

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE:)	
Appeal by Cromer Food Services, Inc.)	Case No. 2014-2
)	
)	
IFB No. 5400006793)	
Campus Vending Services for Piedmont)	
Technical College)	
)	

This matter is before the South Carolina Procurement Review Panel (the Panel) for further administrative review pursuant to section 11-35-4210(6) and 11-35-4410 of the Consolidated Procurement Code (the Procurement Code). Cromer Food Services, Inc., (Cromer) appeals the decision of the Chief Procurement Officer (CPO) finding that he lacked jurisdiction to consider Cromer’s protest because it was untimely. The Panel requested the parties to submit written briefs on the issue of jurisdiction and now issues this order without a hearing. Michael H. Montgomery, Esquire, represented Cromer before the Panel, and William Dixon Robertson, III, Esquire, represented the CPO.

Findings of Fact

The Materials Management Office (MMO) conducted this solicitation on behalf of Piedmont Technical College (PTC) to acquire vending machine services at the various PTC campuses. After evaluating the bids received, MMO posted a notice of intent to award the contract to Canteen Vending (Canteen) on January 6, 2014. Record at PRP17. The notice includes the following provision: “Unless otherwise suspended or canceled, this document becomes the final Statement of Award effective 08:00:00, January 17, 2014.” Record at PRP 17. The notice also advises that any bidder aggrieved by an intended award must protest within ten

days of the date the notice of intended award is posted. *Id.* Cromer filed its “protest” letter on March 12, 2014. Record at PRP14 – PRP15.

Mr. C. T. Cromer, Founder and Chairman of Cromer Food Services, addressed the March 12th letter to Theresa Watts, the MMO procurement officer conducting the IFB for PTC. Record at PRP14. The opening paragraph of the letter states:

I am writing in reference to the Piedmont Technical College invitation for bid solicitation #5400006793, that was recently awarded to Canteen Vending. My protest is due to the failure of the State of South Carolina Materials Management Office to enforce the requirements outlined in the Request for Bid **Pricing and Equipment**.

Record at PRP14 (emphasis in original). Mr. Cromer expresses his disappointment with the State for failing to “enforce this contract.” *Id.* In particular, Mr. Cromer complains that the pricing for several items in the Canteen vending machines is higher than that specified by the IFB. *Id.* Mr. Cromer also complains that Canteen did not install certain machines at several campus locations as required by the IFB. *Id.* In closing, Mr. Cromer “requests that the state terminate this contract **in whole** for the convenience of the state as outlined in Paragraph (1) Termination on page 31 of the [I]FB.” Record at PRP15.

In his order, the CPO dismissed Cromer’s protest for lack of jurisdiction, finding that it was filed more than ten (10) days after the posting of the intended award and thus untimely. Record at PRP6 – PRP7. Mr. Cromer then filed this appeal with the Panel, which raises the same complaints about high pricing and equipment not being installed. Record at PRP12 – PRP13. He also states, “Our protest was not based on the fact that we were not awarded the contract, our protest was based on the fact that Canteen did not have to adhere to the specifics set forth in in the [Invitation] for Bid as stated by the SC Procurement Office.” Record at PRP12.

The Panel has also considered the May 2, 2014, letter from former State Procurement Officer John Stevens to Mr. Cromer, which Cromer included as an attachment to its written brief on jurisdiction.¹ In this letter, Mr. Stevens explains that most of the price changes Cromer complains of were established by Amendment 3 to the IFB and that Canteen's pricing is consistent with this required pricing. Mr. Stevens also determined that Canteen requested, and PTC approved, the addition of a large bag of chips for \$1.00. Although Canteen and PTC did not follow the formal change order process, Mr. Stevens noted that such changes were contemplated by the terms of the IFB and indicated that MMO did not object to the addition. With regard to the machines not installed as specified by the IFB, Mr. Stevens observes that PTC initiated these changes and that such changes were also contemplated by the IFB. Although the original solicitation did not require these changes to be documented through formal change orders, Mr. Stevens informed PTC that similar future changes should be so documented.

