

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

ORDER

IN RE:)
)
Protest of Palmetto Unilect, LLC;)
Diebold Election Systems;)
iPServices, LLC; Maximus, Inc.;)
and Election Systems & Software, Inc.)

Appeal of Palmetto Unilect;)
Diebold Election Systems; and)
Election Systems & Software, Inc.)

Case No. 2004-6

This matter came before the South Carolina Procurement Review Panel for a hearing on June 23 and 24, 2004. The Panel heard requests for review of the May 26, 2004, written determination of the Chief Procurement Officer (CPO). The CPO's order was appealed to the Panel by Palmetto Unilect (Unilect), Diebold Election Systems (Diebold), and Election Systems & Software, Inc. (ES&S). At the hearing before the Panel, Unilect was represented by Marc Manos, Esquire. Diebold was represented by Henry Wall, Esquire, and Wade Mullins, Esquire. Craig K. Davis, Esquire, was counsel for ES&S. Keith McCook, Esquire, represented the Chief Procurement Officer and H. Clay Walker, Esquire, was counsel for the State Election Commission.

The Panel first heard outstanding motions and then began the hearing. After deciding the motions, the hearing of the matter was bifurcated. The Panel first heard the issue of the responsiveness of ES&S. The Panel then heard the issue of whether Diebold should have been awarded the contract once ES&S was found to be non-responsive. This order will follow that same pattern.

Motions

1. CPO's Motion to Dismiss Unilect's Appeal Letter as Untimely Filed

The CPO moved to have Unilect's appeal to the Panel dismissed because the CPO received the appeal via e-mail at 5:28 p.m. on June 7, 2004. (ES&S joined in the motion). A party seeking to appeal from a CPO decision must file a request for further administrative review within ten days of the date the CPO's decision is posted. S.C. Code Ann. §11-35-4210 (6). In this case the tenth day after the decision was posted was June 5. Being that June 5 was a Saturday, the deadline was then extended until Monday, June 7. "...[I]f the final day of the designated period falls on a Saturday, Sunday, or legal holiday for the state or federal government, then the period shall run to the end of the next business day." S.C. Code Ann. §11-35-310 (13).

It was clear from the parties that counsel for the CPO was copied on the e-mail to the CPO and received the copied e-mail before 5:00 p.m. Unilect also presented an affidavit from the employee who sent the e-mail stating that she sent the e-mail to Mr. Spicer at 4:43 p.m. and that she placed the appeal in the U.S. mail on June 7. However, the Panel finds these facts unpersuasive. The statute clearly sets out how a request for further administrative review must be filed. It "...shall be direct to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel...." S.C. Code Ann. §11-5-4210 (6).

We recognize that an entity's counsel many times may act on behalf of his client, but we do not find that acceptance of a request for review under §11-35-4210 is one of those times. The provisions of the CPO's order are fulfilled as soon as the time for appeal passes. This is necessary to ensure the business of the State goes forward in a timely manner. This is also the reason a postmark through the U.S. mail has not been used as the filing date. At the close of business on the tenth day, the CPO needs to know whether a case has been appealed. If it is not,

the award is usually made the next morning. The business cannot be put on hold while a letter makes its way through the U.S. mail or an e-mail finds its way through cyberspace. The CPO for Information Technology does accept filings through e-mail so this was not at issue. Nevertheless, it is the responsibility of the person filing to get it there on time.¹ Therefore, Unilect's request for review by the Panel is dismissed.

Unilect moved for reconsideration during the hearing, but the Panel denied the motion. Unilect also moved to be allowed to participate even though its issues on appeal would not be heard. The Panel denied the motion, finding that Unilect no longer had standing to participate.

2. CPO's Motion to Dismiss Certain Issues of Unilect's Appeal and Protest

(ES&S joined in the motion).

The Panel found this motion to be moot after its decision on the first motion.

3. CPO's Motion to Dismiss an Issue of Diebold's Appeal

The issue addressed here is the matter of ES&S's bid bond and whether it complied with statutory and regulatory requirements. (ES&S joined in the motion). Before the CPO, iP Services made a motion involving the bid bond. However, the bid bond issue had not been part of the protest and therefore, the CPO found that the issue was not timely filed. Diebold resurrected the issue at the hearing, but the CPO declined to address it since it had not come before him by way of protest letter. We find that pursuant to §11-35-4410(1), we lack jurisdiction to hear this issue.

