

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	DECISION
In the Matter of Protest of:)	
)	CASE No. 2011 – 139
)	
Hills Machinery Company, LLC)	
)	
)	
Department of Transportation)	POSTING DATE: December 2, 2011
IFB No. SB10366)	
<u>Excavator, Crawler</u>)	MAILING DATE: December 2, 2011

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest received by the CPO September 27, 2011 from Hills Machinery Company, LLC (Hills). With this invitation for bids (IFB), the South Carolina Department of Transportation (SCDOT) attempts to procure two excavator, crawlers; one with mechanical thumb installed and one without mechanical thumb. SCDOT rejected Hills' bid and posted an intent to award to Blanchard Machinery Company (Blanchard). In the letter, Hills protested SCDOT's rejection of its bid and the intent to award to Blanchard.

In order to resolve the matter, the CPO conducted a hearing November 22, 2011. Appearing before the CPO were Hills, represented by John Schmidt, Esquire; Blanchard, represented by Mark Greene, Vice President of Heavy Division, and Brian Smith, Territory Manager; and SCDOT, represented by Glennith Johnson, Esquire.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On August 12, 2011, SCDOT issued the IFB. (Ex. 1)
2. On September 6, 2011, SCDOT opened the bids received as follows:

<u>Bidder</u>	<u>Bid Amount</u>
Hills	\$283,705.95
Flint Equipment Company	287,410.00
Blanchard	299,890.00
Linder Industrial Machinery	300,400.00
Altman Tractor & Equipment	317,150.00
ASC Construction Equipment (Ex. 7)	317,155.34

3. On September 7, 2011, Jim Castle, SCDOT Specification Writer, “disapproved” Hills’ bid writing, “The transport width for both Hills Machinery and Flint Equipment exceeded specification guidelines outlined in paragraph 3.6.” (Ex. 4)¹
4. On September 20, 2011, SCDOT posted its intent to award to Blanchard. (Ex. 5)
5. On September 27, 2011, Hills filed its protest with the CPO.
6. On October 3, 2011, SCDOT suspended its intent to award. (Ex. 6)

CONCLUSIONS OF LAW

Six bidders submitted bids, with Hills being the lowest bid. (Ex. 7) Vickie Stephans, SCDOT Procurement Manager, submitted Hills’ bid to Tim Castle, SCDOT Specification Writer, for evaluation. Mr. Castles “disapproved” awarding the contract to Hills citing, “The transport width for both Hills Machinery and Flint Equipment (another rejected bidder) exceeded specification guidelines outlined in paragraph 3.6” as the single basis for rejection of Hills’ bid. (Ex. 4) He recommended that SCDOT award to Blanchard instead, which SCDOT did September 20, 2011. (Ex. 5) Hills protested SCDOT’s intent to award to Blanchard and specifically SCDOT’s rejection of Hills’ bid.

¹ SCDOT rejected Flint’s bid, but that rejection was not at issue in this protest.

Specific to transport width, the IFB required “Transport width shall not exceed 10ft 5 inches” (125 inches). (Ex. 1, p. 22, Dimensions and Weight) Hills, in its response to the questionnaire that SCDOT included in the IFB, wrote that the transport width of the Case Model # CX 210B that it bid was “10 ft, 6 in.” (126 inches) (Ex. 3, p. 29) According to Hills’ bid, the transport width of the model excavators it offered SCDOT were 126 inches wide, which exceeded the transport width specification by one inch.

The Code reads, in part, “notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids must be given.” (11-35-1520(10), Competitive Sealed Bidding, Award) Hills’ bid was not responsive to the transport width requirement of the IFB.

However, the Code defines a responsive bidder as “a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids.” (Responsive bidder 11-35-1410(7)) (Emphasis added) The Regulations provide further, “Any bid that fails to conform to the essential requirements of the invitation for bids shall be rejected.” (S.C. Reg. 19-445-2070(A)) (Emphasis added) At issue here is whether a transport width of one inch greater than that specified is “essential.”

