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CHAIRMAN, HOUSE WAYS AND MEANS

THE DIVISION OF PROCUREMENT SERVICES
DELBERT H. SINGLETON, JR.
DIVISION DIRECTOR
(803) 734-8018

MICHAEL B. SPICER
INFORMATION TECHNOLOGY MANAGEMENT OFFICER
(803) 737-0600
FAX: (803) 737-0639

Protest Decision

Matter of: Shealy Environmental Services, Inc.

Case No.: 2017-103

Posting Date: July 22, 2016

Contracting Entity: Department of Health and Environmental Control

Solicitation No.: 5400011575

Description: Analysis of drinking water from public and private wells

DIGEST

Protest alleging that the apparent successful bidder is not a responsible bidder and its price is unreasonably low is denied. Shealy Environmental Services' (Shealy) 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 South Carolina Department of Health and Environmental Control (DHEC) issued the Invitation for Bids on May 27, 2016, to establish a one-year contract for services to perform laboratory analysis of samples collected from drinking water wells, using EPA methods 524.2, 504.1, 8260B, 200.8, 245.1 and 245.2, at sites with petroleum releases from regulated UST sites. A Statement of Award was issued to Pace Analytical Services, Inc. (Pace) on June 30, 2016.

<i>Event</i>	<i>Date</i>
Solicitation Issued	05/27/2016
Amendment One Issued	06/16/2016
Statement of Award Issued	06/30/2016
Protest Received	07/05/2016
Award Suspended	07/06/2016

ANALYSIS

Shealy protests that Pace is not certified by DHEC to perform the tests required by the solicitation and consequently should not receive the award:

SCDHEC recently required potable water samples collected from UST related sites to be analyzed by USEPA Safe Drinking Water Act approved methods. The two primary methods that are now required are 524.2 and 504.1. As per SCDHEC regulations, laboratories performing analysis on these samples must be certified by the SCDHEC laboratory certification division for 524.2 and 504.1. Accordingly, the Invitation for Bid (IFB) for the subject solicitation requires the laboratory performing analysis to be a SCDHEC certified laboratory. This is documented in Sections 3.1.1. and 3.1.2 (page 19) of the IFB as well as the Amendment One answer to question 6. Attached is the list of laboratories certified for method 524.2 as of today, and Pace is not on the list.... It is inappropriate and negligent to make an award to a laboratory that does not meet the minimum requirement of maintaining SCDHEC certification for all requested methods.

In its bid, Pace responded:

3.1.2 All analyses shall be performed by a SCDHEC Certified Laboratory. All certification documentation is included as attachment "Appendix A".

Pace included the following statement at the beginning of Appendix 1 in its bid:

*Pace has submitted the required paperwork for SC certification for method 524. Included in this appendix is the sub-contract laboratory certification for method 524.

Pace included the DHEC 524 certification for Eurofins Eaton Analytical Inc. South Bend which appears on the list of certified laboratories included in Shealy's protest. (Attachment 2) The solicitation does not prohibit subcontracting the analyses. This issue of protest is denied.

Shealy also protests that

Shealy further protests this award because it violates the Responsiveness/Improper Offers (Jun 2015) clause found on page 14 of the IFB. With respect to (d) Price Reasonableness Pace's pricing of \$13.00 for oxygenates+ethanol by 8260B is well beyond unreasonable. A reasonable competitive price range for this analysis is \$35-65/sample. Pricing in the \$22-\$34/sample range is certainly offered in certain cases, but \$13/sample is unprecedented and well below a laboratory's fully -factored costs. Pace's current pricing associated with solicitation 5400003038 is \$55/sample for this analysis.²

Shealy argues that Pace's bid of \$13.00 to test for oxygenates + ethanol by 8260B is unreasonably low and should be rejected under the following provision found on page 14 of the solicitation:

(d) Price Reasonableness: Any offer may be rejected if the Procurement Officer determines in writing that it is unreasonable as to price. [R. 19-445.2070].