4. ES&S's Motion to Dismiss an Issue of Diebold's Appeal

ES&S moved to dismiss an the issue of Diebold's appeal which states the evaluators failed to adhere to stated weighting by failing to reconcile technical and cost scores to oral scores. ES&S challenges this ground and asked that it be dismissed because this was a challenge

¹ There was no evidence that the CPO's computer or e-mail was malfunctioning. Our ruling may have been different if the State's equipment was not working, but that was not before us.

to the solicitation and therefore it is untimely. We deny the motion. The issue on appeal by Diebold goes to the application of the weighting and reconciliation, not the requirements of the RFP.

5. Diebold's Motion for Summary Judgment on the Issue of ES&S's responsiveness

Diebold asserts that the issue of ES&S's responsiveness is a matter of law and can be resolved on summary judgment. However, we find there are genuine issues of material fact to decide. We deny the motion.

Case on Review

1. Was ES&S's proposal responsive to the RFP?

The CPO found that ES&S's proposal was non-responsive because some of the pricing offered remains unfixed or open.

Findings of Fact

On October 10, 2003, the Request for Proposals (Solicitation 04-S6230) was issued. The request sought proposals to provide services and products for a uniform statewide voting system. The specifications in the RFP were a collaborative effort among the State Election Commission, a private consultant, and the Budget and Control Board.

The contract was designed to last for up to seven years. The RFP states,

The initial term of this agreement is one (1) year from the effective date as stated on the award document. Unless terminated by either party at the end of the initial term, at the end of successive "contract" terms, or as otherwise allowed within this document...the contract will automatically extend at the prices, terms and conditions approved by the Information Technology Management Office. Said extensions may be less than, but will not exceed, six (6) additional, one-year periods.

Record, pg. 127-128.

The proposals from the offerors were to be evaluated in two different stages. All offerors were evaluated in Stage One, and depending on the scores, a limited number of offerors were invited to participate in Stage Two.

Stage One was divided into two parts. The first part was the technical proposal. This part was to allow the offerors to provide a description of the technical solution being proposed, a description of qualifications and responses to the technical requirements set out in the RFP. The second part was the cost proposal. The cost proposal was to be submitted separately and was to include pricing for all products and services, including unit pricing. The cost proposal was not to exceed \$36 million. A template was provided with the RFP to guide the offerors in setting out their cost proposals. The RFP asked offerors to give unit prices for all proposed product components including future purchase of components during the life of the system contract. It asked for unit rates for initial project services and continued services. Initial project services were to be the initial purchase of equipment, hardware, software, installation, training, and technical support needed for the start up. The other future costs were additional equipment, hardware, software, and continued services that would be provided through the life of the contract. In fact, the template produced for the RFP divided the costs into initial and future sections.

ES&S submitted its proposal without fixed pricing. Following are excerpts of ES&S's proposal:

Election Management Package

* Unit prices for future purchases of ES&S equipment and software are effective for 2 years from contract date.

** See accompanying breakdown of the Election Definition & Results Accumulation Network. Please note that pricing for these components may (sic) change as ES&S requirements or manufacturer specifications change.

Also, for the future purchases years, the amount was TBD, commonly standing for “to be determined.”

Precincts Voting Package

* Unit prices for future purchases of ES&S equipment and Software are effective for 2 years from contract date.

Under its authority in §11-35-1530 (8)(b), the State entered into contract negotiations with ES&S. One of the questions asked by the State was:

2.11 How long is the contract price for equipment valid? Clarify all additional hardware and software purchase prices. Prices need to be secured for the length of the contract.

ES&S responded:

As set forth on Page 2 of the Unit Pricing Schedule, the price quoted will be effective through the end of the calendar year 2006.

We find that the length of the contract was seven years. The end of calendar year 2006 would be a little over two years, the period for initial purchases and services. However, we find the length of the contract was seven years as set out by the RFP. There is no evidence that this contract was meant to be a two-year contract.

Conclusions of Law

The Procurement Code governs competitive sealed proposals in S.C. Code Ann. §11-35-1530. Section 11-35-1530(9) states, “Award must be made to the responsive offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and evaluation factors set forth in the request for proposals,....” A “[r]esponsive bidder or offeror” as “a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.” S.C. Code Ann. §11-35-1410(7). Therefore, for the award to ES&S to be upheld, ES&S must be found to be a responsive offeror. We fail to see how ES&S conformed in all material aspects to the request for proposals.

