

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In Re: Protest of Staples Business
Advantage

CASE NO.: 2015-114

Protest of Award to Forms & Supply, Inc.
for a Statewide Term Contract for Office
Supplies and Copy Paper, Solicitation No.
5400006696

POSTING DATE: October 7, 2014

MAILING DATE: October 7, 2014

The South Carolina Consolidated Procurement Code (the Code) grants the right to protest to any actual bidder who is aggrieved in connection with the intended award of a contract. S.C. Code Ann. § 11-35-4210(1)(b). This solicitation is for a Statewide Term Contract for Office Supplies and Copy Paper. Staples protests the timing of the “Final Statement of Award Effective Date” of September 17, 2014 to Forms & Supply, Inc. (“FSI”) [Attachment 1] The Chief Procurement Officer¹ issues this ruling without a hearing.

Findings of Fact

Issued Solicitation	September 26, 2014
Issued Amendment 1	October 10, 2014
Issued Amendment 2	October 15, 2014
Issued Amendment 3	October 30, 2014
Issued Amendment 4	November 5, 2014
Issued Amendment 5	November 25, 2014
Issued Amendment 6	December 5, 2014
Issued Amendment 7	January 21, 2014
Issued Amendment 8	February 5, 2014
Issued Amendment 9	February 11, 2014
Opened Bids	February 18, 2014
Staples determined non-responsive	March 31, 2014
Posted Intent to Award to Forms & Supply	April 1, 2014
Protest by Staples	April 3, 2014
Protest by Greenville Office Supply	April 11, 2014

¹ The Interim Materials Management Officer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

Intent to Award to Forms and Supply Suspended	April 11, 2014
CPO denies Greenville protest; grants Staples protest	June 10, 2014
Appeal by Greenville Office Supply	June 20, 2014
Panel Decision affirming CPO	September 10, 2014
Intent to Award to Forms & Supply Reinstated	September 16, 2014
Intent to Award to Forms & Supply Effective	September 17, 2014
Issued Intent to Award to Staples	September 17, 2014
Intent to Award to Staples Effective	September 29, 2014

Discussion

The Materials Management Office (MMO) issued this Invitation for Bids to establish contracts to furnish, warehouse and provide inside, desktop delivery of office supplies, copy paper and envelopes. The intent was

... to award one (1) contract to a contractor that will provide services statewide and one (1) contract per region of the State for service to each of the three (3) regions identified in the attachment. All told, the State intends to award up to four (4) contracts. During the maximum contract period, it is the State’s intent that customers will have two (2) contractors to choose from in each region; the “statewide” contractor and one (1) regional contractor. No single bidder will be considered for award for both statewide service and service to an individual region, however.

[Solicitation, page 3]

MMO initially found all bidders other than Forms & Supply non responsive and issued an Intent to Award the statewide contract to Forms & Supply on April 1, 2014. The award statement included the following language:

OFFERS FOR GREENVILLE OFFICE AND OFFICE DEPOT, WERE AT PRICES LOWER THAN THAT OF AWARD ARE NON-RESPONSIVE AS THEY DID NOT MEET THE SOLICITATION REQUIREMENTS.

Because the statewide vendor could not also hold any regional contract, MMO made no award for the regional contracts. Section 11-35-4210(1)(b)² grants any actual bidder the right to protest the intended award of a contract within 10 days after posting. Staples and Greenville Office Supply timely protested the procurement officer’s determination each was non-responsive. Neither, however, disputed that Forms

² 11-35-4210(1)(b) Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award....

& Supply was both responsive and responsible. Section 11-35-4210(7)³ states that, in the event of a timely appeal, the State **will not proceed further** with the award until after a decision is rendered by the CPO or the Panel if there was a timely appeal. The procurement is frozen in place until after the final administrative decision is issued. The Intent to Award to Forms & Supply was suspended on April 11, 2014.