The quoted language from the solicitation, and Regulation 19-445.2070(E), are drawn from the federal acquisition regulations. FAR § 14.404-2, like the South Carolina regulation, is titled "Rejection of individual bids." Section 14.404-2(f) provides:

Any bid may be rejected if the contracting officer determines in writing that it is unreasonable as to price. Unreasonableness of price includes not only the total price of the bid, but the prices for individual line items as well.

² Solicitation 5400003038 was issued by DHEC in May of 2011 for Analytical Laboratory Services for the Underground Storage Tank Division and Pace was not the successful bidder. DHEC issued a subsequent solicitation, 540007867, which was awarded to Pace in June 2014. Pace bid \$13.00 to test oxygenates using EPA method 8260.

Decisions³ interpreting the FAR consistently hold, in the context of a bid protest, that the contracting officer's evaluation for price reasonableness under FAR § 15.402(a) of an offer provided by a bidder "focuses primarily on whether the offered prices are higher than warranted ... below-cost pricing is not prohibited." *All Phase Envtl., Inc.*, Nos. B-292919.2-B-292919.7, 2004 WL 437450, at *7 (Comp.Gen. Feb.4, 2004); *accord CSE Constr.*, No. B-291268.2, 2002 WL 31835783 (Comp.Gen. Dec.16, 2002), at *4; *see also Rodgers Travel, Inc.*, No. B-291785, 2003 WL 1088876 (Comp.Gen. Mar.12, 2003), at *2 n. 1 (stating that the purpose of a price reasonableness determination is to ensure that the prices offered are not higher, as opposed to lower, than warranted). Since Shealy alleges that Pace's prices are too low, not too high, this ground of protest fails to state a claim for relief and must be dismissed.⁴

In this case, the procurement officer did not make a determination that the price was unreasonable. A bidder, for various reasons, in its business judgment may decide to submit a below-cost bid. For example, the bidder may be attempting to buy-in to the market, might have excess inventory, or the products solicited might be at end-of-life. The Code does not prohibit the State from accepting below-cost bids from responsible bidders. Regulation 19-445.2070 does authorize the contracting officer to reject unreasonably priced bids, but a bid is not unreasonable simply because it is below-cost. Whether the awardee can perform the contract at the price offered is a matter of responsibility. The Code requires a determination of responsibility prior to making an award and Pace was determined to be a responsible bidder. Shealy's protest that Pace's bid should be rejected simply because the prices are, in its opinion, too low, is dismissed.

Shealy also protests that Pace's low price constitutes unbalanced bidding:

SCDHEC procurement needs to investigate why Pace offered a price of
\$13/sample for this solicitation and \$55/sample for solicitation 5400003038

³ Decisions of the U.S. Comptroller General are not controlling in S.C. State Government protests. It does not appear the Panel has directly and definitively addressed the issue whether pricing that is claimed to be too low must be rejected as non-responsive. In cases like this, federal procurement decisions are enlightening.

⁴ The Panel has determined that a claim of unreasonably low pricing does not, without more, establish a violation of the Code's obligation of good faith. *Appeal by Catamaran LLC*, Panel Case No. 2015-2. In fact, the Panel quoted federal decisions to support its holding that a protestor's claim that another offeror has submitted an unreasonably low price - or even that the price is below the cost of performance - is not a valid basis for protest. *Id.*

which they are currently under contract for. This leads to (e) Unbalanced Bidding as the possibility of providing excessively low pricing for analysis that are presumed to not be required since they are already accounted for in an existing contract.

the relevant language prohibiting materially unbalanced bidding is provided by the following clause in the IFB:

(e) Unbalanced bidding. The State may reject an Offer as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the State even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

The Procurement Review Panel determined the proper legal test to apply in deciding whether or not a bid is materially unbalanced in *Appeal by Advanced Imaging*, Panel Case No. 2013-7:

Looking solely at this language, the Panel finds that materially unbalanced bidding is an issue of responsiveness, not responsibility. The award in this solicitation is governed by section 11-35-1520(10) of the Procurement Code, which provides that an award will be made "to the lowest responsive and responsible bidder[] whose bid meets the requirements set forth in the [IFB]." S.C. Code Ann. § 11-35-1520(10) (2011). Responsiveness is determined at the time the bids are opened on the basis of the information contained in the bid. S.C. Code Ann. § 11-35-1520(6) (2011)....

