

State of South Carolina)	Before the Chief Procurement Officer
)	ITMO Case No. 2000-218
County of Richland)	SC Solicitation No. 04-S6462
In re: Central Reservation System)	
and Point of Sale for State Parks)	Decision
)	Posted: 05/28/04
Protest of Spherix Incorporated)	Mailed: 05/28/04
_____)	

The South Carolina Consolidated Procurement Code grants the right to protest to any bidder who is aggrieved in connection with the solicitation or award of a contract. Spherix Incorporated (SI) filed a protest of the rejection of SI's late bid by the Information Technology Management Office (ITMO). The facts of this case are not in dispute and the Chief Procurement Officer (CPO) for the Information Technology Management Office (ITMO) is issuing this decision without a hearing.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference. The following summary of protest issue reflects the general nature of the protestant's allegations. Of course, reference must be made to the actual letters of protest.

Protest of Spherix, Incorporated

SI's only issue of protest is that ITMO erred in rejecting SI's solicitation response as late.

FINDINGS OF FACT

04/02/2004	Issued Request for Proposal
04/26/2004	Issued Amendment 1
05/04/2004	Opened Solicitation Responses

DISCUSSION

SI claims, and the State will stipulate, that its proposal was properly addressed and was delivered by Federal Express to the South Carolina Law Enforcement Division at 4400 Broad River Road, Columbia, SC, at approximately 8:55 a.m. on May 4, 2004. The solicitation required proposals be delivered to the Office of the State CIO at 4430 Broad River Rd. prior to 2:30 p.m. on May 4, 2004. SI's proposal was not delivered to the Office of the State CIO until some days later. SI's proposal was rejected by ITMO under Regulation 19-445.2070.H.¹

It is regrettable that FedEx delivered SI's proposal to the wrong address and it is regrettable that the error was not discovered and rectified before 2:30 p.m. However, under the regulation, proposals must be delivered to the designated purchasing office or the mail room that services that purchasing office prior to the bid opening. The mail room at the SLED does not service the purchasing office at CIO. There is no central system responsible for the mail for all state agencies. Each agency determines how mail will be handled within that agency. Delivery to the wrong agency does not mean that the mail is misplaced or mishandled by the State. Under the Regulation, it does not matter if the proposal was delivered to the mail room of a State agency in the same building, the same block, or elsewhere in the State, if proposals are delivered to a mail room that does not service the purchasing office that issued the solicitation, the proposal must be rejected.

DETERMINATION

It is the Offeror's responsibility to insure proper delivery of its solicitation response to the correct location. The only exception is delivery to the mail room that services the procurement office that issued the solicitation.

¹ **19-445.2070.H. Exceptions to Rejection Procedures.**

Exceptions to Rejection Procedures. Any bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected unless the bid had been delivered to the designated purchasing office or **the governmental bodies' mail room which services that purchasing office prior to the bid opening. (emphasis added)**

Protest Denied.

For the Information Technology Management Office



Michael Spicer
Chief Procurement Officer

May 27, 2004

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4210, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten calendar days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the Panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

**Additional information regarding the protest process is available on the internet at the following web site:
<http://www.state.sc.us/mmo/legal/lawmenu.htm>**

NOTE: Pursuant to Proviso 66.1 of the 2002 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel [filed after June 30, 2002] 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." 2002 S.C. Act No. 289, Part IB, § 66.1 (emphasis added). PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

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VIA FACSIMILE AND FEDERAL EXPRESS

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
4430 Broad River Road
Columbia, South Carolina 29210

**Re: Protest of Spherix Incorporated Regarding Request For Proposal
No. 04-S6462**

Dear Mr. Spicer:

Spherix Incorporated ("Spherix"), through counsel, hereby submits the following protest against the State of South Carolina Request for Proposal No. 04-S6462 ("RFP"). As you are aware, the South Carolina Department of Parks, Recreation and Tourism ("SCPRT") and State Parks Service ("SCSPS") issued the RFP seeking proposals from established, experienced vendors that could design, provide, and implement a complete or turnkey self-supporting business solution meeting the Agencies centralized reservation/registration, retail point of sale and other administrative sales needs. The RFP specifically required that offerors submit their proposals to the State of South Carolina by 2:30 p.m. on May 4, 2004. In response to the RFP, Spherix prepared a fully-compliant proposal and delivered the same to a State of South Carolina government employee, via commercial carrier Federal Express, at 8:55 a.m. on May 4, 2004. Despite this fact, the Information Technology Management Office ("ITMO") has rejected Spherix's proposal as late.

