STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCURMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	CASE NO. 2001-4
In re: Protest of Weaver Company, Inc.	)	
	)	ORDER
Appeal by Weaver Company, Inc.	)	

This case came before the South Carolina Procurement Review Panel (Panel) on May 30, 2001 on appeal by Weaver Company, Inc. (Weaver) of a decision by the Chief Procurement Officer for Construction (CPOC). Prior to the July 11, 2001 scheduled hearing in this case, the Panel received a Motion to Dismiss, without a hearing, from the Myrtle Beach Air Force Base Redevelopment Authority (MBRDA). The Office of General Services of the Budget and Control Board (General Services) and Cherokee, Inc. (Cherokee) joined in this motion. After review of the applicable laws, MBRDA's motion, Weaver's response to the motion, and the supporting documents, the Panel granted the Motion to Dismiss, without a hearing, on July 19, 2001. Therefore, an order is issued in this case without a formal hearing.

FINDINGS OF FACT

On January 22, 2001 (revised February 15, 2001), MBRDA solicited sealed bids, using bidding documents prepared by it's engineer of record, Thomas & Hutton Engineering Company (T&H), for the following work which represents the Base Bid: *Site demolition, excavation of roughly 29 acres of lake, storm drainage installation (lake connecting pipes and control structures) grassing and related work on the former Myrtle Beach Air Force Base.* MBRDA included in the Bid Form the following two Bid Alternates (only the second bid alternate is relevant to this case):

ALTERNATE 1 - *Substitute rip rap for turf reinforcement mat (equivalent to Pyramat) at all locations shown on the drawings noting turf reinforcement.*

ALTERNATE 2 - *Delete site clearing, including disposal of all trees, shrubs and removal of stumps.*

On April 26, 2001, MBRDA posted a Notice of Intent to Award the contract to Cherokee, Inc. for the Base Bid only. The bid alternates were rejected. Weaver protested the award on May 9, 2001, contending that Weaver's net bid (the Base Bid minus the deductive amount for Bid Alternate 2) is less than the bid of Cherokee. Weaver requested that the Intent to Award be set aside and that Weaver be declared the lowest responsive and responsible bidder, or in the alternative, that the issue be submitted to the full Board of MBRDA so that consideration could be given to the information that the alternative could be contracted for at no cost. On May 22, 2001, the CPOC issued a decision without a formal hearing. On May 30, 2001, Weaver appealed the CPOC's decision to the Panel.

CONCLUSIONS OF LAW

ISSUE: WHETHER MBRDA SHOULD HAVE CONSIDERED ALTERNATE #2 AND FOUND WEAVER THE LOWEST RESPONSIVE AND RESPONSIBLE BIDDER

Weaver's appeal presents the following arguments: "the record is clear that either the Authority failed to consider the fact that the property could be cleared at no cost in making the decision to reject Alternative 2, or else the Authority Board was not supplied such information so that it could have knowledgeably and intelligently made a determination as to whether to accept or reject the alternative bids. Acceptance of Alternative 2 would have determined Weaver Company to be the low bidder and would have necessarily saved the Authority $92,000.00. Refusal to consider the alternative was therefore unfair, arbitrary and capricious."

MBRDA contends that the additional information, which Weaver's appeal is based on, arrived at MBRDA on April 25, 2001, was unrelated to the project, was not for the same area that was to be cleared for the project and was not included in the materials submitted on April 12, 2001 which was the date of the bid openings. Further, MBRDA contends that the cost of clearing the property would have been approximately $92,000 according to an estimate provided by their engineer of record, T&H.[1] MBRDA also contends that Weaver abandoned their claim for award to them as the lowest responsive and responsible bidder. The Panel finds the reference to the Protest contained in the request for review preserved both issues.

