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Protest Decision

Matter of: Knoll, Inc., Case No. 2018-154
Hyer Office Furniture, Inc., Case No. 2018-155
Krueger International, Case No. 2018-156
Jasper Seating Company, Inc., d/b/a Jasper Group, Case No. 2018-157
Kimball Office Inc., Case No. 2018-158
National Office Furniture, Inc., Case No. 2018-159
Herman Miller, Inc., Case No. 2018-160
Allsteel, Inc., Case No. 2018-161
HON Company, LLC, Case No. 2018-162

Posting Date: July 31, 2018

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400013853

Description: Office Furniture Statewide Term Contract

DIGEST

Protest of evaluation process granted, resulting in cancelation of awards for two of four lots. All other protests either dismissed as moot or denied.

AUTHORITY

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

BACKGROUND

Event	Date
Solicitation Issued	09/28/2017
Amendment One Issued	10/16/2017
Amendment Two Issued	10/26/2017
Intents to Award Issued	03/16/2018
Knoll protest received	03/20/2018
Hyer protest received	03/23/2018
Krueger protest received	03/23/2018
Jasper protest received	03/25/2018
Kimball protest received	03/26/2018
National Office protest received	03/26/2018
Allsteel protest received	03/26/2018
HON protest received	03/26/2018
Allsteel amended protest received	04/02/2018
HON amended protest received	04/02/2018

The State Fiscal Accountability Authority (SFAA) issued this Invitation For Bids (IFB) on September 28, 2017 to establish a state term contract for office furniture. The solicitation requested bids on one or more of four lots. Each lot included a category of furniture: Desks & Tables; Filing, Storage & Wooden Case Goods; Seating; and Systems. Each category was represented by a market basket of products published in the original solicitation as Attachment E and replaced in Amendment 2 with Attachment M. Items in the market basket were identified by manufacturer, manufacturer product number or code, manufacturer part number, and description. Bidders were to submit pricing for each product in the market basket as specified or a functionally equivalent product from another manufacturer. The low bid for each lot would be

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

based on the market basket grand total for the lot. Contracts could be awarded to as many as the fifteen lowest priced responsive and responsible bidders for each lot.

Instructions for submitting a functionally equivalent product were originally published in Attachment E² as follows:

The State will accept items that are functionally equivalent to the items specified. For all items proposed, the Offeror MUST include an Item Description Vendor Part Number and Location Information. "Location Information" may be a URL that leads to a website or downloadable catalog. Alternatively, Offerors may include catalog attachments to their bid that include information on each item proposed. In this case, Offerors must list the page number of the attachment that the item proposed is located in the Location Information column. Offerors may include a Manufacturer Number/Product Code if it exists and is necessary for the State to identify the product proposed. DO NOT LEAVE ANY ROW BLANK. The State reserves the right to reject any item proposed for the listed items and require the vendors to provide an alternative product that meets its requirements, at the price originally proposed.

[Attachment E, Instructions, B12]

In response to a request to define "Functionally Equivalent," the state responded:

A functional equivalent shall concentrate on what the product is intended to do, with the same or similar materials and dimensions. If an Offeror has multiple variations in grade or materials available for a particular product, the State advises the Offeror provide the most cost effective model without compromising functional equivalency

[Attachment J - Questions & Answers, Question 39 (emphasis supplied).]³

This same response was referenced in response to the following question:

Not all manufacturers' items are exact in size. Will standard product be acceptable?

² This same statement appears in Attachment M.

³ Attachment J was added to the solicitation through Amendment 2. All changes and answers to bidder's questions became a part of the solicitation and consequently part of the resulting contract.

When questioned as to what was more desirable, function or aesthetic, the state responded that function was more desirable. [Questions & Answers, Question 41]

This was a brand name or equal specification as defined by Regulation 19-445.2140(2) as:

“Brand Name or Equal Specification” means a specification which uses one or more manufacturer’s names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet state requirements, and which provides for the submission of equivalent products.

The Procurement Review Panel observed:

Where a purchase description is used, bidders must be given the opportunity to offer products other than those specifically referenced if those other products will meet the needs of the State in essentially the same manner as those referenced. It should always be clear that a “Brand-Name or Equal” description is intended to be descriptive not restrictive and is merely to indicate the quality and characteristics of the product that will be satisfactory and acceptable. Products offered as equal must, of course, meet fully the salient characteristics and product requirements listed in the Invitation for Bids.