As explained herein, ITMO's rejection of Spherix's proposal violates well-established rules contained in the South Carolina Consolidated Procurement Code, the South Carolina State Procurement Regulations, and the decisions of the South Carolina Procurement Review Panel. Spherix took all reasonable steps to ensure timely delivery of its proposal. The proposal was properly addressed and provided to Federal Express, a reliable commercial delivery company. Federal Express delivered the package to your facility nearly six hours prior to the bid opening and a State of South Carolina employee accepted the package on behalf of the procurement officer. Under the circumstances, the bid was timely delivered and should have been accepted.

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In the alternative, Spherix requests the time for bid submission be extended. Upon information and belief, only two vendors exist that are truly capable of satisfying the evaluation criteria of the RFP and providing a turnkey centralized reservation/registration, retail point of sale system for SCSPS. Therefore, it would plainly benefit SCSPS to extend the bid opening time to ensure it receives the benefit of competition.

For all of the reasons that follow, Spherix requests that you sustain this protest and direct the relevant contracting officer to accept and evaluate Spherix's bid in accordance with the requirements of No. 04-S6462. Alternatively, as stated herein, Spherix respectfully requests that the date for submission of proposals be extended or that ITMO re-solicit in a manner that will allow for effective and independent competition.

I. GENERAL INFORMATION

- A. Protestor: Spherix Incorporated
12051 Indian Creek Court
Beltsville, MD 20705
- B. Solicitation No.: Request for Proposal No. 04-S6462

II. BACKGROUND

In April of 2004, the State of South Carolina issued Request for Proposal No. 04-S6462. The RFP sought proposals from "established, experienced vendors that could design, provide, and implement a complete or turnkey self-supporting business solution meeting the Agencies centralized reservation/registration, retail point of sale and other administrative sales needs." RFP p. 24. The RFP promised that award of the resulting contract will be made to the offeror whose proposal is of greatest benefit to the State of South Carolina as scored using the evaluation criteria listed in this RFP.

The RFP further provided that bids/proposals had to be submitted not later than 2:30 p.m. on May 4, 2004:

Return Bid No Later Than...(Opening Date/Time): 05/04/2004 02:30 p.m.

RFP p. 1. The following address was also provided for the submission of proposals:

MAIL PROPOSALS TO: Division of the State CIO
Information Technology Management Office
4430 Broad River Road
Columbia, South Carolina 29210

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HAND CARRY TO: Division of the State CIO
Information Technology Management Office
4430 Broad River Road
Columbia, South Carolina 29210

RFP p. 2.

Spherix is an experienced, premier provider of turnkey centralized reservation/registration and sales systems. Indeed, for years Spherix has successfully designed and maintained sophisticated registration/reservation and sales systems for clients that include a wide range of federal and state agencies. During the past several months, Spherix drew upon its vast experience and expertise and expended significant time and expense to prepare a proposal that was fully compliant with the requirements of the RFP. A package containing Spherix's proposal was prepared and forwarded by Spherix to commercial carrier Federal Express on May 3, 2004. This package was addressed to: "SAM HANVEY/DIV OF THE STATE CI, INFORMATION TECH MGMT OFFICE, 4430 BROAD RIVER ROAD, COLUMBIA, SC 29210, US."

On the morning of May 4, 2004, Federal Express timely presented Spherix's proposal to South Carolina government shipping clerk, L. Stewart. L. Stewart accepted delivery and signed for receipt at 8:55 a.m. on May 4, 2004, (more than five and one-half hours before the deadline for receipt of proposals). Although L. Stewart accepted delivery on behalf of Mr. Hanvey, he apparently did not physically deliver Spherix's proposal to ITMO (which was simply across the street). According to an investigation subsequently conducted by Federal Express, Mr. Stewart called ITMO and was told they would pick up the package, however, the package was not picked up. In any event, ITMO apparently did not receive Spherix's proposal prior to 2:30 p.m. on May 4, 2004.

