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Protest Decision

Matter of: Pepsi Bottling Company

Case No.: 2017-102

Posting Date: July 19, 2016

Contracting Entity: University of South Carolina

Solicitation No.: USC-BVB-2952-JB

Description: Beverage and Pouring Rights-University of South Carolina Upstate Campus

DIGEST

Protest alleging an error in evaluating bid price is denied where offer was properly rejected as non-responsive. Pepsi Bottling Company's (Pepsi) letter of protest is included by reference.

[Attachment 1]

AUTHORITY

The Chief Procurement Officer¹ conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on the evidence and applicable law and precedents.

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

BACKGROUND

The University of South Carolina (USC) issued this Best Value Bid on April 12, 2016 to award Beverage and Pouring Rights at the University of South Carolina Upstate Campus.

| <i>Event</i> | <i>Date</i> |
|------------------------|-------------|
| Solicitation Issued | 04/12/2016 |
| Amendment One Issued | 05/06/2016 |
| Amendment Two Issued | 05/23/2016 |
| Intent to Award Issued | 06/22/2016 |
| Protest Received | 07/05/2016 |

ANALYSIS

Pepsi protests that USC did not accurately apply the percentage commission rates set forth in Pepsi's proposal in determining the points awarded for the first evaluation criteria and consequently in determining the highest ranked offeror. This issue of protest is without merit since, prior to evaluation, Pepsi's bid was determined in writing to be non-responsive to material requirements of the solicitation and not evaluated. [Attachment 2]

The Procurement Officer determined that Pepsi had failed to conform to two essential requirements of the solicitation and must be rejected under Regulation 19-445.2070(A):

Requirements of the solicitation stated the Offeror to pay a 3% transaction fee for all sales made utilizing the Carolina Card, Pepsi cannot meet this requirement.

Requirements of the solicitation stated the Offeror to pay \$25.00 per machine per day for the period the equipment is out of service, Pepsi cannot meet this requirement.

While validating the Procurement Officer's determination, the CPO takes note that Pepsi attached a document to its bid electronically titled LEGAL COMMENTS for RFP issued by University of South Carolina 6 2 16. The first three pages of this document are attached hereto as Attachment 3. In addition to the issues cited by the Procurement Officer this document took exception to numerous legal terms and conditions including Payment and Interest, Indemnification, and Termination for Convenience which would justify disqualification under Regulation 19-445.2070(D)(1)(f) which states:

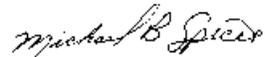
(1) Ordinarily a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the State, since to allow the bidder to impose such conditions would be prejudicial to other bidders. For example, bids should be rejected in which the bidder:

(f) limits the rights of the State under any contract clause.

DECISION

For the reasons stated above, the protest of Pepsi Bottling Company is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1



Kyle McKinney
Foodservice Key Account Manager
2700 Nevada Blvd., Charlotte, NC 28273
tel: (704) 506-0122
email: kyle.mckinney@pepsico.com

July 5, 2016

Via E-mail: protest-mmo@mmo.state.sc.us
Chief Procurement Officer
Materials Management Office
University of South Carolina
1201 Main Street, Suite 600
Columbia, SC 29201

Re: **Solicitation USC-BVB 2952-1B (the "Solicitation")**

Dear Sir or Madame:

Pepsi is in receipt of the Intent to Award dated June 22, 2016 issued by the University of South Carolina ("University"), wherein the University notifies bidders of its intent to award the referenced Solicitation to The Coca-Cola Company.

Upon Pepsi's request, Juaquana Brookins, the University's Procurement Manager, provided me with the following side-by-side analysis that the University used to make its determination to the award the Solicitation to The Coca-Cola Company.

| | Pepsi | Coke |
|--------------------------------|--------------|-------------|
| Guaranteed Commission | \$ 25,000 | \$ 25,000 |
| Support Fee Offered | \$ 55,300 | \$ 50,500 |
| Total Commission & Support Fee | \$ 80,300 | \$ 75,500 |

| | | |
|--------------------------------|---------------|---------------|
| % of Commission | 35 | 47 |
| Support Fee Offered | \$ 55,300.00 | \$ 50,500.00 |
| Percent * Gross Sales | \$ 85,156.12 | \$ 114,352.50 |
| Total Commission & Support Fee | \$ 140,456.12 | \$ 164,852.50 |

