

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE: Appeal by Short Counts, LLC	)	
	)	Case No. 2014-4
	)	
	)	
RFP No. 5400006878	)	
Traffic Data Collection Services for the	)	
South Carolina Department of Transportation)	)	

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This matter is before the South Carolina Procurement Review Panel (the Panel) for further administrative review pursuant to sections 11-35-4210(6) and 11-35-4410 of the Consolidated Procurement Code. The appeal before the Panel involves a solicitation conducted by the South Carolina Department of Transportation (SCDOT) to acquire traffic data collection services. Short Counts, LLC (Short Counts) and its subcontractor, Palmetto Traffic Group, LLC (PTG) protested SCDOT's intended award to Quality Counts, LLC (Quality Counts). After the Chief Procurement Officer (the CPO) for Supplies and Services dismissed PTG's protest for lack of jurisdiction and denied Short Counts' protest on May 29, 2014, PTG and Short Counts timely appealed those decisions to the Panel, and the Panel scheduled a hearing for July 22, 2014. Prior to that scheduled hearing, the parties filed various motions which were heard by the Panel by conference call on July 21, 2014. The Panel subsequently ruled that the CPO had erred in dismissing PTG's protest and remanded that matter to him for further proceedings.<sup>1</sup> Because PTG's protest involved the same SCDOT solicitation, the Panel also stayed Short Counts' appeal until such time as the CPO reached a decision.<sup>2</sup> The Panel's order staying Short Counts' appeal did not resolve motions filed by Quality Counts and the CPO seeking partial dismissal and/or

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<sup>1</sup> This Panel decision may be accessed at [http://www.mmo.sc.gov/PS/legal/decisions/2014-3\(II\).pdf](http://www.mmo.sc.gov/PS/legal/decisions/2014-3(II).pdf).

<sup>2</sup> This Panel decision may be accessed at [http://www.mmo.sc.gov/PS/legal/decisions/2014-4\(II\).pdf](http://www.mmo.sc.gov/PS/legal/decisions/2014-4(II).pdf).

summary judgment on two of Short Counts' appeal grounds. After the CPO issued a written determination denying PTG's protest, Short Counts' appeal was restored to the Panel's calendar.

With the consent of the parties, the Panel conducted a telephonic hearing on the unresolved motions on January 8, 2015. During the conference call, Short Counts was represented by E. Wade Mullins, III, Esquire. John E. Schmidt, III, Esquire, represented Quality Counts. Amanda T. Taylor, Esquire, represented the South Carolina Department of Transportation (SCDOT), and W. Dixon Robertson, III, Esquire, represented the Chief Procurement Officer for Supplies and Services (the CPO).

### **Background**

In November of 2013, SCDOT issued a Request for Proposal (RFP) "seeking firms or individuals to provide **Traffic Data Collection Services**, in relation to the collecting, processing, uploading, and reporting of traffic data. . . . for a calendar year at traffic data collection sites designated by the SCDOT and located in one of the forty-six (46) counties in South Carolina." Record at PRP88. The RFP provided divided the counts into two lots, and the award was to be made by lot. Record at PRP107. On February 21, 2014, SCDOT posted a notice of intent to award Lot A to Quality Counts. Record at PRP138. Short Counts timely protested this intended award on February 28, 2014. Record at PRP79 – PRP81.

Short Counts' protest letter<sup>3</sup> raised the following concerns:

1. Short Counts and Quality Counts were very close in the many aspects of the RFP. In respect to pricing on the RFP, Short Counts was lower in many categories (especially on the higher quantities).
2. The organization of the prices that Quality Counts submitted is not reasonable or rational. By putting the same price for all of the quantities they marginalized the bidding process, and should not be accepted by the SCDOT. The only

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<sup>3</sup> Short Counts' protest letter did not number its protest grounds; each statement was designated by a bullet point. The CPO numbered the protest grounds in his written determination, and the Panel has adopted that numbering for ease of reference.

reasoning I can understand for their bid is if they had an intimate knowledge of what type and amount of counts will be ordered in the upcoming years (since they have been performing these type of counts over the past year). If this is accepted then there is a problem with the RFP to the point that lower quantities carry weight on the proposal grading, but have no real world applications.