Protest by General Sales Company, Inc., Panel Case No. 1983-5

In defining functional equivalency, the State set the minimum standard, or salient characteristics, a product must meet to be considered equal. It must perform the same function with “the same or similar materials and dimensions.” Attachment J, *ante*, answer to question 39.

Section 11-35-1520(10) requires, and the solicitation put bidders on notice, that award would be made to the lowest priced responsible and responsive bidders. A responsive bidder is a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals. A bidder must offer the brand named product or a product that performs the same function with the same or similar materials and dimensions to be considered responsive.

During the evaluation process, if there was a question about whether a product was a functional equivalent, the State provided the bidder the opportunity to explain how the product was

functionally equivalent through the discussions and clarifications provisions of the Code and Regulations, which state:

Section 11-35-1520(8) Discussion with Bidders. As provided in the invitation for bids, discussions may be conducted with apparent responsive bidders for the purpose of clarification to assure full understanding of the requirements of the invitation for bids. All bids, in the procuring agency's sole judgment, needing clarification must be accorded that opportunity. Clarification of a bidder's bid must be documented in writing by the procurement officer and must be included with the bid. Documentation concerning the clarification must be subject to disclosure upon request as required by Section 11-35-410.

(emphasis supplied).

Regulation 19-445.2080 Apparent responsive bidder, as used in the source selection process, means a person who has submitted a bid or offer which obviously conforms in all material aspects to the solicitation. A procurement officer's decision regarding whether a bid is apparently responsive is final unless protested.

(emphasis supplied).

In some cases, bids that were obviously non-responsive on their face were afforded the opportunity for clarification.⁴ These communications were in violation of the Code, since the opportunity for clarification is limited to apparent responsive bidders only. In response, some bidders acknowledged that the product they bid was not functionally equivalent and offered a different product citing the following provision found in the Instructions for Attachment M:

The State reserves the right to reject any item proposed for the listed items and require the vendors to provide an alternative product that meets its requirements, at the price originally proposed.

Neither Code Section 11-35-1520(8), Reg. 19-445.2080, nor this statement in the IFB can be used to make a bid responsive after bid opening. Section 11-35-1520(6) Bid Acceptance and Bid Evaluation requires:

⁴ Some bidders were able to satisfactorily explain that their products were functionally equivalent. Presumably, the alternate product those bidders proposed appeared to be functionally equivalent to the specified product.

Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The invitation for bids must set forth the evaluation criteria to be used. Criteria must not be used in bid evaluation that are not in the invitation for bids. Bids must be evaluated based on the requirements in the invitation for bids and in accordance with the regulations of the board.

(emphasis added) This prohibition is further amplified in Regulation 19-445.2085(B) which states:

To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.

Bids may not be modified, altered or changed after bid opening. Awards were posted on March 16, 2018.

ANALYSIS

1. PRICE EVALUATION OF THE SEATING AND THE FILING, STORAGE, AND CASEGOODS CATEGORIES

National Office Furniture submitted bids for the Filing, Storage, and Casegoods and Seating categories. National protests that MMO failed to evaluate the offerors' pricing for those lots based upon the disclosed criteria:

The Solicitation provided that the lowest costs would be determined by the "Grand Total" of the offerors' pricing, as calculated by the pricing spreadsheet and reflected on the "Summary" tab of the spreadsheet. (Solicitation§ VI). This does not appear to be what MMO did.

Based upon what National has learned from other offerors, the total price listed in the Notice of Award does not match the "Grand Totals" listed in the other offerors' Attachment M pricing spreadsheets. As a result, National assumes that MMO employed some price adjustment or weighting criteria to the Grand Totals in the pricing spreadsheet in order to come up with the prices listed in the Notice of Award and Bid Tabulation document. If MMO did not employ some adjustment, then it has made substantial errors in the pricing it has assigned to the offerors.

Assuming that MMO did weigh the pricing in some manner, such adjustment was not disclosed to the offerors and not permitted by the terms of the Solicitation. Because MMO did not evaluate the offerors in the manner required by the Solicitation, the awards should be reversed, and the contracts should be re-solicited.

[Attachment 1].

Kimball Office Inc. protested that the price it bid for the Seating lot was different than the evaluated price indicated on the bid tabulation:

In the Seating category, MMO informed Kimball that it was not among the 15 lowest offerors. In the bid tabulation provided to Kimball by MMO after the notice of award, Kimball's "Grand Total" price was listed as \$13,325.76. This was not Kimball's "Grand Total" for Seating contained in its Attachment M pricing proposal.