Pepsi is concerned that the percentage commission rates set forth in Pepsi's proposal to the University are not accurately represented in the above analysis and we respectfully submit below what we believe to be the true calculation of the financial proposal submitted by Pepsi.

| | Pepsi |
|--------------------------------|--------------|
| Guaranteed Commission | \$ 25,000 |
| Support Fee Offered | \$ 55,300 |
| Total Commission & Support Fee | \$ 80,300 |

| | |
|--------------------------------|---------------|
| % of Commission | 45/35 |
| Support Fee Offered | \$ 55,300.00 |
| Percent * Gross Sales | \$ 98294.49 |
| Total Commission & Support Fee | \$ 153,594.49 |



Pepsi is offering more guarantee money to the school due to the declining vending business on campus. Pepsi brands have proven to sell better in a C&U environment and will positively affect the vending business. Any other concerns from our proposal, Pepsi is willing to discuss terms.

To ensure that the highest ranking bidder is awarded the Solicitation, Pepsi requests that the University review the above calculations provided by Pepsi, and respond to Pepsi's concerns in this regard before the University finalizes its award of the Solicitation.

Sincerely,

Kyle McKinney
Foodservice Key Account Manager

Attachment 2

MEMORANDIUM TO THE FILE

DATE: June 13, 2016

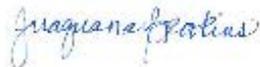
FROM: Juaquana Brookins

RE: Non-Responsive Vendor

It has been determined that the response submitted by PepsiCo for Solicitation Number USC-BVB-2952-JB is non-responsive based on Section 19-445.2070 (A) . 'Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.'

Requirements of the solicitation stated the Offeror to pay a 3% transaction fee for all sales made utilizing the Carolina Card, Pepsi cannot meet this requirement.

Requirements of the solicitation stated the Offeror to pay \$25.00 per machine per day for the period the equipment is out of service, Pepsi cannot meet this requirement.



Juaquana Brookins

Procurement Officer



**REQUEST FOR PROPOSAL # USC-BVB-2952-JB (“RFP”)
UNIVERSITY OF SOUTH CAROLINA (“University”)
Beverage and Pouring Rights – University of South Carolina Upstate Campus**

“Bottling Group, LLC ‘s (“Pepsi”) response to the RFP is subject to the following conditions:

I. Pepsi’s University/College Agreement Template:

If the University accepts Pepsi’s proposal, Pepsi requests that the University and Pepsi incorporate their entire understanding of the relationship into one agreement which will be negotiated between the University and Pepsi. Enclosed is a copy of Pepsi’s template University/College Agreement which Pepsi makes available to the University in the event that it chooses to adopt that form of contract.

Pepsi does not require the University to use Pepsi’s template. However, Pepsi regularly enters agreements of the type discussed in the RFP and its template is well-suited to speak to respective rights and obligations of Pepsi and the University. Pepsi believes that using the attached template will be in the best interests of the parties and will provide the most efficient means to complete a contract between the parties.

Except as expressly stated below, Pepsi is willing to modify its template to align with the terms and conditions of contract expressed in the RFP. Where the RFP is silent, however, Pepsi requests that the University agree to substantially similar terms and conditions as in the attached template.

II. Pepsi’s Clarification to RFP Terms:

SCOPE OF WORK/SPECIFICATIONS

Pepsi wishes to clarify that its financial proposal is in consideration of Pepsi’s beverages being the exclusive carbonated and non-carbonated beverages that are sold, distributed, advertised, promoted or displayed at or in connection with the University and its facilities and teams.

VENDING MACHINE EQUIPMENT REQUIREMENTS

A. Pepsi will provide new or “like new” equipment for dispensing of its beverage products at University facilities. As new equipment technology is released, Pepsi will work with the University on campus roll out opportunities. To the extent that future technology enhancements, equipment platforms or products to support these platforms are substantially different in scope or composition compared to existing equipment components and products, Pepsi and University will work in good faith to negotiate the economic terms for implementation of the new technology equipment.

