

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE:)	
)	Case No. 2009-2
Protest of Otis Elevator Company,)	
Appeal of Otis Elevator Company)	
)	
Solicitation No. 5400000548)	
Elevator Maintenance for the Medical)	
University of South Carolina)	

This matter came before the South Carolina Procurement Review Panel (the Panel) for a hearing on August 26, 2009. The Panel heard the appeal by Otis Elevator Company (Otis) of the June 15, 2009, decision of the Chief Procurement Officer for Construction (the CPO)¹. The CPO's decision denied Otis' protest and upheld the Materials Management Office's (MMO's) Intent to Award the contract for an elevator maintenance contract at the Medical University of South Carolina (MUSC) to ThyssenKrupp Elevator Corporation, Inc. (Thyssen). Otis sought further administrative review before the Panel.

In the hearing before the Panel, John E. Schmidt, III, Esquire, represented Otis. Craig K. Davis, Esquire, and James F. Flanagan, Esquire, represented Thyssen. Keith C. McCook, Esquire, represented the CPO.

Findings of Fact

MMO issued this solicitation on behalf MUSC on December 12, 2008. Through this Invitation for Bids (IFB), MUSC sought to acquire maintenance services for its "vertical transportation systems," which include passenger and freight elevators, escalators, dumbwaiters, and handicapped lifts. Record at 79. The IFB required bidders to provide unit prices. Record at

¹ The CPO for Construction conducted the administrative review and issued a decision in this protest pursuant to the CPO for Goods and Services' delegation of authority under S.C. Code Ann. § 11-35-840 (Supp. 2008).

78. The elevators to be serviced and maintained were specified in Attachment G of the IFB. Record at 83. Bidders were also required to complete a bidding schedule form that indicated that the unit of measure was “Years” and that the form represented one year. Record at 100. Bidders were to fill in blank cells on the form under the headings “Unit Price” and “Extended Price.” *Id.* The bidding schedule form also contained the following note: “ALL UNIT PRICES MUST BE FILLED IN ON ATTAC[H]MENT G AND THE TOTAL IS TO BE FILLED IN ABOVE FOR THE UNIT PRICE AND THE EXTENDED PRICE. THIS WILL BE THE TOTAL FOR ONE (1) YEAR OF SERVICE.” *Id.* Despite this reference to unit prices, the IFB did not contain the standard clause that unit prices control.

Attachment G is a table that lists ninety-four elevators and which provides their MUSC and State numbers, location, manufacturer, date of installation, machine type, and a space for bidders to enter the monthly maintenance cost for each elevator. Record at 112 – 115. At the bottom of the table, bidders were to list the total monthly maintenance cost, the total yearly cost, and the total five year cost. Record at 115.

The IFB was amended twice in response to bidder questions. Record at 118 – 125. Amendment #1, issued on February 5, 2009, changed the bid opening date to February 24, 2009. Record at 120. Amendment #1 also answered a question relevant to the protest and appeal currently before the Panel:

19. Many elevators on campus are currently under a no-cost warranty service period with different expiration dates. What does MUSC intend to do about these units and how should we account for them in our bid response?

ANSWER: A list of elevator[s] currently under warranty are listed below. After the warranty period expires the elevators will be added to the schedule in accordance with item #D-7 “Addition or Deletion of Units.”²

² Item #D-7 provided:

Any unit added or deleted by MUSC from said list will result in an equitable adjustment to the contract price. Any unit added that is of the same make and model number currently on the contract will be added at the current monthly contract price. Any unit added that is not currently

Elevator #'s 133, 124, 136, 137, 110, 33, and 34.

Record at 121 – 122.

Amendment #2 was issued on February 12, 2009, and corrected answers given to several questions in Amendment #1, including Question 19. The corrected answer to Question 19 provided:

19. Many elevators on campus are currently under a no-cost warranty service period with different expiration dates. What does MUSC intend to do about these units and how should we account for them in our bid response?

ANSWER/UPDATED RESPONSE: THE LEVEL OF SERVICE COVERS WARRANTY ISSUES ONLY NOT MONTHLY MAINTENANCE AS DESCRIBED IN OUR BID DOCUMENT FOR ELEVATORS 110, 133, 134, 135, 136, and 137. AS FOR ELEVATORS #220, 221, 222, 223, 224 BIDDERS SHALL INCLUDE THE MAINTENANCE COST WITH THEIR BID THESE ELEVATOR [sic] WILL BE IN OPERATION DURING THE LIFE OF THE CONTRACT THE SUCCESSFUL VENDOR WILL ONLY BILL WHEN WORK IS PREFORMED [sic].

Record at 125. Amendment #2 also changed the bid opening date to March 3, 2009. Record at 125. With this change in the opening date, bidders had a period of at least two weeks during which they could have sought further clarification regarding the elevators under warranty or not yet in existence. However, no bidder submitted any follow-up questions to Amendment #2.

In the hearing before the Panel, Bruce Mills, the Facilities Manager at MUSC, testified that the eleven elevators listed in the amended answer to Question 19 were all Otis Gen2 elevators which were under warranty at the time of the solicitation. Mr. Mills also testified that the solicitation included two elevators, numbers 148 and 149, which were in a building that MUSC was in the process of purchasing at the time of the solicitation. Finally, Mr. Mills testified that three elevators, 225, 226, and 227, were in a building that was under construction.

on the contract will be negotiated by MUSC, the contractor, and the State and added per written change order. If a unit is deleted, the price as stated on the contract in effect for the [a]ffected unit will be subtracted from the contract price.