At approximately 3 p.m. on May 4, 2004, Spherix was informed by Sam Hanvey that Spherix's proposal was not in the possession of ITMO at 2:30 p.m. and, therefore, would not be evaluated for contract award. It is our understanding that, despite the fact that South Carolina government employees have maintained exclusive control and custody of Spherix's proposal from the time of its acceptance, ITMO refused to take physical possession of the proposal from L. Stewart. As a result, on May 7, 2004, Federal Express carried the unopened proposal from L. Stewart's office to Mr. Hanvey's ITMO office.

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III. DISCUSSION

A. ITMO's Rejection of Spherix's Proposal as Untimely Violates South Carolina Procurement Laws and Regulations Regarding the Receipt of Proposals

Section 19-445.2070 of the State of South Carolina Procurement Regulations addresses the rejection of bids and provides, in relevant portion:

Rejection of Individual Bids.

A. General Application.

Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.

However, this regulation further provides an exception to general rule and the rule regarding the rejection of bids considered to be untimely. Subsection H specifically provides that a bid should not be rejected as untimely when the bid had been actually received by the government prior to the time set for receipt of proposals:

H. Exceptions to Rejection Procedures.

Any bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected unless the bid had been delivered to the designated purchasing office or the governmental bodies' mail room which services that purchasing office prior to the bid opening.

Significantly, this regulation was recently revised by the South Carolina legislature. Prior to 1995, subsection H of the regulation provided:

Any bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected unless a bid was in the possession of the designated purchasing office and had been misplaced by state employees in that officer. In this event, the Chief Procurement Officer, or the procurement officer of the governmental body, shall annotate the bid tabulation and consider the misplaced bid along with the other previously received bids.

In Re Protest by M.L. Clapp Construction Company, SCPD 1987-9, October 15, 1987 (quoting 19-445.2070(H)). (Emphasis added). However, through an amendment to the regulation, the legislature greatly broadened the scope of the exception by eliminating any requirement that bids be "misplaced" or otherwise mishandled in order to be subject to the exception. Accordingly, under the revised regulation, the exception to the rejection of late bids applies to all bids "delivered" to a governmental mail room prior to the bid opening -- regardless of whether or not they were "misplaced" or otherwise mishandled.

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In the present case, Spherix's bid was timely presented to South Carolina shipping clerk L. Stewart sometime prior to 8:55 a.m. on May 4, 2004. Even though Mr. Stewart was not the addressee specifically noted on the package, he accepted and signed on behalf of Sam Hanvey, the addressee. While this mail room's distribution practice is not uncommon, by signing for and accepting Spherix's bid, Mr. Stewart and the State assumed the responsibility to see that the bid package was promptly delivered to the addressee unmistakably noted on the label. However, through no fault of Spherix or its commercial carrier, during the next approximately six hours (nearly a complete workday), Mr. Stewart and the other employees of the State mail room failed to forward this package to the addressee.

Under the circumstances, it is clear that Spherix's bid package was received by Mr. Stewart and placed in the State's mail system almost six hours prior to the deadline set for the receipt of proposals. Accordingly, under revised Procurement Regulation 19-445.2070(H), Spherix's proposal cannot be considered late. Indeed, as revised, the plain language of the regulation provides that any proposal within the State mail system must be considered timely -- even if received only a minute before the deadline for the receipt of proposals. Here, Spherix's proposal was accepted and received into the mail system more than five and one-half hours prior to the deadline set for the receipt of proposals. Therefore, even if analyzed under the old regulation, it is clear that Mr. Stewart's acceptance and subsequent failure to properly forward Spherix's bid would qualify as government "mishandling" or "misplacement" and would necessitate ITMO's acceptance and consideration of Spherix's bid.