[Attachment 2]

The State provided bidders with a spreadsheet that was Attachment M. The spreadsheet was prepopulated with the market baskets for each category, blank fields for bidders to complete, and formulas for calculating totals. In the Desk and Tables category, there was an error in the formula for calculating the grand total. Some bidders corrected the formula prior to bid submission. The State reviewed every submission to ensure that the correct formulas were used to calculate the Grand Total prior to evaluation.

During the evaluation of the "Filing, Metal Storage and Wooden Casegoods" category, the State determined that a Steelcase 4 drawer lateral file, model RLF18425F, was too unique and thus limited competition unnecessarily. The State deleted that item from the published market basket by reducing each bidder's grand total by the amount it bid for that item.

During the evaluation of the "Seating" category, the State determined that a National Office Furniture arm chair model N95AACX and an Indiana chair model 228 were too unique and thus limited competition unnecessarily. The State deleted those items from the published market basket by reducing each bidder's grand total by the amount it bid for those items.

Section 11-35-1520(6) requires that:

Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The invitation for bids must set forth the evaluation criteria to be used. Criteria must not be used in bid evaluation that are not in the invitation for bids. Bids must be evaluated based on the requirements in the invitation for bids and in accordance with the regulations of the board.

(emphasis added) Opening and reviewing bids, then deciding that a material requirement is problematic for some, but not all, bidders and then altering the bids by deleting the bid price for that particular requirement from all bidders violates the Code in numerous ways. It invites questions of preferential treatment, favoritism, and worse. Altering the bid prices after opening is a clear violation of the Code. In addition, these changes violated the evaluation process published in the solicitation:

CALCULATING THE LOW BID

For the “Desks and Tables,” “Filing; Metal Storage and Wooden Casegoods” and the “Seating” categories, the low bid(s) will be calculated as follows: [In Attachment E – Pricing Schedule] The sum of the Item Price column for all sample furniture items listed in each Category tab (there is a separate tab for each Office Furniture Category) of the Pricing Schedule spreadsheet will be summed to generate a Grand Total for each Office Furniture category which will be represented on the Summary Tab.

For the “Systems” category the low bid(s) will be calculated as follows: [In Attachment E – Pricing Schedule] The sum of the Item Price column for all sample furniture items listed in each Category tab (there is a separate tab for each Office Furniture Category) of the Pricing Schedule spreadsheet will be summed to generate an Item Total. The Item Total will be weighted at 85% of the Grand Total. The remaining 15% will be accounted for by the hourly rates as reports on the Installation and Design tab in Attachment E – Pricing Schedule.

Awards will be made to the lowest responsive and responsible bidders determined by the “Grand Total.” Each of the four categories will be awarded separately.

[Solicitation, Page 30]

The effects of these modifications cannot be waived. These modifications to the bid schedule in the “Filing; Metal Storage and Wooden Casegoods” category did not change the ranking of the

bidders, but did change the number of bidders that were responsive to the published requirements. In the Seating category, both the number of responsive bidders and the ranking of the bidders were affected. These issues of protest are granted. As a consequence, all awards for these two categories are cancelled. The State is ordered to proceed to fulfill its needs for these two categories in accordance with the Code.⁵

2. KNOLL'S PROTEST OF THE DETERMINATION ITS BID FOR DESKS & TABLES WAS NON-RESPONSIVE

Knoll, Inc., was awarded a contract to provide products in the Systems category. Knoll protests as follows:

We are submitting this protest because we believe our submittals meet the State's requirement for "Functional Equivalents" on Desks & Tables, Filing Storage & Wooden Casegoods & Seating as described in your initial bid documents. . . .

Knoll hereby requests the following relief, we request a review of the Pricing Schedules submitted herewith and either an award of the Desks & Tables, Filing & Storage & Seating OR specific documentation on why these categories were not awarded.