The RFP called for a cost proposal that included prices for all proposed products and services. The RFP called for unit prices for all proposed product components, for future purchases of components during the life of the system contract. These unit rates were clearly for extended services that are offered beyond the initial services provided as part of the system purchase. It spelled out that unit prices for the purchase of additional products, training classes, and rates for annually-renewable services, in quantities above and beyond those proposed, shall be purchased at unit contract prices. In parts of the ES&S proposal it would be impossible to determine what those prices are.

ES&S argues that these examples are minor informalities or irregularities that have no effect or merely a trivial or negligible effect on total bid price, quality, quantity or delivery. We do not think that failure to list prices in a contract that so clearly called for specific prices can be considered a minor informality or irregularity. Further, it cannot be called a minor informality when it is impossible to determine if those figures were known, whether ES&S would remain under the \$36 million cap for the contract.

2. Should the CPO have awarded the contract to Diebold instead of ordering resolicitation of the contract?

Upon finding that ES&S was non-responsive, the CPO ordered that the contract be resolicited.

Findings of Fact

The Findings of Fact set out in Issue #1 above are incorporated into this section.

Diebold submitted two proposals in response to the RFP. They submitted a primary proposal and an alternative. The process as set out by the RFP was that after the first stage was completed (the technical proposal and cost proposal) and the scores were known, the high scorer

and those proposals that scored within at least 85% of the high score would move on to Stage Two, the oral presentation. At the conclusion of Stage One, Diebold had the high score. ES&S and Parsons were within 85% and were asked to make oral presentations. After oral presentations, ES&S was in first place, Diebold in second, and Parsons in third place.

Despite the language of the RFP, the evaluators only looked at the first two years. Cost was only considered for the first two years.

Conclusions of Law

Pursuant to §11-35-4310 (2) the CPO and the Panel have three remedies upon a finding that a solicitation or proposed award of a contract is in violation of the law. The CPO or the Panel may order that the solicitation or proposed award be: (a) canceled; (b) revised to comply with the law; or (c) awarded in a manner that complies with the provisions of this code.

The CPO chose to order that the matter be resolicited. In his order in a footnote, he states that he was “concerned that the State’s determination to evaluate only the cost for the first two years of the contract may be improper since the cost of owning the system over the life of the contract was available for evaluation.” Order of the CPO, Record, p. 49. We agree. Since the proposals were not evaluated in a manner consistent with the RFP it is impossible to say for certain who should get the award. ES&S was found responsive in the initial evaluation because the evaluators only looked at two years. However, we have already determined that when the proposals were considered as the RFP called for, they did not meet the material requirements. Likewise, we cannot say what position the other offerors, such as Diebold, would have been in had the evaluators looked at the life of the contract. In fact, the evidence reflects that Diebold’s proposal for the entire seven-year period exceeded \$36 million. Had the proposals been

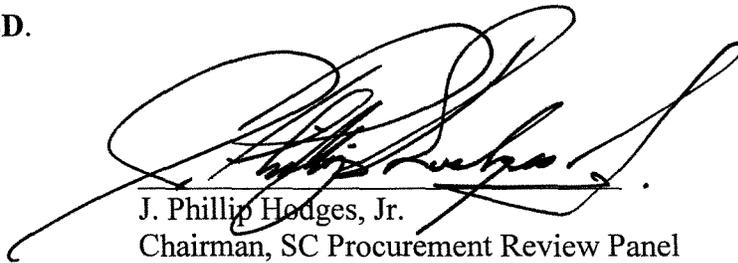
considered according to the RFP, Diebold may have been found to be non-responsive. Therefore, since there is no way to apply the requirements of the RFP consistently, we conclude that the best and least prejudicial alternative pursuant to §11-35-4210 is to uphold the CPO's decision to order a resolicitation.

Order

Based on the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that ES&S's proposal on the RFP (Solicitation 04-S6230) was non-responsive and the contract should be resolicited. This order affirms the May 26, 2004, order of the CPO.

AND IT IS SO ORDERED.



J. Phillip Hodges, Jr.
Chairman, SC Procurement Review Panel

This 1st day of July, 2004