

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

Short Counts, LLC

South Carolina Department of
Transportation
RFP #5400006878
Traffic Data Collection Services

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO. 2014-108

POSTING DATE: May 29, 2014

MAILING DATE: May 29, 2014

This matter is before the Chief Procurement Officer (CPO) pursuant to a protest filed by Short Counts, LLC (Short Counts) under authority of South Carolina Code Section 11-35-4210. With this Request for Proposals (RFP), the South Carolina Department of Transportation (SCDOT) attempts to procure traffic data collection services. After evaluating the proposals received, on February 21, 2014, SCDOT posted an Intent to Award Lot A to Quality Counts, LLC and Lot B to Short Counts, LLC. The award for Lot A to Quality Counts, LCC (Quality Counts) was protested by Short Counts.

The CPO convened a hearing May 15, 2014 to hear arguments on the allegations of unbalanced bidding by Quality Counts. Appearing before the CPO were Palmetto Traffic Group, LLC¹ (PTG) and Short Counts, LLC, both represented by Wade Mullins, Esquire; Quality Counts, represented by John Schmidt, Esquire; and SCDOT, represented by Amanda Taylor, Esquire.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference

¹ PTG worked with Short Counts to prepare the offer. It also filed a protest, which the CPO dismissed in a decision posted May 29, 2014, as Case No. 2014-107.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On November 7, 2013, SCDOT published the RFP. [Ex. 1]
2. According to the document, on the same day, SCODT issued Amendment #1. [Ex. 2]
3. On December 10, 2013, SCDOT opened the proposals including that of Short Counts [Ex. 5] and Quality Counts [Ex. 6].
4. On February 21, 2014, following evaluation of the proposals, SCDOT posted Intents to Award Lot A to Quality Counts, LLC and Lot B to Short Counts, LLC. The award of Lot A is under protest.
5. On February 28, 2014, Short Counts protested the Intent to Award Lot A to Quality Counts.
6. On May 15, 2014, the CPO convened a hearing to hear only so much of the protest as alleged Quality Counts' pricing was materially unbalanced..

DISCUSSION

SCDOT solicited proposals to procure Traffic Data Collection Services. In soliciting this requirement, SCDOT identified the scope of work as:

The South Carolina Department of Transportation (SCDOT) is issuing this 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. All the collected traffic data counts are 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.

[Emphasis SCDOT's] (Ex. 1, Part I. Scope of Work, Acquire Services, p. 4)

Following evaluation and scoring of the proposals received, SCDOT posted its Intent to Award Lot A to Quality Counts. The composite scores for Lot A were:

<u>Offeror</u>	<u>Total Score</u>
Quality Counts	446.0
Short Counts	415.8
Southern Traffic Services	345.5
The Traffic Group	324.3
Davenport	215.2
Quality Traffic Data	210.6
Traffic Data Services	154.25
Vaughn & Melton/SEPI	153.5

[Ex. 7]

PROTEST GROUNDS

Short Counts protested SCDOT's intent to Award Lot A to Quality Counts on the following grounds:

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 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 value in 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 and out of state agency when the numbers are so close. Short Counts, Roger Dyar, 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 can not 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.

CONCLUSIONS OF LAW

Protest Ground 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).

Protest Ground 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.

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

Protest Ground 5 - Did Quality Counts adhere to all of the items published in the RFP?

Protest Ground 6 - Furthermore, it appears to me that the SCDOT would support a local firm over and out of state agency when the numbers are so close. Short Counts, Roger Dyar, 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 can not 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.

SCDOT processed this solicitation as a Request for Proposals. The Consolidated Procurement Code (the Code) reads, “If a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive sealed proposals.” [11-35-1530 (1) Conditions for Use] It reads further, “The request for proposals must state the relative importance of the factors to be considered in evaluating proposals but may not require a numerical weighting for each factor.”

[11-35-1530(5) Evaluation Factors]

The RFP identified the evaluation criteria as:

1. Cost associated with the Scope of Work and terms and conditions as outlined in the solicitation for the total potential five (5) year contract. - **50%**
2. Experience and Qualifications as detailed in the Scope of Work - **30%**
3. Traffic Data Collection Methodology and Equipment as detailed in the Scope of Work - **20%**

An evaluation committee of SCDOT technical experts determined Quality Counts the highest ranked offeror.

