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Department of Administrative Services

Sonny Perdue
Governor

Dana R. Russell
Commissioner

August 26, 2004

VIA FAX 404-688-0671 & US MAIL

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233 Peachtree Street, NE
Atlanta, Georgia 30303-1530

RFQ # 47500-104-000000033 ("RFQ")

Dear Mr. Joy:

This letter responds to the Request for Formal Review that you filed on behalf of Five Stars Auto Collision ("Five Stars"). For the reasons stated in this letter, Five Star's appeal is denied.

I have separately determined, however, that the contracts awarded and issued through this process must be rebid for reasons independent of Five Stars' protest. Performance will be authorized for Regions 5, 6, and 7 for which contract awards have been issued pursuant to the RFQ but those contracts will expire upon issuance of a new award for Regions 5, 6, and 7.

Section 3.7 of the *Georgia Vendor Manual* gives DOAS the authority to review the award independent of any protest. After reviewing the RFQ, I have concluded that the RFQ was fatally flawed since the solicitation of "pricing" is confusing at best and at worst makes no sense. In soliciting the "prices" upon which award would be made, Page 2 of the RFQ states that:

"[DMVS] may ... renew this contract for up to four additional one year terms at the same terms and conditions with price escalation as follows: Bidder shall submit the following quotes for renewal years based on justified increased costs

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of operations. Any one year renewal increase cannot exceed five percent (5%) of the previous year's rates. Renewal percentage will be considered as part of the bid evaluation.

First year renewal: _____ % (percentage)
 Second year renewal: _____ % (percentage)
 Third year renewal: _____ % (percentage)
 Fourth year renewal: _____ % (percentage)"

The foregoing language clearly appears to contemplate that the state will pay money to the contractor. In this contract however, the state pays no money to the contractor – the contractor pays money to the state (in which case the state would want the “price” to increase as much as possible). For this reason, this price escalation paragraph makes no sense because it tries to limit the benefit to the state. The Issuing Officer has explained that the foregoing language was used because it was “standard language” – no consideration was given to the fact that compensation was different from the standard compensation arrangement.

Even if one can get beyond the fact that the price escalation clause makes no sense, it would still be unclear whether the 5% threshold is based on the money paid to the state (i.e. dollars paid to the state cannot decrease by more than 5%) or whether the 5% threshold is based on the commission percentage itself. In other words, is the “rate/price” the commission rate or the dollars paid? If there were some language in the RFQ which could fairly lead to one conclusion or another, the award could possibly be sustained. However, I find no such language and the Issuing Officer's admission that the language was used because it was a “standard clause” without regard to the specifics of the procurement further supports that there is no language which leads to one conclusion or another. Therefore, the RFQ must be rebid.

I. FIVE STARS' PROTEST AND APPEAL

A. BACKGROUND

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By way of background, the bid closing date/time was June 7, 2004 at 1:00pm. Five Stars' bid was received in the State Mail Room¹ operated by DOAS via certified mail at 2:52 pm on June 4, 2004. Five Star's bid was received and stamped in the State Purchasing Office Bid Room at 2:30pm, June 7, 2004.²

B. FIVE STARS' PROTEST WAS UNTIMELY

Five Stars' protest is untimely and ineligible for consideration according to Section 3.8 of the *Georgia Vendor Manual* which requires that protests be filed within 10 days of the date of the Notice of Award. In this case, the Notice of Award was publicly issued and posted on the Georgia Procurement Registry on June 23, 2004. Therefore, Five Stars was required to have filed its protest by July 6, 2004³. Therefore, the July 16 filing of the

¹ There seems to be some confusion regarding the status of the mail room operated by DOAS. Five Stars appears to believe that the mail room receives mail on behalf of just DOAS. The mail room is actually operated by DOAS pursuant to 50-5-51(3) and serves all state government agencies in the Capitol Hill area so it receives and distributes not just DOAS mail but mail for all state agencies in the Capitol Hill area. Therefore, if delivery to the mail room equals delivery to the Bid Room, any bid (or any other document) addressed to any agency is deemed delivered to that agency once it is in the mail room. I am unprepared to establish this as a matter of policy.

² I have also reviewed the transcript of Five Stars' July 29 oral presentation. Five Stars appears especially concerned that Five Stars' bid inexplicably sat in the State Mail Room for 3 days from June 4 – June 7.

-... The package somehow and we're not sure what happened here , somehow apparently was not transferred or we've been told was not sent to the bid room to 1308 until the 7th until somewhere around 2:30 ... That's three days later. Now my presumption is the procedure is not for mail to sit in the mail room for three days, particularly if it has bid marked on it. SO that by itself we think is sufficient to show that there was – that some governmental employee didn't do what they were supposed to do. p. 15

-Why it took three days we don't know p. 21

-It was received here in the mail room and for whatever reason it did not get from the mail room to the bid room apparently as we've been told for almost three days p. 34

I have reviewed the calendar and June 4 was a Friday and June 7 was a Monday so one of the reasons for the three day gap was the intervening Saturday and Sunday during which time state offices were closed.

³ The 10th day fell on Saturday July 3; Monday July 5 state offices were closed for observation of the July 4 holiday.

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protest is untimely. Five Stars has argued that the 10 day period begins when Five Stars received personal notice of the Notice Award. I can find no authority for Five Stars' position.