J. Except as can reasonably be attributed to the negligence or misconduct of University or its employees or agents, Pepsi shall be reasonable for any loss or damage to its equipment placed at University facilities.

MAINTENANCE AND REPAIR OF EQUIPMENT

D. Pepsi will provide new or “like new” vending machines for dispensing of its beverage products at University facilities. As new vending machine technology is released, Pepsi will work with the University on campus roll out opportunities. To the extent that future technology enhancements, equipment platforms or products to support these platforms are substantially different in scope or composition compared to existing equipment components and products, Pepsi and University will work in good faith to negotiate the economic terms for implementation of the new technology equipment.



L. Initial vend prices will be as set forth in Pepsi's proposal. Pepsi shall have the right to increase vend prices in response to increases in Pepsi's cost of goods sold.

OPERATING STATEMENT

C. Statements will accompany commissions which will be provided to University within thirty (30) days after the close of each of Pepsi's four-week accounting periods during the term.

F. Pepsi cannot agree to pay the \$25.00 per diem penalty set forth in this section.

G. Commissions will be paid to University within thirty (30) days after the close of each of Pepsi's four-week account periods during the term. Pepsi cannot agree to pay the interest penalty set forth in this section.

I. Pepsi cannot agree to pay the 3% transaction fee set forth in this section.

J. In accordance with Pepsi's record retention policy, Pepsi will maintain records pertaining to the agreement for a period of six (6) years following the end of each contract year with respect to such contract year.

INSTALLATION OF EQUIPMENT, THEFT AND RECYCLING

F. Except as can reasonably be attributed to the negligence or misconduct of University or its employees or agents, Pepsi shall be reasonable for any loss or damage to its equipment placed at University facilities.

FOOD AND BEVERAGE REQUIREMENTS, MARKETING, PROMOTIONS

A. At all times during the Term, University agrees to mandate the distribution of a minimum core assortment of Products, as identified by Pepsi based on Equipment type, at each of University's facilities.

FIXED PRICING REQUIREMENT

Pricing for Pepsi's beverage products for the initial one-year term of this agreement shall be as set forth in Pepsi's proposal. Pepsi shall have the right to increase pricing in each of the renewal periods as communicated by Pepsi to University.

PAYMENT AND INTEREST

Payment for product purchased from Pepsi will be in accordance with the Pepsi's standard credit terms and conditions.

TAXES

University acknowledges and agrees that neither Pepsi nor its affiliates shall be responsible for any taxes payable, fees or other tax liability incurred by the University in connection with any fees payable by Pepsi under this Agreement. In addition, Pepsi shall be responsible only for the payment of taxes on the sales of Products through Vending Machines. Pepsi shall not be assessed common area maintenance fees, taxes or other charges based on its occupation of the space allocated to its Equipment.

CHANGES

All changes or modifications to the agreement between Pepsi and University may only be made written amendment to the agreement, signed by both parties.



DEFAULT

Pepsi cannot agree to any right of University to terminate the agreement without notice and a cure period. The right to terminate the agreement for cause/default shall be provided to each party. Written notice of default will be provided to breaching party with a cure period of not less than 30 days. If Pepsi terminates the agreement as a result of breach by the University, Pepsi will be entitled to reimbursement of any unearned portion of funds advanced to the University under the agreement.

INDEMNIFICATION

This Section shall be applicable only to the extent of Pepsi's negligence or willful misconduct. Pepsi will not indemnify the University from losses arising out of acts or omissions of the University or third parties not acting on behalf of Pepsi.

PRICE ADJUSTMENTS

Pricing for Pepsi's beverage products for the initial one-year term of this agreement shall be as set forth in Pepsi's proposal. Pepsi shall have the right to increase pricing in each of the renewal periods as communicated by Pepsi to University.

OPTION TO RENEW

Term of agreement may be renewed by mutual written consent of parties.

TERMINATION FOR CONVENIENCE

Pepsi's financial proposal is based, in part, on University's commitment to honor the agreement for the full term set forth in the RFP. As such, Pepsi is not able to agree that the agreement may be terminated for University's convenience.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised September 2015)

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 111.1 of the 2015 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 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.