

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In Re: Protest of Liberty Fire Protection Inc.

CASE NO. 2015-131

Protest of Solicitation No. 15.50.NC.B.T5,
Maintenance Contract for Fire
Extinguisher and Hood Systems for the
College of Charleston

POSTING DATE: March 30, 2015

MAILING DATE: March 30, 2015

The South Carolina Consolidated Procurement Code (the Code) grants the right to protest to any prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract. S.C. Code Ann. § 11-35-4210(1)(a). This solicitation was issued by the College of Charleston for the maintenance of Fire Extinguisher and Hood Systems. Liberty Fire Protection, Inc. (Liberty) protests the solicitation as unduly restrictive. (Attachment 1) The College of Charleston's response to Liberty's protest is included as Attachment 2. The Chief Procurement Officer¹ issues this ruling without a hearing.

Findings of Fact

Invitation For Bids Published:
Protest Received

02/26/2015
02/26/2015

Discussion

Liberty protests that a specification in the solicitation requiring the contractor and its service technicians be certified by the manufacturers creates an unfair competitive advantage for its competition. The requirement is found in the Scope of Work / Specifications, Section B Certification as follows:

Contractor and service technician(s) must be certified by Kidde Inc., Ansul Inc, Pyrochem, and Denlar in order to inspect or work on the hood systems listed at Appendix A.

Liberty protests that:

Ansul and Pyrochem systems are Tyco Inc. systems and Tyco owns Simplex Grinnell thus Simplex not only automatically received the distribution license due to this fact, but they also receive preferential pricing thus giving them an unfair competitive advantage.

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

Liberty also protests that:

... in order to receive a certification from these companies you must be a distributor for them and both Ansul and Pyrochem (both owned by Tyco) have been and continue to deny allowing us to gain a distribution license for their product lines as they state that our market is currently “oversaturated” with a total of three distributors in the area.

Liberty requests the requirement be modified to read as follows:

B Licensing: Contractor and service Technician(s) must have a current Pre-engineered Fixed Suppression System Class D license issued by the State of South Carolina. A copy of manufacturer certification or a sworn affidavit attesting to the contractors [*sic*] ability to obtain the proper manufacturer’s installation and maintenance manuals and provide testament that all inspections and maintenance shall be performed in compliance with the manufacturer’s standard per South Carolina Law Section 23-9-45 shall be included. Copy of the State license and either the manufacturer certification or a Sworn Affidavit must be submitted with quote.

The College of Charleston responds that:

The position is that the Chief Fire Marshal (CFM), part of the Office of the President, is concerned that any organization purporting to be capable of servicing such fire equipment should provide absolute proof of their ability to undertake the tasks by providing certified approval from the equipment manufacturers. That manufacturer certification, coupled with State mandated certification, would provide the CFM with absolute assurance and certainty that training, conforming to standards that the equipment manufacturers stipulate, would be utilized in maintaining a safe and secure campus for the students, staff and faculty of the College. The College asserts that these standards of safety must not be compromised.... In this solicitation the College is solely concerned with safety of life and standards of service provision and has no knowledge of or role in allocation of distributorships by companies providing such goods and services.

It is not uncommon that some distributors receive better discounts than other distributors. Preferential discounts are not limited to manufacturer-owned distribution. They may be granted to high volume distributors or distributors that simply negotiated better rates. Liberty acknowledges that there are three distributors for Ansul and Pyrochem systems in the service area. One of these is Simplex Grinnell, which is owned by Tyco. Liberty alleges that Tyco’s granting Simplex, a distributorship and preferential pricing for its other products, Ansul and Pyrochem, gives Simplex an unfair competitive advantage.² However, nothing in the Code prohibits the business arrangement between Tyco and Simplex. This ground of protest is denied.

Liberty also states that the requirement that the contractor to have manufacturer’s certification prevents it from participating in this procurement because, to get Ansul and Pyrochem certification, a contractor

² Neither of the other two Ansul and Pryochem distributors have raised this issue.

must be a distributor for Ansul and Prychem and Liberty has been denied distributorships for these systems. According to Liberty, it is denied a distributorship because Ansul and Pyrochem believe that three distributors in this area are sufficient to service their customer base.³ The College's decision to require manufacturer's certification does limit competition. The question is, does this requirement limit competition in violation of the Code?

In *Appeal by Cambex Corporation*, Panel Case No. 1992-7, the South Carolina Procurement Review Panel acknowledged that:

To summarize, a specification can be restrictive so long as it is not "unduly" so - in other words, it must be written in such a manner as to balance the reasonable, objective needs of the State against the goal of obtaining maximum practicable competition.