[Attachment 3]

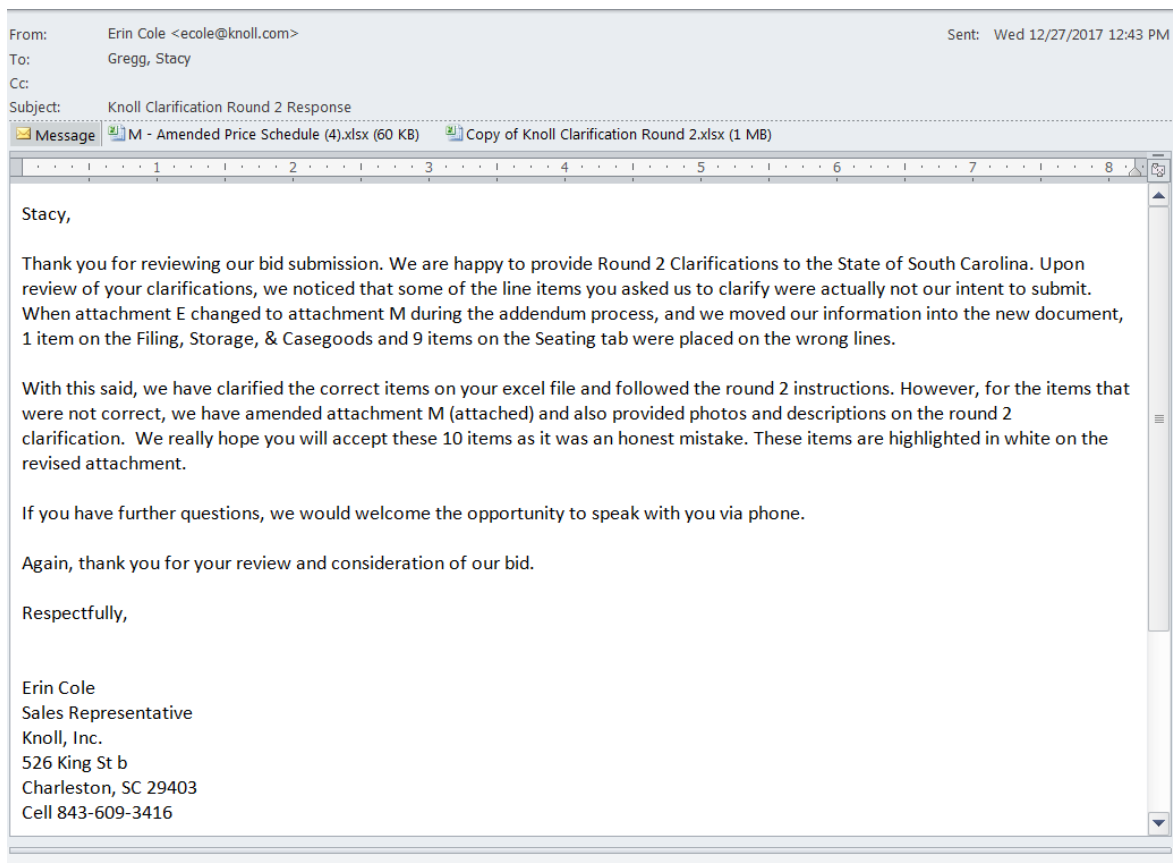
Here, the Procurement Officer determined as non-responsive ten Knoll products in the Seating category, six in the Desk and Tables category, and five in the Filing, Storage, and Casegoods category. [Attachment 3A] For example, in the Seating category, the State requested an ottoman, and Knoll bid a side chair. In the Desks & Tables category the State requested Indiana Furniture right and left Desk Returns or equal. Knoll bid an Antenna work surface 24D x 42W. The State requested a National Office Furniture T-leg base with casters. Knoll bid a height adjustable C-leg base 42W x 24D. The State requested a Krueger work surface, and Knoll bid a flip-top table.

⁵ Krueger protested, among other things, that the procurement officer erroneously determined its bid for the Filing, Storage and Casegoods category was non-responsive. Knoll and HON, among other complaints, lodged the same protests respecting their bids for both the Seating and the Filing, Storage and Casegoods categories. Allsteel protested generally, asserting latent defects in the IFB. Because all awards for the Seating and the Filing, Storage and Casegoods categories are canceled, those portions of the protests of Krueger, Knoll, Allsteel and HON are dismissed as moot.

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Thus, Knoll's bid was non-responsive in the Desk and Tables category. In the Filing Storage & Wooden Casegoods category, the State requested an Indiana Furniture lateral file. Knoll bid a mobile pedestal. The State requested a two door tower with three drawers, but Knoll bid a one door tower with one drawer. The State requested a 4 drawer lateral file cabinet, and Knoll bid a 2 drawer lateral file cabinet. Attachment 3A shows a complete listing of the non-responsive products.