Regarding award of an RFP, the Code reads, “Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking

into consideration price and the evaluation factors set forth in the request for proposals.” [11-35-1530(9) Award] The Code reads further, “The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law: 11-35-1530(9) (Competitive Sealed Proposals Award).” [SC Code 11-35-2410. Finality of determinations. (A)]

Section 11-35-4210(2)(b) requires that “[a] protest ... must set forth both the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided.”

The Procurement Review Panel has ruled numerous times that a protestant must notify all parties of the issues to be decided with sufficient particularity. See *Appeal by NBS Imaging Systems*, Panel Case No. 1993-16 (challenge to broad areas of the RFP were too vague; more complex solicitations require greater specificity in protest). The Procurement Review Panel has eschewed overly technical analyses of protest letters. The Panel has required that the protest must in some way alert the parties to the general nature of the grounds for protest. *Protest by Sterile Services Corporation*, Panel Case No. 1983-17. An effective way to do this is by alleging that some provision of the solicitation has been ignored, or that the award of the contract has violated some statute or regulation. *Appeals of Logisticare Solutions, LLC, and Medical Transportation Management, Inc.*, Panel Cases Nos. 2011-1 and 2011-2 (Order on motion to dismiss issued May 11, 2011); cf. *Appeal by Coastal Rapid Public Transit Authority*, Panel Case No. 1992-16 (protestant must show the State departed from standards set forth in the Procurement Code and the RFP).

The CPO finds that none of these protest grounds gives adequate notice with sufficient particularity of the issues to be decided. Short Counts' Ground 5 stated no particular issues to be decided at all. Therefore, it is dismissed as overly vague.

The CPO finds the remaining grounds assert no violation of law. Therefore, Short Counts' grounds 1, 3, 4, and 6 are dismissed for failure to state a claim.

Additionally, regarding Short Counts' Ground 6, "it appears to me that the SCDOT would support a local firm over and out of state agency when the numbers are so close", the Code offers vendors resident to South Carolina, as well as, vendors selling South Carolina end products substantial preferences. [11-35-1524] However, the Code excludes RFP's from these preferences [11-35-1524(E) (5)] Therefore, SCDOT had no legal basis to favor a local firm during consideration of the award.

Protest Ground 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 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 value in real world applications.

The CPO treats this protest ground as alleging Quality Counts' pricing was materially unbalanced and therefore its offer should have been rejected as non-responsive.

SCDOT asked offerors to propose pricing for eighty-two (82) different variations and quantities of traffic counts in the categories:

- Items 1-8 - Forty-eight (48) hour, non-directional, volume count (in quantities ranging from 1-10 to 7,001-10,000)
- Items 9-16 - Forty-eight (48) hour, directional, volume count (in quantities ranging from 1-10 to 7,001-10,000)
- Items 17-19 - Forty-eight (48) hour, ramp volume count (in quantities ranging from 1-100 to 5001-2,000)

- Items 20-25 - Forty-eight (48) hour, directional, vehicle classification count (in quantities ranging from 1-10 to 501-1,000)
- Items 26-31 - Forty-eight (48) hour, directional, vehicle classification count by lane (in quantities ranging from 1-10 to 501-1,000)
- Items 32-36 - Forty-eight (48) hour, directional, speed count 9in quantities ranging from 1-10 to 101-500)
- Items 37-41 - Forty-eight (48) hour, directional, speed count (in quantities ranging from 1-10 to 101-500)
- Items 42-49 - Forty-eight (48) hour, directional, speed count (in quantities ranging from 1-10 to 7,001-10,000)
- Items 50-57 - Twenty-four (24) hour, directional, volume count (in quantities ranging from 1-10 -7,001-10,000)
- Items 58-60 - Twenty-four (24) hour, ramp volume count (In quantities ranging from 1-10 to 501-2,000)
- Items 61-66 - Twenty-four (24) hour, ramp volume count (in quantities ranging from 1-10 to 501-1,000)
- Items 67-72 - Twenty-four (24) hour, directional, vehicle classification count by lane (in quantities ranging from 1-10 to 501-1,000)
- Items 73-77 - Twenty-four (24) hour, directional, vehicle classification count by lane (in quantities ranging from 1-10 to 101-500)
- Items 78-82 - Twenty-four (24) hour, directional, speed and vehicle classification count by lane (in quantities ranging from 1-10 to 101-5000)

All the offerors, except Quality Counts, submitted tiered prices by category for the quantities offered. Short Counts alleged that fact alone was evidence of unbalanced bidding by Quality Counts.