Looking again at the language of the IFB clause quoted above, 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.

As the party challenging Pace's responsiveness, Shealy bears the burden of proving its claim of materially unbalanced bidding by a preponderance of the evidence. *Appeal by Heritage Community Services*, Panel Case No. 2013-1 (Revised) (May 6, 2013) (citing *Protest by Blue Bird Corp.*, Panel Case No. 1994-15 (December 16, 1994)). While Shealy alleges that Pace's price of \$13.00 is significantly less than the cost of providing the analysis, it provides no

Protest Decision, page 6

Case No. 2017-103

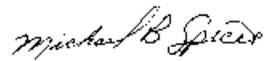
July 22, 2016

evidence that other items are priced significantly more than the cost of providing the analysis. Nor does Shealy raise a reasonable doubt that Pace's bid will result in the lowest overall cost to the State despite being the low evaluated bid. Shealy has failed to prove its claim and this issue of protest is denied.

DECISION

For the reasons stated above, the protest of Shealy Environmental Services, Inc. is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1



**Environmental
Services, Inc.**

106 Vantage Point Drive • West Columbia, South Carolina 29172

Phone. 803.791.9700 • Fax. 803.791.9111 • www.shealylab.com

July 5, 2016

John White
Chief Procurement Officer
State of South Carolina
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

Subject: Solicitation No. IFB-5400011575

Analysis of drinking water from public and private wells (524.2, 8260B, 504.1, & 200.8)

Dear Mr. White:

Please consider this letter as Shealy Environmental Services, Inc.'s (Shealy) formal protest of the award of the referenced solicitation to Pace Analytical Services, Inc. (Pace). This award was posted 6/30/2016.

SCDHEC recently required potable water samples collected from UST related sites to be analyzed by USEPA Safe Drinking Water Act approved methods. The two primary methods that are now required are 524.2 and 504.1. As per SCDHEC regulations, laboratories performing analysis on these samples must be certified by the SCDHEC laboratory certification division for 524.2 and 504.1. Accordingly, the Invitation for Bid (IFB) for the subject solicitation requires the laboratory performing analysis to be a SCDHEC certified laboratory. This is documented in Sections 3.1.1.1 and 3.1.1.2 (page 19) of the IFB as well as the Amendment One answer to question 6. Attached is the list of laboratories certified for method 524.2 as of today, and Pace is not on the list. Selecting a laboratory that does not have the applicable certifications for the requested analysis during the evaluation process invalidates the actual award, as certification for all methods is required and precedent has clearly been set with prior solicitations. It is inappropriate and negligent to make an award to a laboratory that does not meet the minimum requirement of maintaining SCDHEC certification for all requested methods. In essence, this solicitation was created to get pricing for method 524.2 since that was the new analytical driver, and the selected laboratory does not have that certification. It is unfair, negligent, and in conflict with the solicitation's requirements to select a laboratory that does not have the certification at award time and simply assume the laboratory will gain that certification by the time samples are collected. If that was the case, it would be open season for bidding on all solicitations by anyone, since no certifications are needed for evaluation as SCDHEC procurement is just hoping for the best. In the environmental laboratory industry certifications and accreditations are essential for being able to bid on solicitations. The fact that an award was made to a laboratory that does not have certification for the key methodology (524.2) is not only in violation of the IFB intent, but it is unprecedented for a SCDHEC laboratory award.