Conclusions of Law

Cromer first argues that it was error for the CPO to dismiss its protest for lack of jurisdiction under section 11-35-4210(1)(b) because its March 12th letter was not a protest but rather a request for resolution of a contract controversy under section 11-35-4230. The Panel notes that Mr. Cromer's March 12th letter does not specifically refer to either the protest or the contract controversy provision. Moreover, although the letter uses the term "protest" several times, it asks for a remedy, termination for convenience, which is more appropriate to a contract dispute. However, as discussed below, the Panel finds that it makes no practical difference whether Cromer intended its letter to raise a protest or a contract controversy because the Panel lacks jurisdiction under either statutory provision.

¹ The Panel has attached a copy of this letter to this order as Panel Attachment A.

Section 11-35-4210(1)(b) requires protests of an award or intended award to be filed within ten days of the posting of the notice of award. S.C. Code Ann. § 11-35-4210(1)(b) (2011). The Panel has consistently held that the time for filing cannot be waived. *In re: Protest of Printmasters Professional Printers, Inc.*, 2008-3 (November 21, 2008); *In re: Protest of Jones Engineering Sales, Inc.*, Panel Case No. 2001-8 (September 24, 2001). The notice of intent to award in this case was posted on January 6, 2014. Thus, to be timely filed, any protest of the intended award needed to be filed by January 16th. Mr. Cromer's letter, sent to Ms. Watts on March 12th, is clearly too late to confer jurisdiction under section 11-35-4210. If Mr. Cromer's letter is a protest, the CPO properly dismissed it for lack of jurisdiction.

Section 11-35-4230 provides in pertinent part:

(1) Applicability. This section applies to *controversies between a governmental body and a contractor . . . which arise under or by virtue of a contract between them* including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recession. The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor . . . concerning a contract solicited and awarded pursuant to the provisions of the South Carolina Procurement Code.

(2) Request for Resolution; Time for Filing. Either the *contracting state agency or the contractor . . .* may initiate resolution proceedings before the appropriate chief procurement officer by submitting a request for resolution to the appropriate chief procurement officer in writing setting forth the specific nature of the controversy and the specific relief requested with enough particularity to give notice of every issue to be decided. . . .

S.C. Code Ann. § 11-35-4230 (2011) (emphasis added).² Under the express terms of this provision, only the contractor or the state agency may seek resolution of a contract controversy before the CPO. The contract in this case was awarded to Canteen, not Cromer. Thus, the only parties with standing to request resolution of a contract controversy in this case are Canteen and

² Section 11-35-4230 also recognizes the right of a "subcontractor who is the real party in interest" to bring a request for resolution of a contract controversy. Cromer clearly does not fall under this category because it is Canteen's competitor, not its subcontractor.

PTC. Therefore, because Cromer lacks standing under section 11-35-4230, the Panel does not have jurisdiction to consider Cromer's claim as a contract controversy.

In its brief, Cromer also contended that the Panel should exercise its original jurisdiction under section 11-35-4410(1)(b) to review the questions Cromer has raised regarding the administration of the contract between PTC and Canteen. In particular, Cromer argued that the contract has been modified to reduce the number of machines installed and to raise prices in a manner which is inconsistent with the terms of the IFB and the general principles of the Procurement Code. Section 11-35-4410(1)(b) authorizes the Panel to conduct a de novo review of

[R]equests for review of other written determinations, decisions, policies, and procedures arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

S.C. Code Ann. § 11-35-4410(1)(b) (2011). In other words, this provision allows the Panel to review matters "other" than protests, suspensions, debarments, or contract controversies. The Panel has rarely exercised its jurisdiction under this section. *See, e.g., In re: Appeal Morganti National, Inc.*, Panel Case No. 1995-10 (Panel review of a CPO's determination to lift the automatic stay and proceed with award); *In re: Request for Review by Excent Corp.*, Panel Case No. 2013-3 (Panel review of a CPO determination cancelling an intended award while an appeal concerning that award was pending before the Panel); *In re: Protest of Three Rivers Solid Waste Authority by Chambers Dev. Co., Inc.*, Panel Case No. 1996-4 (wherein the Panel declined to review a political subdivision's adoption of a procurement policy when the request to the Panel

was not timely filed); and *In re: Petition for Administrative Review, GTECH Corp.*, Panel Case No. 2002-4 (wherein the Panel declined to review a “Cover Agreement” entered into by the State and contractor after contract award, finding it to be a “mutual agreement” and not a “written determination.”). The Panel finds that the modifications Cromer complains of do not materially alter the work being performed: Canteen is still providing and stocking vending machines at PTC. Moreover, any deficiencies or irregularities noted by Mr. Stevens regarding the lack of formal change orders have been adequately addressed and do not warrant further consideration by the Panel. Therefore, the Panel declines to exercise its jurisdiction under section 11-35-4410(1)(b).