South Carolina Consolidated Procurement Code Section 11-35-3020(2)(b), which deals with Construction Procurement Procedures, provides in part the following:

> ***"Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code."***

Section 11-35-3020(2)(c) provides in part the following:

> ***"...notice of an intended award of a contract to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation for bids shall be given..."***

In *Protest By Sperry-Rand Corporation and Tandy Corporation*, Case No. 1985-2, the Panel found as a legal conclusion that ***the consideration of factors outside those listed in a solicitation is inequitable, improper, and in violation of the Procurement Code.***

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[1] Weaver contends that MBRDA apparently considered the letter dated April 25, 2001 from its engineer, but gave no consideration whatsoever to the proposal from Pee Dee Timber, Inc. dated the same date. [RESPONSE ON BEHALF OF WEAVER COMPANY INC. TO MOTION TO DISMISS p. 2]

The Panel has reviewed the Minutes of the Meeting of MBRDA dated April 25, 2001 and finds no support for this contention by Weaver. The minutes state, *"Mr. Styers that he recommends, as do our engineers, T&H, and Ms. Margaret Jordan of the State Engineers Office, that we go with the low bid and not consider the alternate... This gives us a turn-key operation with one contractor, and we don't have to take any steps to select another contractor to do the additional work. It removes all risk associated with having two contractors and two different jobs."* Furthermore, the letter from T&H on April 25, 2001 references the April 12, 2001 bid and merely gives the engineers opinion on how to proceed. There is also evidence in the record that T&H estimated the clearing cost prior to April 25, 2001 (See Comparison of Bids Record p. 17). The letter from Pee Dee is titled "Proposal and Contract Form" which appears to make a bid offer for work at no cost and in no way refers back to the April 12, 2001 bid opening. The Panel finds no similarity in the context of these two letters.

Based on the documents presented, the Panel finds that Exhibit B [Record p. 11] submitted by Weaver would in fact constitute information outside the requirements set forth in the invitation for bids. The information was sent to MBAFB thirteen days after the bid opening date of April 12, 2001. Further, the Panel finds support for MBRDA's contention that the information in Exhibit B was not for the same area that was to be cleared for the project. This support being that the current project references *"roughly 29 acres of lake"* and the scope of work in Exhibit B references *"approximately 20 Acres @ Proposed Lake Sites."*

The Panel finds that after acquired information in relation to an IFB would be irrelevant. Further, the Panel finds that it would have been an improper violation of the Procurement Code for MBRDA to consider Weaver's Exhibit B in awarding this contract.[2]

Article 9 (prepared by the State Engineer) - Supplementary Instructions to bidders, which is provided for in Regulation 19-445.2145(E)(2)(a), addresses the determination of the "low bidder" where alternates are concerned in paragraph 5.3.2 as follows:

> ***"The Agency shall have the right to accept Alternates in any order or combination, ... and to determine the low Bidder on the basis of the sum of the Base Bid and Alternates accepted."***

The Panel finds that MBRDA had the right to reject Alternate #2 in this case and did so knowingly and intelligently. Weaver was not the lowest responsive and responsible bidder in this case because bid Alternate #2 was not accepted. The Base Bid received from Cherokee was $2,987,950.00 and the Base Bid received from Weaver was $2,994,168.00. [Record p. 17] Cherokee was clearly the lowest responsive and responsible bidder.[3]

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[2] South Carolina Consolidated Procurement Code Section 11-35-1520(6) provides in part: *"No criteria may be used in bid evaluation that are not set forth in the invitation for bids."* Section 11-35-1520 provides in part: ***"After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition shall be permitted."***

[3] The Panel acknowledges that the Executive Director made an incorrect assertion in the minutes by stating, *"we are not, we have the alternative of choosing the offer that is in our best interest."* However, MBRDA did take the low bid which was consistent with the Procurement Code.

"To prove arbitrary and capricious conduct such as will permit the court to overturn a procurement decision, the aggrieved bidder must demonstrate a lack of reasonable or rational basis for the agency decision or subjective bad faith on the part of the procuring officer or clear and prejudicial violation of relevant statutes and regulations which would be tantamount to a lack of reasonable or rational basis." Robert E. Derecktor of Rhone Island, Inc. v. Goldschmidt, 516 F.Supp. 1085. Weaver has failed to prove by a preponderance of the evidence that MBRDA's refusal to consider Alternate #2 was unfair, arbitrary and capricious.

The Panel finds that Weaver's appeal issues are legally insufficient to state a claim for which relief can be granted. MBRDA had sole discretion to reject alternates to this project and their doing so had a rational basis. Further, the lowest responsive and responsible bidder was awarded the contract in accordance with the Procurement Code.

CONCLUSION

For the forgoing reasons, the decision of the CPO is upheld. The appeal by Weaver is dismissed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: _____

Gus J. Roberts, Chairman

Columbia, SC

August 16 ,2001