Shealy utilized considerable effort and resources to gain certification for 524.2 prior to submission of our proposal so that we could deliver a responsive proposal. SCDHEC procurement must select a laboratory that is certified on or before the bid due date (6/23/16) for all analysis requested in this IFB.

Shealy further protests this award because it violates the Responsiveness/Improper Offers (Jun 2015) clause found on page 14 of the IFB. With respect to (d) Price Reasonableness Pace's pricing of \$13.00 for oxygenates+ethanol by 8260B is well beyond unreasonable. A reasonable competitive price range for this analysis is \$35-65/sample. Pricing in the \$22-\$34/sample range is certainly offered in certain cases, but \$13/sample is unprecedented and well below a laboratory's fully-factored costs. Pace's current pricing associated with solicitation 5400003038 is \$55/sample for this analysis. Method 524.2 and 8260B are separate methods with different specific quality control requirements therefore 524.2 and 8260B can't be performed together. Beyond acceptance limits and reporting limits differences, method 524.2 requires a 4 minute desorb which is not required by, or performed by a laboratory when following method 8260B. SCDHEC procurement needs to investigate why Pace offered a price of \$13/sample for this solicitation and \$55/sample for solicitation 5400003038 which they are currently under contract for. This leads to (e) Unbalanced Bidding as the possibility of providing excessively low pricing for analysis that are presumed to not be required since they are already accounted for in an existing contract. Again methods 524.2 is the major driver for this solicitation as SCDHEC already has pricing for oxygenates by method 8260B.

Shealy is a South Carolina small business employing over 60 full-time employees that work in our laboratory in West Columbia. It should also be noted that Shealy is fully-certified and highly qualified to perform the work under this solicitation, as we have performed very well on similar contracts for SCDHEC. Additionally, we are a provider of these same services to the USEPA, the DoD, the DoE, consulting/engineering firms, and many industrial and municipal clients.

We respectfully request that you award this solicitation to a responsive bidder that held all the requested certifications at the bid due date of 6/23/16.

If you have any questions please contact me at 803-227-2701 or dwright@shealylab.com.

Sincerely,



Daniel J. Wright
President & CEO

Attachment

Attachment 2

07/05/2016

**Certified Laboratories
COMMERCIAL Laboratories
SAFE DRINKING WATER ACT
EPA 524.2 (1995)**

Lab ID	Lab Name / Address	Director Name / Phone No.
	APPL INC 908 N TEMPERANCE AVE CLOVIS CA 93611	DEHMLow, SHARON 559-275-2175
	ENCO CARY 102A WOODWINDS INDUSTRIAL CT CARY NC 27511	THROWER, A L 919-467-3090
	EUROFINS EATON ANALYTICAL INC 750 ROYAL OAKS DR STE 100 MONROVIA CA 91016-3629	LASHBROOK, DANIEL 626-386-1100
	EUROFINS EATON ANALYTICAL INC SOUTH BEND 110 S HILL ST SOUTH BEND IN 46617-2702	HARTZ, MATTHEW 574-472-5523
	EUROFINS LANCASTER LABORATORIES ENVIRONMENT/ 2425 NEW HOLLAND PIKE LANCASTER PA 17601-5994	LUCKENBILL, DUANE 717-656-2300
	NSF INTERNATIONAL 789 N DIXBORO RD ANN ARBOR MI 48105-9723	LEVANSELER, KERRI L 734-827-6874
	RESEARCH & ANALYTICAL LABORATORIES INC PO BOX 473 KERNERSVILLE NC 27284-0473	CHAMPION, SIDNEY L 336-996-2841
	ROGERS & CALLCOTT ENGINEERS INC PO BOX 5655 GREENVILLE SC 29606	AVERY, SAM 864-232-1556
	SHEALY ENVIRONMENTAL SERVICES INC 106 VANTAGE POINT DR WEST COLUMBIA SC 29172	WRIGHT, DAN 803-791-9700

Count: 9

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.