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 
C. BRIAN MCLANE, SR., CHAIRMAN

This 28th day of August, 2014.

Columbia, South Carolina

Panel Attachment A

NIKKI HALEY, CHAIRMAN
GOVERNOR

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STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL



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May 2, 2014

Cromer Food Services, Inc.
Mr. C.T. Cromer
PO Box 1447
Anderson, SC 29662

Re: Solicitation No. 5400006793 / Contract No. 4400007688 – Piedmont Technical College

Dear Mr. Cromer:

Per our recent conversations, I reviewed your complaint letter dated March 12, 2014. Previously, I instructed Procurement Manager Theresa Watts to direct inquiries to both the current contractor and Piedmont Technical College. Since I wasn't fully satisfied with the level of detail provided, I asked both current contractor Canteen Vending and customer Piedmont Technical College (PTC) to provide a full accounting of both pricing and delivery for the locations and products identified in the original solicitation under Exhibits A and B.

Based on the information gathered, I find the following:

Regarding pricing, Solicitation Amendment No. 3 published to the web on November 25, 2013, corrected several vending prices found in Exhibit B to

Candy-\$1.00,
Small Chips/Crackers-\$.75,
Coffee-\$.75, and
Pastry-\$1.00.

Of those products/package sizes priced in Exhibit B, Canteen is in compliance with the required pricing.

Separately, and without reporting the change to the Materials Management Office (MMO), PTC authorized Canteen to add a large (2 ounce) bag of chips priced at \$1.00 each in select machines. Although the college's decision to add this package size was not reported to MMO, we do not object to this change.

Further, such changes were considered in the original solicitation on page 17, Part III, Scope of Work/Specifications, Requirements, R, which read in part, "Other items may be included upon approval of the College's Vending Contract Administrator and the Materials Management Office." However, PTC should formally request all such product changes in writing so that MMO may formalize via a Change Order.

While it is true that no sandwich machines were installed at either the Abbeville or Newberry Campuses and no coffee machine was installed at Abbeville, PTC directed such changes. PTC indicated that in these new campus locations, there was no room for the food machines, and, in the Abbeville location, the coffee machine. The locations and equipment identified in the original solicitation were based upon the old campus locations.

Such changes were considered in the original solicitation on page 15, Part III, Scope of Work/Specifications, first full paragraph under "Background," that read in part, "The number of vending machines, change machines and microwave ovens at each location may increase/decrease between the contractor and PTC during the course of the contract to accommodate the student/staff population. PTC must authorize the increase or decrease of these machines."

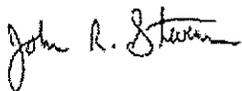
Although PTC should formally request all such product changes in writing so that the MMO may formalize via a Change Order, the original solicitation did not specifically require such documentation.

Canteen Vending submitted its offer based on the pricing, equipment, and locations identified in the original solicitation, Amendments 1, 2 and 3. On an ongoing basis, the State expects both Canteen Vending and Piedmont Tech to comply with the requirements of the resultant contract, considering any changes the state may authorize.

Since your complaint letter was automatically copied to Chief Procurement Officer for Supplies and Services Voight Shealy via the protest email address, I am copying Mr. Shealy, Piedmont Technical College Procurement Officer Kevin Wells, and Compass Group/Canteen Vending representative Terri Carpenter for their review and consideration.

Further communication should be directed to all parties copied on this correspondence.

Sincerely,



John R. Stevens, CPPB, CPM
State Procurement Officer

Cc: V. Shealy – B&CB – Division of Procurement Services
K. Wells – Piedmont Technical College
T. Carpenter – Compass USA / Canteen Vending