Record at 83.

On March 3, 2009, MMO opened bids from Thyssen, Otis, and Southern Elevator Company. Record at 26. Thyssen bid a monthly maintenance cost of \$15,000.00, or \$180,000.00 per year, and was the low bidder. Record at 126, 170, and 185. On its Attachment G, Thyssen placed asterisks by the monthly cost given for sixteen elevators and inserted the following notation: “*Future unit pricing not included in total pricing below per Amendment 2.” Record at 184 – 185. The sixteen elevators marked by asterisks were numbers 110, 133, 134, 135, 136, 137, 148, 149, 220, 221, 222, 223, 224, 225, 226, and 227. Record at 184 – 185. Thus, Thyssen excluded from its total pricing those elevators under existing warranty, construction, or purchase at the time of the solicitation.

On March 5, 2009, Gary Hodgin, a Procurement Manager for MMO, noted for the record that Thyssen had omitted some of its unit prices from its total and that MMO had included “these unit prices . . . in Thyssen Krupp’s evaluated amount.” Record at 257. In this memo, Mr. Hodgin does not characterize Thyssen’s omission as a mistake. *Id.* Furthermore, Mr. Hodgin testified in the hearing before the Panel that Thyssen did not seek to file any correction to its bid prior to opening.

On March 25, 2009, MMO posted a statement of intent to award the contract to Thyssen. Record at 278. The intended award was for a one year contract in the amount of \$244,440.00. *Id.* This amount was listed as both the “Unit Price” and the “Total” on the statement of intent to award. *Id.* Otis filed its protest on April 3, 2009. Record at 58 – 61.

Conclusions of Law

At the beginning of the Panel’s hearing, Thyssen moved to dismiss several of Otis’ protest grounds. Otis, in turn, withdrew several protest grounds. The Panel denied Thyssen’s

motion and proceeded to consider the merits of the responsiveness issue, which was the remaining ground of protest.³

Otis contends that Thyssen's bid was not responsive to the IFB because it excluded sixteen elevators from its total in Attachment G and on the bidding schedule. The Procurement Code defines a responsive bidder as "a person who has submitted a bid . . . which conforms in all material aspects to the invitation for bids." S.C. Code Ann. § 11-35-1410(7) (Supp. 2008). As an initial matter, therefore, the Panel must address whether Thyssen's exclusion of the sixteen elevators under existing warranty, construction or purchase at the time of solicitation affected a material requirement of the IFB. The Panel notes that determining materiality in this case is needlessly complicated by the vague and inconsistent wording of the IFB's requirements and the answers provided in the amendments.⁴ In light of the absence of a provision that unit prices control, however, the Panel finds that to be responsive to this particular IFB, a bidder needed to include the monthly prices for **all** ninety-four elevators listed in Attachment G in its total price for one year of service. Because Thyssen's bid excluded sixteen elevators from its total yearly price, its bid is not responsive.⁵

In the hearing before the Panel, the CPO urged the Panel to treat Thyssen's omission as a minor informality. The Procurement Code defines a minor informality as

one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders.

³ Although Otis also raised an issue regarding whether Thyssen's offer and the State's acceptance of it was based on a "meeting of the minds," the Panel declines to address that issue in light of its ruling on responsiveness below.

⁴ The Panel agrees with the CPO's assessment that "This protest could have been avoided by taking the time to proofread the solicitations and amendments to make sure every instruction to bidders was clear." Record at 32, n. 10.

⁵ The Panel notes that Thyssen, along with the other bidders, had ample time to seek further clarification of the unit and total pricing for Attachment G. However, Thyssen did not take advantage of this opportunity, choosing instead to submit a nonresponsive bid.

S.C. Code Ann. § 11-35-1520(13) (Supp. 2008). The Panel finds that the change between the price bid (\$180,000.00) and the price awarded (\$244,440.00) had more than a trivial effect on the total bid price. Moreover, the Panel finds that it was improper for the procurement officer to “correct” Thyssen’s bid in the absence of a mistake as this had a prejudicial effect on fair competition.⁶ Therefore, the Panel declines to find that Thyssen’s omission of sixteen elevators was a minor informality.

Additionally, the Panel finds that the poor wording of the IFB and its amendments created undue confusion and affected the fairness of the procurement. Therefore, the Panel finds that resolicitation of the contract is the proper remedy in this case. Resolicitation will give the State the opportunity to clarify its requirements regarding elevator maintenance at MUSC and will give the parties an opportunity to bid on a level playing field.

For the reasons stated above, the Panel reverses the decision of the CPO and directs the resolicitation of the contract in question with the understanding that the State may make such changes to the current IFB as it deems necessary to address the above issues.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

**BY: /s/ Willie D. Franks
Willie D. Franks, Vice-Chairman**

This 10th day of September, 2009.

Columbia, South Carolina

⁶ See S.C. Code Ann. section 11-35-1520(7) (Supp. 2008) (“After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted. After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations promulgated pursuant to it.”)