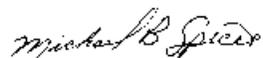
In analyzing whether a specification meets the requirement that it not be unduly restrictive, the Panel will not substitute its judgment for the judgment of the using and procuring agencies so long as the choice of specification is not unreasonable, arbitrary, capricious or contrary to the Procurement Code.

The Chief Fire Marshall for the College of Charleston is responsible for the safety of its resident and non-resident students, faculty and administrative personnel while they are on campus. In his professional opinion he feels that this requirement is in the best interest of the College and its students, faculty and employees. Liberty has not proven that the requirement is unreasonable, arbitrary, capricious, or contrary to the Code. The certification requirement is not unduly restrictive, and this ground of protest is denied.

Determination

For the foregoing reasons, Liberty's protest is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

³ Like Tyco's arrangement with Simplex, these are private business decisions that are not prohibited by the Code.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised October 2014)

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 209, 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 for 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.

Attachment 1

From: [Adam Webb \(843\) 514-5855](mailto:Adam.Webb@tyco.com)
To: [Protest-MMO](#)
Subject: Protest 15.50.NC.B.T5 Maintenance Contract for Fire Extinguisher and Hood Systems
Date: Thursday, February 26, 2015 12:29:23 PM
Attachments: [image001.ipa](#)
[image002.ipa](#)
Importance: High

February 26, 2015

Attention: Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

Good afternoon Chief Procurement Officer,

This letter is to serve as our formal protest of bid number 15.50.NC.B.T5, titled Maintenance Contract for Fire Extinguisher and Hood Systems per section C.11.12.

We are protesting under the section for Disclosure of Conflicts of Interest or Unfair Competitive Advantage, section (b) preventing an unfair competitive advantage.

Under the Scope of Work / Specifications, Section B Certification: "Contractor and service technician(s) must be certified by Kidde Inc., Ansul Inc, Pyrochem, and Denlar in order to inspect or work on the hood systems listed at Appendix A."

The problem as we see it is twofold:

- First, the Ansul and Pyrochem systems are Tyco Inc. systems and Tyco owns Simplex Grinnell thus Simplex not only automatically received the distribution license due to this fact, but they also receive preferential pricing thus giving them an unfair competitive advantage.
- The second issue lies in the fact that in order to receive a certification from these companies you must be a distributor for them and both Ansul and Pyrochem (both owned by Tyco) have been and continue to deny allowing us to gain a distribution license for their product lines as they state that our market is currently "oversaturated" with a total of three distributors in the area. Therefore, this clearly causes an unfair competitive advantage against our company.
- Being this is a state institution and a state bid we would expect one to therefore follow state laws in regards to licensing and not provide specific terminology designed to specifically limit involvement and provide an unfair competitive advantage.
- We are capable of obtaining both material and manufactures instruction manuals per state law and therefore believe this along with four licensed techs with over 30 years of experience installing, inspecting and servicing such systems to be more than sufficient to meet the needs as illustrated in this scope of work.

As this contract is currently written it will not only provide an unfair competitive advantage but it will limit competitive bids to possibly just those companies that hold Tyco's Ansul and Pyrochem distribution license thus not allowing us to even participate in the bidding process.

The relief we are requesting is to have the Certification section of the Scope of Work / Specifications to be removed from the contract and replaced with: B Licensing: Contractor and service Technician(s) must have a current Pre-engineered Fixed Suppression System Class D license issued by the State of South Carolina. A copy of manufacturer certification or a sworn affidavit attesting to the contractors ability to obtain the proper manufacturer's installation and maintenance manuals and provide testament that all inspections and maintenance shall be performed in compliance with the manufacturer's standard per South Carolina Law Section 23-9-45 shall be included. Copy of the State license and either the manufacturer certification or a Sworn Affidavit must be submitted with quote.

Thank you for your time and consideration in regards to this protest. Please feel free to contact us with any questions or concerns. We look forward to your response shortly.

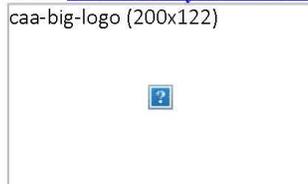
Kind Regards,

Adam Webb

Adam Webb



Liberty Fire Protection Inc.
Cell: (843) 514-5855
Office: (843) 552-1301
Fax: (843) 552-8018
Email: adam@libertyfireprotectioninc.com
Web: www.LibertyFireProtectionInc.com



Attachment 2

From: [Cabill, Niall P](#)
To: [Spicer, Mike](#)
Cc: [White, John](#); [Singh, Anastasia](#); [Hutto, Kristen](#); [Skinner, Gail](#)
Subject: 15.50.NC.B.T5 :: Maintenance Contract for Fire Extinguisher and Hood Systems :: Protest
Date: Monday, March 02, 2015 11:00:56 AM
Attachments: [image001.jpg](#)
[image002.jpg](#)

Chief Procurement Officer,

Please see, below, the response by the College of Charleston to the protest.