3. Quality Counts was rated lower in other categories except for pricing. Is the SCDOT sacrificing quality for price? Once again, Short Counts had lower prices in many higher quantity categories. Who put together the RFP and provided the grading scale? It was very similar looking to the GDOT RFP that was published last year.

4. Why was there a five week suspension of the award from its original publishing date?

5. Did Quality Counts adhere to all of the items published in the RFP?

6. Furthermore, it appears to me that the SCDOT would support a local firm over [an] out of state agency when the numbers are so close. Short Counts, Roger Dyer, and Palmetto Traffic Group are all South Carolina counting firms with South Carolina (tax paying) employees. Awarding this contract to a firm based in Oregon with a satellite office in North Carolina is taking money earmarked for SC infrastructure and moving it out of state where it [cannot] help the SC economy but hurt it. This has taken an opportunity to help and support three SC based small businesses and help them grow, but instead will cripple them.

Record at PRP80. Short Counts did not amend its protest letter.

The CPO convened a hearing on May 15, 2014 to consider Short Counts' protest ground number 2 above, which he interpreted to raise a claim that Quality Counts' bid was materially unbalanced. Record at PRP17. Of the remaining grounds, the CPO found that numbers 1, 3, 4, and 6 failed to allege a violation of law; therefore, the CPO dismissed those grounds for failure to state a claim. Record at PRP17. With regard to ground number 6, the CPO also noted that resident vendor preferences do not apply to RFPs under the Procurement Code. *Id.* The CPO also found that ground number 5 failed to state any issue to be decided and dismissed that ground for being overly vague. *Id.*

In its appeal letter to the Panel, Short Counts did not challenge the CPO's dismissal of protest grounds 1, 3, 4, 5, or 6. Record at PRP36 – PRP42. Rather, Short Counts challenged the CPO's ruling on protest ground number 2,<sup>4</sup> and raised two additional grounds for appeal: one asserting that SCDOT testimony at the CPO's hearing indicated that the bid schedule as implemented was ambiguous and did not reflect the State's actual needs (Appeal Issue #2), and one asserting that the CPO should have canceled the intended award because SCDOT failed to properly apply the weightings as established by the award criteria (Appeal Issue #3).<sup>5</sup> Record at PRP40 – PRP42.

### **Conclusions of Law**

Quality Counts and the CPO have each moved for dismissal of Appeal Issue #2 and Appeal Issue #3 because neither issue was set forth in Short Counts' protest letter and are therefore untimely under the Procurement Code. In addition, the CPO argues that even if Appeal Issue #2 was raised by Short Counts' protest letter, it should still be dismissed because it is an untimely protest of the solicitation. Furthermore, the CPO argues that Appeal Issue #3 should be dismissed because the CPO never issued a written determination regarding SCDOT's withdrawn request to cancel the solicitation and the Panel therefore has nothing to review. SCDOT joined the motions filed by Quality Counts and the CPO.

In response, Short Counts argues that Appeal Issue #2 was raised in light of testimony at the CPO's hearing that revealed that although the bid schedule listed 82 line items, SCDOT intended to issue one purchase order for one line item during the first year of the contract. Short Counts argues that there was no way it could have known prior to the CPO's hearing how

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<sup>4</sup> This protest and appeal ground, which is labeled number 1 in Short Counts appeal letter, will be considered by the Panel in a merits hearing to be held at a later date.

<sup>5</sup> The record before the Panel includes a letter from SCDOT's procurement officer requesting that the CPO cancel the intended award under Regulation 19-445.2085(c)(7). Record at PRP59. However, SCDOT's subsequently withdrew its request for cancellation. Record at PRP71.

SCDOT intended to implement the bid schedule. In addition, Short Counts asserts that Appeal Issue #2 was raised in its protest letter under protest ground number 2.<sup>6</sup> With regard to Appeal Issue #3, Short Counts contends it raised the issue of SCDOT's withdrawn request at the CPO's hearing. For the reasons discussed below, the Panel disagrees and grants the motions to dismiss Appeal Issue #2 and Appeal Issue #3.