In an overabundance of caution, the State gave Knoll the opportunity, through Section 11-35-1520(8) and Regulation 19-445.2080 clarifications, to explain how the products bid were functionally equivalent. Knoll's Erin Cole responded:



Knoll acknowledged that it made errors in completing the bid schedule. It mistakenly bid some products and made errors in transferring data between spreadsheets.

In response to the request for clarification, Knoll attempted to modify its bid response by submitting a corrected Appendix M. These modifications to a bid cannot be accepted. Section 11-35-1520(6) requires that bids be accepted unconditionally without alteration or correction:

Bid Acceptance and Bid Evaluation. Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The invitation for bids must set forth the evaluation criteria to be used. Criteria must not be used in bid evaluation that are not in the invitation for bids. Bids must be evaluated based on the requirements in the invitation for bids and in accordance with the regulations of the board.

(emphasis added). Regulation 19-445.2085(B) requires:

To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.

See, e.g. Appeal by Greenville Office Supply, Panel Case 2014-5 (finding it “inherently prejudicial to fair competition” to allow the procurement officer to contact a bidder to allow it to correct a bid after an amendment had collapsed several line items into one). In addition, Knoll’s bids for Desks & Tables; Filing, Storage, & Wooden Casegoods; and Seating were non-responsive on their face. As discussed above, the opportunity to clarify a bid is limited to apparent responsive bidders. Knoll was not an apparent responsive bidder, and should not have been afforded the opportunity to clarify their bids in the first place. Knoll’s protest is denied.

3. PROTEST BY HYER OFFICE FURNITURE

Hyer Office Furniture, Inc., only bid the Systems category and was determined non-responsive for one item in the category. The State requested a Steelcase 49-inch utility light or equivalent. Hyer bid a 29 inch utility light and was determined to be non-responsive. (Attachment 4A) Hyer protests that the use of sample products in Attachment M as a specification resulted in overly restrictive specifications:

To the extent the State relies upon its list of sample products in Attachment M to make a nonresponsiveness finding as to Hyer, such reliance is in error. In effect,

the examples in Attachment M were inappropriately allowed to become specifications themselves, resulting in unduly restrictive specifications.

[Attachment 4]

The use of a list of sample products, identified by specific manufacturer, and the requirement that bidders provide pricing for that product or a functionally equivalent product was published in the original solicitation as Attachment E and adjusted in Amendment 2 as Attachment M. A functionally equivalent product was defined in Attachment J to Amendment 2 as

A functional equivalent shall concentrate on what the product is intended to do, with the same or similar materials and dimensions. If an Offeror has multiple variations in grade or materials available for a particular product, the State advises the Offeror provide the most cost effective model without compromising functional equivalency.

(emphasis added) Section 11-35-4210(1)(b) stipulates:

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, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(emphasis added) Hyer's issues with the use of a list of sample products identified by specific manufacturer and the requirement to provide a price for that product or a functional equivalent could have been raised as a protest of the solicitation but cannot be raised as a protest of the award. By failing to file a timely protest to the solicitation, Hyer waived the right to challenge the specifications. This issue of protest is denied.

Hyer next argues that it was inappropriate to have a sample product's dimensions serve as the basis for a nonresponsive determination absent some justification of needs for the dimensional requirements. Again, this was an IFB conducted under Section 11-35-1520. This solicitation utilized a brand name or equal specification. To be responsive a bid must provide the brand name product or an equal product. Products offered as equal had to be functionally equivalent to the

brand named products. Functional equivalency was defined as performing the same function with the same or similar materials and dimensions. Hyer was advised of this requirement with the issuance of Amendment 2. Hyer could have questioned the need for the dimensional requirements or requested a change to a more functional requirement during the solicitation process. Hyer is barred from raising this issue as a protest of the award.

Hyer's protest that the pricing submitted in Attachment M as limited to validating the veracity of each offeror's discount is in error. The solicitation clearly indicates:

For the "Systems" category the low bid(s) will be calculated as follows: [In Attachment E – Pricing Schedule] The sum of the Item Price column for all sample furniture items listed in each Category tab (there is a separate tab for each Office Furniture Category) of the Pricing Schedule spreadsheet will be summed to generate an Item Total. The Item Total will be weighted at 85% of the Grand Total. The remaining 15% will be accounted for by the hourly rates as reports on the Installation and Design tab in Attachment E – Pricing Schedule.⁶

Awards will be made to the lowest responsive and responsible bidders determined by the "Grand Total." Each of the four categories will be awarded separately.

