

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE CHIEF PROCUREMENT)
OFFICER FOR CONSTRUCTION)

IN THE MATTER OF: BID PROTEST)
MYRTLE BEACH AIR FORCE BASE)
PARKWAY CONSTRUCTION,)
LAKES 1-5)

DECISION

STATE PROJECT M26-N003-MJ-A1)
WEAVER COMPANY, INC.)

POSTING DATE: MAY 22, 2001

vs.)

MYRTLE BEACH AIR FORCE BASE)
REDEVELOPMENT AUTHORITY)

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Weaver Company, Inc. (Weaver) under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on the Myrtle Beach Air Force Base Parkway Construction, Lakes 1-5 Project (Project) for the Myrtle Beach Air Force Base Redevelopment Authority (RDA). Pursuant to §11-35-4210(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and determined that mediation was not appropriate. A decision is issued without a formal hearing after a thorough review of the bidding documents and the applicable law.

NATURE OF THE PROTEST

Using Bidding Documents prepared by its A/E, Thomas & Hutton Engineering Co. (T&H), the RDA solicited sealed bids for the following work:

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.¹

In addition to the Base Bid described above, the RDA included in the Bid Form two Bid Alternates, the first of which is not germane to the issue before the CPOC (Exhibit 2). The second bid alternate, which was deductive in nature², requested firm pricing for the following:

¹ Section 01011 of the Technical Specifications, paragraph 1.2A. (Exhibit 1)

*Delete site clearing, including disposal of all trees, shrubs and removal of stumps.*³

Bids were received and read aloud. The RDA subsequently posted a Notice of Intent to Award the Base Bid to Cherokee, Inc. (Cherokee) for the Base Bid only, thereby rejecting all bid alternates. Weaver protests the RDA's posting, contending that Weaver's net bid (Base Bid less the deductive amount for Bid Alternate 2) is less than the net bid of Cherokee. Weaver requests the CPOC to set aside the posting and award the contract to Weaver, or in the alternative, to submit the issue to the RDA's Board for consideration of both the Base Bid and the Bid Alternates.

DISCUSSION

CLAIMANT'S POSITION

Weaver contends that Weaver's net bid (Base Bid less the deductive amount for Bid Alternate 2) is some \$80,000 less than the net bid of Cherokee. Weaver further contends that the work comprising Bid Alternate 2 could be undertaken at no cost to the RDA. Weaver alleges that this information was not considered by the RDA Board, resulting in a total contract price to the RDA some \$93,000 higher than would be the case if the contract, including acceptance of Bid Alternate 2, were awarded to Weaver.

RESPONDENT'S POSITION

The RDA disputes Weaver's allegation that Weaver's net bid is approximately \$80,000 less than the comparable bid of Cherokee. RDA maintains that the work deleted by Bid Alternate 2 is required for the Project and T&H estimates the cost of the Bid Alternate 2 work to be approximately \$92,000. The RDA, based on the written report and analysis of T&H, maintains that possible savings resulting from the acceptance of Bid Alternate 2 are minimal and not worth the delay required to secure another contractor, nor the possible complications of having multiple contractors working simultaneously on the same site.

² A deductive alternate is one that removes work from the scope of work defined as the Base Bid. The term does not imply that acceptance of the alternate will automatically result in a decrease to the price of the Base Bid.

³ SE-330, page BF-1A, Alternate #2 of the Project Bidding Documents. (Exhibit 2)

CPOC FINDINGS

The Code, in §11-35-3020(2)c, requires that the award of a construction contract shall go to:

“...the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation for bids...”

Weaver’s protest is that the State failed to award the contract to the lowest bidder. While the Code and Regulations do not define “low bidder,” the Regulations do speak to the issue of how a low bidder is determined when bid alternates are included. Specifically, Regulation 19-445.2145.E(2)(a) requires the use, when applicable, of the AIA’s standard instructions to bidders, as amended by the State. The impact of bid alternates on the determination of the “low bidder” is addressed in *Article 9-Supplementary Instructions [to Bidders]*⁴. Paragraph 5.3.2 of Article 9 states:

“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.”

On their face, these instructions to bidders explain that the State may determine the low bidder on the basis of the Base Bid and any alternates accepted. In accordance with these instructions, the RDA elected to reject Bid Alternates 1 and 2. Having done so, the determination of the low bidder is based on the Base Bid amount only⁵. The CPOC finds there is no credible evidence presented that would support a finding that RDA failed to comply with the requirements stated above or applied them unfairly, arbitrarily or capriciously. Accordingly, Weaver’s protest is dismissed.

⁴ Article 9 is the State’s standard modification to AIA A701-1987 and is issued pursuant to SC Regulation 19-445.E(2)(a). (Exhibit 3)

⁵ Compare *J.J.D. Urethane Co. v. Montgomery County*, 694 A.2d 368 (Pa Commw. Ct. (1997)) (“[G]overnment entities may solicit alternative specification bids so that after the varying prices are bid, the entities may weigh the costs and benefits of different proposals.”); *L.G. DeFelice and Sons, Inc. v. Argraves*, 118 A.2d 626 (Conn Super. Ct 1955) (allowing state to choose between reinforced concrete and bituminous concrete pavement after bids opened); and *Rance Construction, Inc.*, B-244,456 October 21, 1991, 91-2 CPD ¶ 347 (“Requirements that contracts for public work be let to the lowest bidder are not violated when

DECISION

It is the decision of the Chief Procurement Officer for Construction that the protest filed by Weaver Company, Inc. fails to carry its burden of proof and is hereby dismissed. The Myrtle Beach Air Force Base Redevelopment Authority is hereby authorized to proceed, in accordance with the Procurement Code, with the award of the contract for the Project to the lowest responsive and responsible bidder, consistent with its programmatic needs.

Michael M. Thomas

Michael M. Thomas
Chief Procurement Officer
for Construction

May 22, 2001
Date

specifications are drawn for different work, bids are sought on different bases, and a choice is not made by contracting officials until after all the bids are opened.”).

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(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.