The CPO affirmed MMO's determination that Greenville was non responsive. Greenville appealed this decision to the Panel. The CPO found that Staples was indeed a responsive bidder for all four contracts and granted its protest. No one appealed the Staples decision. Even with the inclusion of Staples bid, Forms & Supply was the lowest responsive and responsible bidder for the statewide contract. On September 10, 2014, the Panel upheld the CPO's determination that Greenville's bid was non responsive. After the Panel issued its decision, MMO reinstated the Intent to Award for the statewide contract on September 16, 2014, with an effective date of September 17, 2014. MMO issued an Intent to Award to Staples for all three regions on September 17, 2014 with an effective date of September 29, 2014. Since this was the initial award for the regional contracts, Section 11-35-1520(10)⁴ requires it be posted for 10 days. No one protested the award to Staples.

Staples, however, protested the "timing of the 'Final Statement of Award Effective Date' of September 17, 2014 to FORMS & SUPPLY INC." Its protest message claimed:

On September 17, MMO posted a notice of intent to award to Staples with an effective date of September 18, 2014. Later that day, MMO issued a new notice of intent and changed the award effective date to September 29, 2011.

Staples contests the MMO's disparate treatment of the award dates of the contract to the two contract awardees. Staples is being put at a competitive disadvantage in that its Award Effective Date is 12 days later than that of FSI. This competitive disadvantage is based upon MMO's mistake and no fault of Staples.

³ 11-35-4210(7) Automatic Stay of Procurement During Protests. In the event of a timely protest pursuant to subsection (1), the State shall not proceed further with the solicitation or award of the contract until ten days after a decision is posted by the appropriate chief procurement officer, or, in the event of timely appeal to the Procurement Review Panel, until a decision is rendered by the panel

⁴ Section 11-35-1520(10) Award. Unless there is a compelling reason to reject bids as prescribed by regulation of the board, 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 by posting the notice at a location specified in the invitation for bids. ... For contracts with a total or potential value of one hundred thousand dollars or greater, notice of an intended award of a contract must be given by posting the notice for ten days before entering into a contract and must be sent to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section.

Staples is correct that MMO made a mistake. That mistake, though, was the erroneous effective date on the first award statement. MMO corrected the mistake when it re-issued the intent to award, properly reflecting the requirement that it be “post[ed] the for ten days prior to entering into a contract.” Section 11-35-1520(10).

Determination

The effective date of the revised Intent to Award to Staples was dictated by statute. Staples fails to identify any violation of the Procurement Code in its protest. Staples’ protest of the intended award of a contract to Forms & Supply fails to state a claim for which relief can be granted.

Protest denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

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 2014 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.

Exhibit 1

From: [Crum, Liz](#)
To: [Spicer, Mike](#); [Robertson, Dixon](#); [Register, Allen](#)
Cc: [William R. Mendelsohn \(william.mendelsohn@staples.com\)](mailto:william.mendelsohn@staples.com)
Subject: Protest on behalf of Staples regarding timing of Award Dates.
Date: Monday, September 22, 2014 3:00:52 PM
Importance: High

This is being filed with Mr. Spicer as CPO since he attended the Panel hearing as CPO in the GOS Panel appeal.

Please accept this as a protest on behalf of STAPLES BUSINESS ADVANTAGE of timing of the "Final Statement of Award Effective Date" of September 17, 2014 to FORMS & SUPPLY INC. ("FSI"). This protest is filed pursuant to § 11-35-4210(1)(b), which provides, in pertinent part: "Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the ... or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier. The reinstatement of the notification of intent to award was 9/16/14 and the date of award was 9/16/14. Staples is within the 10 day period and the protest is timely.

On September 17, MMO posted a notice of intent to award to Staples with an effective date of September 18, 2014. Later that day, MMO issued a new notice of intent and changed the award effective date to September 29, 2011.

Staples contests the MMO's disparate treatment of the award dates of the contract to the two contract awardees. Staples is being put at a competitive disadvantage in that its Award Effective Date is 12 days later than that of FSI. This competitive disadvantage is based upon MMO's mistake and no fault of Staples.