[Solicitation, Page 30] This was an IFB where award must be made to the lowest priced responsible and responsive bidders. Offering a lesser product allows a bidder to gain a competitive advantage by being able to offer a lower price. Hyer's protest is denied.

4. PROTEST OF KRUEGER INTERNATIONAL

Krueger International, Inc., protests that in the category of Desks and Tables its price was lower than four other manufacturers. [Attachment 5] Its bid was determined to be non-responsive.

This was an IFB. Section 11-35-1520(10) requires:

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.

⁶ Attachment E was replaced by Attachment M in Amendment 2.

In the Desks and Tables category the State specified a Steelcase, Inc. 54 inch round table. Krueger bid a rectangular table. The State specified a National Office Furniture conference base, T Leg mobile Platinum. Krueger's equivalent product does not have casters. The State specified a Steelcase Lotus 18" H, 36" square occasional table. Krueger bid a 24 inch table. Finally, the State specified an Indiana Furniture hutch with 66" of storage space. Krueger bid a product with 30" of storage space. The procurement officer properly determined that the products bid by Krueger were not functional equivalents and that Krueger was non-responsive to the requirements of the solicitation for desks and tables. Krueger's protest is denied.

5. PROTEST OF JASPER SEATING COMPANY

Jasper Seating company, Inc., was awarded a contract for the Filing, Storage, and Wooden Casegoods category on March 16, 2018. On March 25, 2018, Jasper filed a protest requesting the State reconsider its bid for the Desk and Tables category on the following grounds:

- (1) Having a category of Filing, Storage & Casegoods, with the exclusion of Desks and Tables, eliminates the ability to provide a complete office solution to the State of Carolina customers.
- (2) Ten manufacturers were awarded to the Desk and Tables Category. Per the State's response to question # 50, "the State will award to no more than 15 vendors per category."
- (3) Jasper Group's feels that it has adequately demonstrated its product to be competitively priced and functionally equivalent to the 10 awarded manufacturers of the Desk and Tables Category and requests to be award to the category if our pricing allows for a position of one of the 15 maximum allowed.
- (4) The category method that this bid was evaluated, only proves a snapshot comparison between random items in the manufacturer brands, and is not a fair evaluation of pricing for a total solution workspace. A complete office typical provides the State with a different cost value than random selected items. See the attached pricing comparisons between JSI, OFS and Indiana Furniture. Jasper Group feels that the category method of evaluation is not in the best interest of the State for administrative use.

- (5) If this contract is allowed to proceed as is, the State of South Carolina customers will be left with gaps in procurement options, and no recourse to add to existing furniture installations.

[Attachment 6]

Jasper's first two issues are arguments in support of an award to Jasper for the Desk and Tables category but allege no violation of the Code, Regulations, or a flaw in the procurement process. Further, to the extent Jasper's first issue complains about the solicitation's categories, Jasper waived this issue by failing to raise it within 15 days of the issuance of the solicitation. *See* S.C. Code Ann. § 11-35-4210(1). These issues fail to state a claim for which relief can be granted and, therefore, are dismissed.

Jasper's third issue of protest claims that it has adequately demonstrated its product to be competitively priced and functionally equivalent. Jasper's bid for Desks and Tables was determined to be non-responsive. The State requested an Indiana Furniture double height hutch model SP65-1566TWDND or functional equivalent. In response to a clarification request, Jasper acknowledged that it had bid a single height hutch and offered a double height hutch for the same price.

Jasper assumed the right to substitute a product that really was functionally equivalent as long as it did not change its price. Jasper relies on the statement in Attachment M that the State reserves the right to reject any item proposed and require the vendors to provide an alternate product that meets its requirements. However, as explained earlier, modification of a bid after bid opening in order to make it responsive is prohibited by law. Jasper's initial bid was non responsive.

Jasper's fourth issue of protest alleges that the category method is not a fair evaluation of pricing for a total solution workplace and not in the best interest of the State for administrative use. The use of a list of sample products for each category, identified by specific manufacturer, and the requirement that bidders provide pricing for that product or a functionally equivalent product to be used as the basis for award, was published in the original solicitation as Attachment E and modified in Amendment 2 as Attachment M. Since this issue could have been raised as a protest of the solicitation, Jasper cannot assert it as a protest of the award.