C. FIVE STARS' CITATIONS ARE NOT APPLICABLE SINCE FEDERAL RULES DIFFER FROM STATE RULES

Even if Five Stars' protest had been timely, the protest fails on the merits. Five Stars has cited numerous cases decided under the Federal Acquisition Regulations (FAR) in support of its contention that bids sent certified mail and received in a mail room before the date and time bids are due is acceptable. After reviewing those cases, I have concluded that those cases are not applicable in this matter because Georgia rules governing mailed bids differ from the rules in those cases (FAR expressly relieves bidders of the risk of delivery errors whereas Georgia rules expressly put the risk of delivery errors on bidders in all respects). Specifically the FAR (and instructions in the bids under FAR) cited in your cases state:

“-CAUTION TO BIDDERS - ... late bids and modifications or withdrawals thereof sent through the mails will be considered ONLY IF SENT BY REGISTERED MAIL, OR BY CERTIFIED MAIL FOR WHICH A POSTMARKED RECEIPT HAS BEEN OBTAINED AS SPECIFIED IN SUCH PROVISIONS Decision of the Comptroller General B-150514

-LATE BIDS AND MODIFICATIONS OR WITHDRAWALS. Bids and modifications or withdrawals thereof received at the office designated in the Invitation for Bids after the exact time set for opening of bids will not be considered unless; (a) they are received before award is made; (b) they are sent by registered mail or certified mail for which an official post office stamp (postmark) on the original Receipt for Certified Mail has been obtained or by telegraph if authorized; and (c) it is determined by the Government that late receipt was due solely to either (i) delay in the mails, or delay by the telegraph company if telegraphic bids are authorized, for which the bidder was not responsible or (ii) mishandling by the Government after receipt at the Government installation Decision of the Comptroller General B-150514

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-A late bid shall be considered for award only if (ii) in the case of a mailed bid (other than one covered by (iii)(B) below), it was sent by registered mail or by certified mail for which an official post office stamp (postmark) on the original Receipt for Certified Mail has been obtained and (iii) it is determined that either (B) The bid if submitted by mail (or by telegram when authorized) was received at the Government installation in sufficient time to be received at the office designated in the invitation by the time set for opening and except for delay due to mishandling on the part of the Government at the installation, would have been received on time at the office designated. Decision of the Comptroller General B-150514 citing ASPR 2-303.2"

Contrast these rules with the rule in Georgia which states that "the State Purchasing Office is not responsible for late delivery or non-delivery ... vendors are responsible in all respects for timely delivery of bids/proposals." See Section 5.18 of the Georgia Vendor Manual. In light of Section 5.18, I cannot conclude that there was no rational basis for rejection of Five Stars' bid on the basis that it was late.

The other provisions of the *Georgia Vendor Manual* (sec 5.22) and *Georgia Procurement Manual* (sec. 5.5.5 (b)) that Five Stars cites merely show that the state has discretion to accept late bids and when that discretion terminates absolutely. Those provisions however do not require the acceptance of late bids. For the reasons stated in the following section, I cannot conclude that the refusal to accept Five Stars' late bid is without a rational basis (i.e. being unable to consistently establish when late is "late" and when late is "not late").

DISCRETIONARY ACCPETANCE OF LATE BIDS

Five Stars has also raised the point that integrity of the bidding process will not be compromised if Five Stars' bid is accepted because Five Stars had no opportunity to revise its bid once it left Five Stars' possession. However, if we accept this as a basis for

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accepting late bids, we must be prepared to answer the questions “when is late delivery to the Bid Room too late?” and “when is late delivery to the Bid Room not too late?”. Being unable to provide a consistent answer, I am unprepared to direct the State Purchasing Office to accept Five Stars’ late bid.

For illustrative purposes only, consider bids that are due on Monday June 7 at 1:00. Three bids are sent certified mail and delivered to the State Mail Room.

- Bid A is delivered certified mail to the State Mail Room on Friday June 4 at 2:30 - well before the Monday 1:00 opening - but not delivered to the Bid Room until after the bid due date.

- Bid B is delivered certified mail to the State Mail Room on Monday after the Monday 1:00 opening but was put in the mail on Friday before the Monday 1:00 opening.

- Bid C is delivered certified mail to the State Mail Room on Tuesday after the Monday 1:00 opening but put in the mail on Saturday before the Monday 1:00 opening

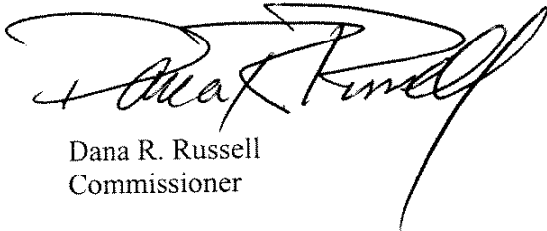
There is no clear rule as to which of these bids to accept and which to reject even though all three bids are just as unsusceptible to tampering by the bidders. A seemingly simple way around this problem would be to adopt a rule that mandates acceptance of late bids when there is proof that the bid was out of the bidders control prior to bid opening. However, such a rule turns the bid due date/time into nothing more than an estimate and I am unprepared establish a policy of bid due date/time as a mere estimate of when bids are due.

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SUMMARY

The protest of Five Stars is denied on procedural grounds since it was filed late but would also fail on substantive grounds for the reasons stated in this letter. Contracts awarded and issued pursuant to this RFP, however, must be rebid since the price escalation provision (which has a direct impact on the evaluation of the bids) of the RFQ made no sense. Performance will be authorized for Regions 5, 6, and 7 for which contract awards have been issued pursuant to the RFQ pending a new award for Regions 5, 6, and 7.

Sincerely,



Dana R. Russell
Commissioner

- cc: Stephen Austin, Austin's Used Truck Parts
- Sidney McLeod, McLeod's Auto Company
- Rhonda Walsh, R&D Auto Truck Salvage
- Sandi Johnston, DMVS
- Hugh Farley, Director, DOAS State Purchasing
- Belinda Luncheon, DOAS Issuing Officer
- Joe Kim, Director, DOAS Office of Legal Services