Asked why he identified so many line items and variations for offers to propose pricing, Daniel Covey, SCDOT Procurement Manager, stated he expected SCDOT to issue purchase orders as needed for specific projects. It would also allow SCDOT to build a database of how it spent its money. However, Todd Anderson, P.E., SCDOT Road Data Services Engineer, stated

he would, most likely, issue one purchase order for all 7,000 counts SCDOT expected to order the first year of the contract. Short Counts and PTG argued Short Counts lower price for 7,000 counts was *prima facie* evidence that Quality Counts' price proposal will not result in the lowest overall cost to the State despite being the low evaluated bid. The CPO finds the evidence inconclusive however.

The Procurement Review Panel recently addressed the issue of unbalanced bidding and established the burden a protestant must prove:

The Panel finds that the following elements must be proven in the instant case to establish a materially unbalanced bid: (1) there must be evidence showing that some prices are significantly less than cost for some line items; (2) there must be evidence showing that some prices are significantly more than cost for some line items; and (3) there is a reasonable doubt that the bid will result in the lowest overall cost to the State despite being the low evaluated bid.

Appeal by Advanced Imaging Systems, Inc., Panel Case No. 2013-7.

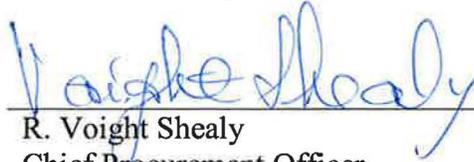
Keith Ripperton, P.E., Quality Counts' Carolina Senior Operations Manager, responded Quality Counts averaged its pricing for all categories and offered level prices for all. He also stated none of Quality Counts' unit prices were less than cost. Brad White, PTG's owner, acknowledged that the cost categories Mr. Ripperton identified and included in Quality Counts' pricing were the same kind of costs Mr. White used in estimating PTG's pricing. He admitted there were different approaches to pricing a contract like this one, and that he did not know the method Quality Counts used. Finally, he did not identify a single line item price in Quality Counts' proposal as significantly above cost.

Given the Panel's directive, Short Counts failed to prove by the preponderance of the evidence the first two elements of an unbalanced bidding claim: (1) that some prices are significantly less than cost for some line items; and (2) that some prices are significantly more

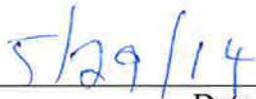
than cost for some line items. Given this failure of proof the CPO need not reach the third element and this protest issue is denied.

DETERMINATION

For the foregoing reasons, Short Counts' protest is denied.



R. Voight Shealy
Chief Procurement Officer
For Supplies and Services



Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2013)

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: <http://procurement.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 108.1 of the 2013 General Appropriations Act, "[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 financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by 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); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.

FORMAL PROTEST FOR SOLICITATION #5400006878 LOT A

After examining the Award for Lot A of the SCDOT Solicitation #5400006878, I have many concerns that I feel warrant immediate attention. These are as follows:

- 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).
- 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 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 value in real world applications.
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- Why was there a five week suspension of the award from its original publishing date?
- Did Quality Counts adhere to all of the items published in the RFP?
- Furthermore, it appears to me that the SCDOT would support a local firm over and out of state agency when the numbers are so close. Short Counts, Roger Dyar, 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 can not 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.

Based on the above-cited (as well as many other reasons), I would ask that award of this contract be suspended/withdrawn until all issues have been addressed.

I would request a formal meeting with all pertinent staff to discuss these matters in an effort for resolution.

Please review this FORMAL PROTEST of Solicitation #5400006878 Lot A and contact me with any questions/comments and to discuss setting up a meeting date/time.

Respectively Submitted,

Mark Short

Short Counts, LLC