VI. Award Criteria, Solicitation page 36).

Altman offered, for this line item, the New Holland B95C. By offering the New Holland B95C, Altman should be considered non-responsive on the Super Duty Backhoe line item because Paragraph 17.3.5.2 (Solicitation page 24) states the mandatory requirement as:

"A hydraulically extendable dipper (with all controls, counterweights, and unit itself installed) of at least 3ft 5 inches between the extended and retracted positions."

The New Holland B95C's extendable dipper only provides 3ft 1.5 inches between the extended and retracted positions, materially and significantly short of the minimum requirement all bidders were required to meet. *See* Ex. 2, New Holland Specs page 9-26 item G Retracted Dipper and G Extended Dipper.

Altman claims that the B95C offers 3ft 5 inches between the extended and retracted positions *with the use of a coupler*. See Exhibit 3, Altman Email 1 page 1: (Reach Retracted 18'8" Extended 22'1").

The coupler is mentioned in paragraph 17.3.5.1 (Solicitation page 24). Even if an added coupler did provide additional reach for retracted and extended reach, **it has no effect on the distance the dipper extends**. The dipper will only extend and/or retract a distance of 3ft 1.5 inches no matter what is coupled on the end. This matter is a serious deviation that affects price, quality, utility and fairness, which cannot be waived, as is shown herein and in proper protest submissions to be offered by Hills per any reasonable schedule to be set by the CPO.

We raise this as the issue is one of customer service and satisfaction, as well as of bidding fairness. We will provide timely documentation support to show that the dipper extension length and the number of inches involved *do* make a material and significant difference in performance. It is our belief that the unit specifications were given for good reason, and that while there are certainly applications for which the shorter dipper will suffice (and the State may want to perform a competitive procurement for such shorter dipper items, *under which all competitors can compete with compliant products of shorter dipper length*), the user specifying the longer dipper will need and expect its full extension length as actually specified. Hills, and other vendors can offer (for less expense to the state) units with the shorter dipper, if that is specified and bid; and Hills would not offer the longer dipper to meet such need. However, if the award to Altman is allowed to stand, not only will the customer not get what they asked for and needed, but Altman will in effect have been given the sole source opportunity to sell the shorter dipper item that was not specified or competitively bid.

Hills, through counsel, have asked for the relevant materials to view, among other things, Altman's bid package. If in fact as suspected, Altman bid their units with Tier 4 Final engine technology, Hills hereby protests that offering as well. On information and belief, if Altman offered the B95C Tier 4 Final, then Altman's bid for the same unit is also non-responsive to IFB paragraph 6.3 (Solicitation page 20). The minimum net horsepower rating for the Super-Duty backhoe is listed at 92 net hp (paragraph 6.3 Solicitation page 20). The maximum net horse power rating for the B95C Tier 4 Final, as listed in the manufacturer's operator's manual, is only 90Hp, (see Ex. 2, New Holland Specs page 9-5), and is non-responsive to the mandatory, essential and material specifications. (On the other hand, if Altman Tractor specified in writing submitted by the bid submission date that it bid the B95C Tier 4 interim, they will be considered responsive in this one respect, but not as to the dipper; that rating is 95Hp net.)

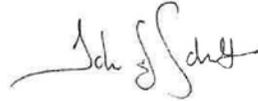
CONCLUSION

Based on the grounds set forth herein, Hills respectfully requests that the award to Altman be stayed pending resolution of this protest, that Hills be granted a hearing on this matter, that the award to Altman be rescinded, and for such other relief as may be afforded under the Consolidated Procurement Code and under law. Hills asks that if the State and the DOT really did wish to obtain competitive bids for a shorter dipper unit than was in the specification,

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that this award to Altman be cancelled and that a new solicitation be issued for the purchase of units with the shorter dipper, on which all can compete equally.

Very truly yours,

A handwritten signature in black ink, appearing to read "John E. Schmidt, III". The signature is fluid and cursive, with the first and last names being more prominent.

John E. Schmidt, III

Attachment 2

From: [Willis, Sheila](#)
To: [Spicer, Michael](#)
Cc: [Craig, Kimber](#)
Subject: FW: bid
Date: Thursday, January 14, 2016 1:36:23 PM

Forwarding Altman Tractor's response.

Sheila

From: Johnny Graham [<mailto:jgraham@altmantractor.com>]
Sent: Thursday, January 14, 2016 1:21 PM
To: Willis, Sheila
Subject: RE: bid

Sheila,
New Holland does not meet the spec 17.3.5.2

Johnny

From: Willis, Sheila [<mailto:swillis@mmo.sc.gov>]
Sent: Wednesday, January 13, 2016 8:27 AM
To: Johnny Graham
Subject: RE: bid

Johnny,
I need an email from you stating that your make and model tractor that you offered for super duty backhoes does not meet the specs identified in the protest. The CPO is requesting this.

Thanks,
Sheila

From: Johnny Graham [<mailto:jgraham@altmantractor.com>]
Sent: Tuesday, January 12, 2016 2:52 PM
To: Willis, Sheila
Subject: bid

Sheila,
Could you call me to discuss the protest.

Johnny Graham
843-662-0151 ext304

This email has been checked for viruses by Avast antivirus software.
www.avast.com

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised September 2015)

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 2015 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.