Under certain circumstances, the Code authorizes the state to allow a bidder to cure certain deficiencies in his bid or to waive the requirement altogether. It reads in relevant part:

A minor informality or irregularity is 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. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing. (11-35-1520(13))

SCDOT rejected Hills' bid based upon one variation from the specifications. In this case, it is not possible, as a practical matter, for Hill's to cure their deficiency, but at issue is whether SCDOT should have waived the exception as an "immaterial variation from the exact requirement."

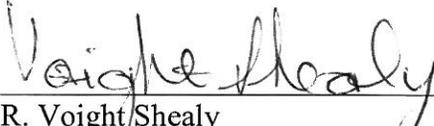
No one argued that Hills' deviation from the strict compliance with the specification on transport width had any affect on price, quality, quantity, or delivery of the equipment. Mr. Castles testified that he did not inquire if the difference affected price." He stated further that he did not evaluate if the variation affected quality or delivery. He stated that the variation does not affect performance; just transport width. Mr. Castle stated "During the review process, I stopped when I reached this one conclusion." In fact, Glennith Johnson, Legal Counsel for SCDOT, stipulated that Hill's deviation on transport width had no affect on price, quality, quantity, or delivery.

According to testimony received, even with the one inch additional width, the excavators offered by Hills will fit on the SCDOT trailers. Further, whether the transport width is 125 inches or 126 inches, SCDOT must seek a waiver in order to transport the excavators on its trailers. According to Mr. Castle, the waiver covers both widths of up to 144 inches.

Therefore, the CPO finds that Hills' one inch variation from the specified transport width to be an "immaterial variation" from the essential requirements of the IFB and waives the variation as a minor informality or irregularity per S.C. Code section 11-35-1524(13).

DETERMINATION

For the aforementioned reasons, the protest is granted. The award to Blanchard is cancelled.



R. Voight/Shealy
Chief Procurement Officer for Supplies and Services

12/2/2011

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2011)

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

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the General Appropriations Act for Fiscal Year 2011-2012, "[r]equests for administrative review before the South Carolina Procurement Review Panel 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...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." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

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Hills Machinery Company, LLC (hereinafter "HMC") respectfully submits this protest of the South Carolina Department of Transportation's intent to award, A-SB10366-9/06/2011, to Blanchard Machinery Company. HMC submits that it met all bid specifications and was the low bidder, and accordingly requests that the contract be awarded to HMC.

The grounds for HMC's protest are as follows:

1) HMC indicated in its bid documents that it would meet all bid specifications. HMC listed no exceptions to its bid. However, HMC was notified that it was disqualified because of a failure to meet a bid specification, specifically a track width of 125 inches. HMC was aware of the 125 inch requirement, and did not take exception because the track widths for the machine being offered was variable from 124.75 inches through 125.5. Accordingly, no exception was taken to the bid specification because the machine met specification, and had HMC been awarded the contract, it would have delivered the requested items as specified in solicitation number SB10366. HMC still maintains both the capability and intention of delivering the specified items.

HMC believes there may have been some confusion because of the generic manufacturer's literature that was attached to the bid. These documents indicate that the, "Track overall width w/31.5 inches (800mm) shoes," is equal to 10 feet and 6 inches or 3.20 meters. The 126 inch dimension, as noted in the Questionnaire, is a nominal measurement and representative only of the controlled Specification Sheet as published by Case Construction. However, as explained above, no exception was listed because Case Construction Equipment, represented by HMC, offers various track shoe widths. Again, variation in track shoe widths for the machine bid for this solicitation allow for an overall machine width range from 124.75 inches through 125.5 inches, and the machine would have been delivered set to 125 inches.

2) HMC was low bidder and met all requirements specified in this solicitation. It is HMC's understanding that the state procurement code requires the contract to be awarded to the low bidder if it has met all contract/bid specifications. In this case, HMC submits that it has met all bid specifications and is the low bidder. Accordingly, HMC respectfully requests that the contract be awarded to HMC.


James F Hicklin


Stephen Davis