Under the Procurement Code, the right to protest arises at two points in time. First, a prospective bidder aggrieved by the State's solicitation or specifications must file a protest within fifteen days of the solicitation's issuance. S.C. Code Ann. § 11-35-4210(1)(a) (2011). Second, an actual bidder aggrieved by an award or intended award must file a protest within ten days of the posting of the award or intended award. S.C. Code Ann. § 11-35-4210(1)(b) (2011). However, an actual bidder is prohibited from raising issues related to the solicitation or specifications in a protest of the award or intended award. *Id.* Reading these two provisions together, if a vendor does not protest a solicitation's language within fifteen days of its issuance, then the vendor loses the right to protest such language. *In re: Appeal by National Cosmetology Association*, Panel Case No. 1996-17 (November 15, 1996); *In re: Appeal by First Sun EAP Alliance, Inc.*, Panel Case No. 1994-11 (October 31, 1994).

Assuming for the sake of argument that the last sentence of Short Counts' protest ground number 2 sufficiently raised the issue, the Panel finds that Short Counts' Appeal Issue #2 challenges the bid schedule itself. As such, Appeal Issue #2 protests a specification set forth in the solicitation SCDOT issued on November 7, 2013. Because Short Counts' protest of the award was filed some four months later, on February 28, 2014, its attempt to raise a solicitation protest is clearly untimely under section 11-35-4210(1)(a). Furthermore, the Panel finds that the

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<sup>6</sup> Short Counts relies specifically on the last sentence of protest ground number 2: "If this is accepted then there is a problem with the RFP to the point that lower quantities carry weight on the proposal grading, but have no real world applications."

fact that Short Counts was unaware of how SCDOT intended to issue its purchase orders during the first year of the contract until it heard testimony at the CPO's hearing does not excuse it from the jurisdictional requirement of filing a timely solicitation protest. *See In re: Appeal by Jones Engineering Sales, Inc.*, Panel Case No. 2001-8 (September 24, 2001) (wherein the Panel noted "the time for filing protests set forth in section 11-35-4210 is jurisdictional and may not be waived by conduct or consent of the parties"); *Cf. In re: Protest by J & T Technology, Inc.*, Panel Case No. 1987-3 (July 13, 1987) (wherein the Panel discussed the specificity needed for stating a grievance and observed, "The protestant cannot alter or modify its grievance as the protest develops except as permitted by § 11-35-4210."). Short Counts could have discovered how SCDOT intended to issue purchase orders during the question and answer period after the solicitation was issued. However, neither Short Counts nor any other vendor asked this question. Therefore, the Panel finds that Appeal Issue #2 was not timely raised in a solicitation protest and is hereby dismissed.<sup>7</sup>

With regard to Appeal Issue #3, the Panel finds that this issue was never raised by Short Counts in its original protest letter. Furthermore, although SCDOT did request the CPO to cancel the solicitation pursuant to Regulation 19-445.2085(C) after Short Counts' award protest was filed, it subsequently withdrew that request. As a result of that withdrawal, the CPO never issued a written determination regarding the issue, nor was he required to do so because he decided not to cancel the award.<sup>8</sup> S.C. Code of State Regulations, Regulation 19-445.2085(C)

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<sup>7</sup> In support of its position, Short Counts urged the Panel to follow its decision allowing a protestant to challenge the evaluation method used by the State in an award protest in *In re: Protests of Office Max, Staples Technology Solutions, and U.S. Ink and Toner, Inc.*, Panel Case No. 2010-3 (March 12, 2010). The Panel declines to do so, finding that *Office Max*, which involved a situation where a procurement officer came up with an undisclosed evaluation method after the bids were submitted, is factually distinguishable from the instant case.

<sup>8</sup> In connection with a CPO's decision not to cancel an award pursuant to Regulation 19-445.2085 (C), the Panel has previously observed that cancellation is not mandatory and that "what is in the best interest of the State can only be determined by the State." *In re: Appeal by Helena Chemical Company*, Panel Case No. 2001-5 (August 23, 2001). In other words, a decision to cancel or not to cancel an award is a matter of business judgment within the sound

(2011). Absent a written determination from the CPO, the Panel has nothing to review and therefore lacks jurisdiction under the Procurement Code. S.C. Code Ann. § 11-35-4410(1)(b) (2011). Thus, the Panel hereby dismisses Appeal Issue #3.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

BY:   
C. BRIAN MCLANE, SR., CHAIRMAN

This 28<sup>th</sup> day of January, 2015.

Columbia, South Carolina

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discretion of the CPO. However, the Panel takes this opportunity to caution the CPOs not to exercise their discretion in such a manner that would allow them to avoid Panel review by declining to issue a written determination if one is required.

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