Under the IFB, the contract for copy paper and office supplies could be awarded up to 4 separate contractors, but the contractor that was awarded the state wide contract was not eligible to be awarded a contract for one of the three regional contracts. FSI was the low responsive and responsible bid and was awarded the state wide contract. Staples and GOS were determined to be non-responsive by MMO and the notice of intent to award to FSI was suspended during the protests of Staples and GOS.

Without a hearing, the CPO, based upon notification from MMO that it had erroneously determined that Staples was non-responsive and that Staples was, in fact, responsive, issued an order determining that Staples had been responsive at all times. GOS appealed its non-responsiveness determination and the Panel upheld the CPO's determination that GOS was non-responsive.

Section 11-35-20 provides, in pertinent part, that the purposes of the procurement code are to:

(b) to foster effective broad based competition for public procurement within the free enterprise system; ...

(f) to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures

followed in public procurement;

Allowing a one contract awardee, in a state term contract, to have a competitive marketing advantage over another contract awardee, neither fosters effective broad based competition for public procurement within the free enterprise system nor ensures the fair and equitable treatment of the disadvantaged contractor—Staples—within the procurement system. MMO's decision to have two disparate contract Award Effective Dates is in violation of Section 11-35-20(b) and (f). The contract award date to FSI should be suspended until the same award effective date as Staples.

Thank you for your consideration of this protest.



M. Elizabeth Crum
Shareholder
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803 799 9800 Main | 803 753 3278 Fax
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STATE OF SOUTH CAROLINA
MATERIALS MANAGEMENT OFFICE
CAPITOL CENTER
1201 MAIN STREET, SUITE 600
COLUMBIA SC 29201

Intent to Award

Posting Date: September 16, 2014

Solicitation: 5400006696
Description: Office Supplies & Copy Paper
Agency: Statewide Term Contract

The State intends to award contract(s) noted below. Unless otherwise suspended or canceled, this document becomes the final Statement of Award effective **08:00 A.M., September 17, 2014**. Unless otherwise provided in the solicitation, the final statement of award serves as acceptance of your offer.

Contractor should not perform work on or incur any costs associated with the contract prior to the effective date of the contract. Contractor should not perform any work prior to the receipt of a purchase order from the using governmental unit. The State assumes no liability for any expenses incurred prior to the effective date of the contract and issuance of a purchase order.

REINSTATEMENT NOTICE

THE INTENT TO AWARD IS HEREBY REINSTATED

CERTIFICATES OF INSURANCE COVERAGE TO BE FURNISHED PRIOR TO
COMMENCEMENT OF SERVICES UNDER CONTRACT.

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest within ten days of the date notification of award is posted in accordance with this code. A protest shall be in writing, shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided, and must be received by the appropriate Chief Procurement Officer within the time provided. [Section 11-35- 4210]

PROTEST - CPO ADDRESS - MMO: Any protest must be addressed to the Chief Procurement Officer, Materials Management Office, and submitted in writing

- (a) by email to protest-mmo@mmo.sc.gov,
- (b) by post or delivery to 1201 Main Street, Suite 600, Columbia, SC 29201.

Contract Number: 4400008126
Awarded To: FORMS & SUPPLY INC
99 VANTAGE POINT ROAD

WEST COLUMBIA SC 29172

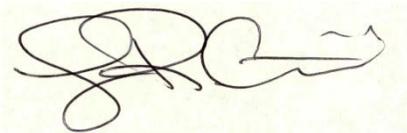
Total Potential Value: \$ 50,000,000.00 *

Maximum Contract Period: September 17, 2014 through September 16, 2019

Item	Description	Unit Price	Total
00001	STATEWIDE Office Supplies	\$ 711,332.08	\$ 711,332.08
00002	STATEWIDE Copy Paper	\$ 1,793,782.00	\$ 1,793,782.00
00003	STATEWIDE discount off catalog	66%	66%

* This amount represents the total spend on office supplies by the State of South Carolina for the five-year contract period and no amount is guaranteed to any awarded vendor.

Procurement Officer



ANTHONY R CROMARTIE