In *In Re Protest by M.L. Clapp Construction Company*, SCPD 1987-9, October 15, 1987, the Procurement Review Panel considered the application of the former Section 19-445.2070(H) to circumstances similar to those in this case. In *M.L. Clapp*, the protestor's bid was received by the State's mail room on the morning of the day set for bid opening. *Id.* at p. 2. However, the State employees responsible for distributing the mail to the proper addressees failed to forward the protestor's bid to the proper office prior to the deadline set for the receipt of bids. The Chief Procurement Officer ("CPO") determined that the protestor's bid was not acceptable under former Section 19-445.2070(H), and awarded the contract to one of the protestor's competitors.

On appeal, the Procurement Review Panel reversed the decision of the CPO. In doing so, the Panel specifically held that the State mail room employees' mere failure to forward the protestor's bid to the addressee by the 11:00 a.m. deadline constituted "misplacement" for purposes of former Section 19-445.2070(H). Accordingly, even if one were to apply the more stringent standard under former Section 19-445.2070(H) (which is not applicable here), the decision in *M.L. Clapp* makes it clear that Spherix's bid must be accepted and evaluated by ITMO.

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B. ITMO Should Extend the Deadline for the Receipt of Proposals or Re-solicit in Accordance with Section 19-445-2065(B) of the Code of Regulations to Ensure Effective Competition

Even if it is determined that Spherix's proposal is untimely, ITMO should extend the deadline for the receipt of proposals or re-solicit the SCSPS requirements in order to ensure an effective competition. Upon information and belief, only two vendors exist that are operating systems that are truly capable of satisfying the evaluation criteria of the RFP and providing a turnkey centralized reservation/registration, retail point of sale system for SCSPS -- Spherix and ReserveAmerica. Therefore, even if Spherix's proposal could be properly excluded as untimely (which it cannot), no meaningful competition will be possible without an extension of the date for receipt of proposals or the cancellation and re-solicitation of new proposals.

Section 11-35-20 of the South Carolina Consolidated Procurement Code ("Code") identifies the underlying purpose and policies of the Code. More specifically, this section notes that the Code was intended to "foster effective broad-based competition for public procurement within the free enterprise system." Sec. 11-35-20(b). Consistent with the goals identified in the Code, Regulation 19-445.2065 provides, *inter alia*:

B. Cancellation of Bids Prior to Award.

*** Invitations for bids may be cancelled after opening, but prior to award, when ...the procurement officer determines in writing that:

* * *

(8) ***cancellation is clearly in the best interest of the State.
Determinations to cancel invitations for bids shall state the reasons therefor.

Accordingly, procurement officers are provided with broad discretion to cancel and re-solicit procurements when such is in the best interest of the State.

In the present case, the elimination of Spherix's bid from consideration will effectively destroy any meaningful competition and convert the best value solicitation process into a de-facto sole source award to ReserveAmerica. ITMO chose to utilize competitive best value bidding in accordance with Section 11-35-1528 of the Code in order to allow a meaningful evaluation of the demonstrated technical skills and experience of the offerors. *See* RFP Tab 3. Upon information and belief, none of the offerors other than Spherix and ReserveAmerica have the skills and experience necessary to meet the SCSPS' reservation and sales needs. Therefore, in order to secure meaningful and effective competition that will assure SCSPS acquires the best available value, ITMO should extend the deadline for the receipt of proposals to allow for the acceptance of Spherix's proposal or cancel the current solicitation and re-solicit. Such action would not only be consistent with the authority conveyed to the procurement officer by Regulation 19-445.2065, but also with the competitive goals identified in Section 11-35-20 of the Code. By contrast, a failure by ITMO to take such action will effectively convert the RFP to

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a sole source procurement that fails to comply with the requirements of Section 11-35-1560 of the Code.

IV. CONCLUSION

For all of the foregoing reasons, Spherix requests that you sustain this protest and direct the relevant contracting officer to accept and evaluate Spherix's bid in accordance with the requirements of No. 04-S6462. Alternatively, Spherix requests that ITMO extend the time for receipt of proposals or re-solicit in accordance with 19-445.2065(B), in order to ensure a legitimate and meaningful competition.

If you have any questions about this matter, please do not hesitate to contact us.

Respectfully submitted,



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