The position is that the Chief Fire Marshal (CFM), part of the Office of the President, is concerned that any organization purporting to be capable of servicing such fire equipment should provide absolute proof of their ability to undertake the tasks by providing certified approval from the equipment manufacturers. That manufacturer certification, coupled with State mandated certification, would provide the CFM with absolute assurance and certainty that training, conforming to standards that the equipment manufacturers stipulate, would be utilized in maintaining a safe and secure campus for the students, staff and faculty of the College. The College asserts that these standards of safety must not be compromised.

Critically, because of need to provide safe and secure accommodation, while permitting ongoing occupation of student housing; staff and faculty facilities together with food services, the CFM, who is likewise the *authority having jurisdiction* is bound by National Fire Protection Association (NFPA) 17A (7.3.1.1) which requires, de facto, that:

- "The service technician shall possess a certification document confirming the requirements in 7.3.1 and issued by the manufacturer or testing organization that is acceptable to the authority having jurisdiction".

It is noted that NFPA 17A recognizes the various options for training classes, but recommends that training and qualifications be conducted by the manufacturer of the equipment being worked on. This is because each manufacturer has different characteristics and variations, so what might be acceptable for one system might not apply to another. The requirement is for specificity rather than general training. The Chief Fire Marshal who is also the authority having jurisdiction requires, correctly, that certification of competency which is endorsed by the manufacturers of the equipment be provided.

Importantly, the CFM is bound by the State's Fire Marshals Rules and Regulations (71-8303.4) which, de jure, require at E(3) that:

- Provide proof of manufacturer's certification for at least one type of fixed fire extinguishing system.

At 71-8303.4 at E(4) it is stated:

- "For each additional type of pre-engineered fire extinguishing system, the applicant may submit proof of a manufacturer's certification or an affidavit which shall attest to the ability to obtain the proper manufacturer's installation, maintenance and service manuals and manufacturer's parts or alternative components that are listed for use with the specific extinguishing system and provide testament that all installations and maintenance shall be performed in complete compliance with the manufacturer's installation, maintenance and service manuals and NFPA standards."

It may also be pertinent to note that 71-8303.5, for the issue of a Class D license, requires applicants provide to the Office of the State Fire Marshal a current manufacturer's training certificate for each type

of fixed pre-engineered system that is sought. It would necessarily follow that to undertake the work being solicited that the vendor would be in possession of that license.

At 71-8303.6 it is specifically stated:

- "No person shall install or service any type of Class D fire equipment not covered on their permit."

This sub-section also prohibits firms or persons from willfully engaging in the business of installing, testing or servicing Class D fire equipment.

The foregoing considered legal requirements are not mandated without just cause. It follows that the Chief Fire Marshal is bound to uphold the laws in relation to certification and is not unilaterally empowered to waive or modify them. In this solicitation the College merely looks to satisfy itself that offerors comply with the laws.

The State Fire Marshal maintains a registry of all firms or persons holding licenses or permits. If the protestor has satisfied the requirements of State law by providing the State Fire Marshal with documentary evidence sufficient to issue the requisite Class D license then no protest would arise based on the case made. For information, in formulating a response to this protest the College has referenced Licensee look-up results from the South Carolina Department of Labor, Licensing and Regulation. No record of licensure for the protestor is evident that would suggest the possession of the requisite competencies. Accordingly, it might be argued that any such protest was knowingly ungrounded in fact or warranted by existing law and, as such, was vindictive, acrimonious or frivolous in nature.

The College would thus argue that, were the protestor to be awarded the solicited contract without the appropriate certification and license, the College would be open to challenge by bona fide firms and would unquestionably fall foul of section 11-35-4310 by awarding a contract in violation of the law. This argument aside, the fundamental point is that the College would have seriously failed to uphold standards sufficient to protect the life, health and safety of students, staff and faculty.

It therefore remains our strongly held view that all offerors for this solicitation must submit certifications by the manufacturers as specified and that alteration of the solicitation as suggested would run counter to mandated requirements. It is argued, if the protestor can meet the legitimate requirements of the solicitation as it stands, that nothing debars their participation. Further, there is no prohibition to the protestor's recruitment of suitably certified staff that would enable them to meet the requirements of the solicitation. It is noted that the protestor cites the presence of three distributors in the area, which suggests that competition in the marketplace exists.

In this solicitation the College is solely concerned with safety of life and standards of service provision and has no knowledge of or role in allocation of distributorships by companies providing such goods and services.

I await your deliberations in the matter.

Regards

Niall Cahill
Procurement Officer