Jasper's last issue is an opinion that alleges no violation of the Code, Regulations, or a flaw in the procurement process. This issue fails to state a claim for which relief can be granted and is dismissed.

6. PROTEST OF KIMBALL OFFICE

Kimball Office, Inc., protests that its bids for the Desks and Tables category and the Systems category were lower than the bids for other awarded bidders. [Attachment 2] Kimball's bids for Desks and Tables and Systems were rejected as non-responsive.

In response to the State's request for clarification about the functional equivalence to a Krueger International, Inc. table top in the Desks and Tables category, Kimball responded:

Kimball model is a 30x60 table top with a 3mm rim. A closer look at the KI price list shows that the top should have 2 grommets. Our revised list price would be \$525. for the top with 2 grommets.

[Attachment 2A]

In response to the State's request for clarification about the functional equivalence to a Krueger International, Inc. relocatable power tap in the Systems category, Kimball responded:

We did not interpret the model number correctly and provided a power infeed. We understand now that the requirement was for a duplex outlet, within a single circuit power system. Our equivalent product would list for \$70.

[*Id.*]

By its own admission, Kimball's initial bids in the Desk and Tables category and Systems category were nonresponsive. The modifications submitted by Kimball during clarifications to make its bids responsive are not allowed as set forth above. These issues of protest are denied.

Kimball next argues that MMO's interpretation of functional equivalency reflects a latent defect in the solicitation:

Based upon the plain language of the Solicitation, its attachments, and MMO's responses to offerors' questions, it appeared that offerors' bids would be accepted

and evaluated as long as it submitted prices in response to each sample item. It further appeared that MMO would accept pricing items as long as they generally did the same thing as the sample products with generally the same and dimensions. At no point were offerors informed that MMO would consider bids to be non-responsive if not functionally equivalent, and at no point were offerors informed that functional equivalence meant that products must be the same in precise ways (i.e., one shelf instead of two).

This was an IFB conducted under Section 11-35-1520. Section 11-35-1520(10) requires the award be made to the lowest priced responsive and responsible bidders. To be responsive a bid must conform to all material aspects of the solicitation. *See* S.C. Code § 11-35-1410(7). This solicitation utilized a brand name or equal specification. To be responsive a bid must provide the brand name product or an equal product. Products offered as equal had to be functionally equivalent to the brand-named products. Functional equivalency was defined as performing the same function with the same or similar materials and dimensions. Simply submitting a price does not make a bid responsive. Allowing a bidder to submit a low price for an inferior product defeats the purpose of competitive bidding.

The process under which this procurement was conducted was defined in the Code, Regulations, and the solicitation which includes all attachments and amendments. There was no deviation from the prescribed process and there was no latent defect in the solicitation or process. This issue of protest is denied.

Finally, Kimball protests that certain offerors should have been excluded from any award because they were not responsible bidders. Kimball did not identify specific awardees that it feels are not responsible bidders and did not supplement its protest. This issue of protest is dismissed as vague.

7. PROTEST OF NATIONAL OFFICE FURNITURE REGARDING RESPONSIVENESS

MMO determined that National's bids were non-responsive. National protests that MMO's determination of non-responsiveness was error. [Attachment 1]

On December 21, 2017, National was asked to explain how certain products it bid were functionally equivalent to the brand named products in the IFB. In the Seating category, National

was asked to explain how its Delgado low back Lounge Chair model N53GUMD was equivalent to Steelcase's Bindu mid-back executive chair with casters, model CO300. National's response was:

We made an error in our response for this line item. We should have entered our Delgado Model, Part Number N53GU5LMC, which has a 5-prong mobile base with casters, similar and functionally equivalent to the noted Steelcase model number. The price remains the same at \$1,400.00 in our Seating 3 Price List, Pg. 581

https://www.nationalofficefurniture.com/NOF/media/documents/pricelists/seating_pricelist.pdf?10252017

[Attachment 1A] By its own admission, National's bid was non-responsive to the material requirements of the IFB.

In response to a request for clarification in the Desks and Tables category, National was asked to explain how its Waveworks Wall Mount Cabinet model WW3618SOHML was equivalent to Indiana Furniture's Hutch, model SP65-1566TWDND. National's response was:

National's unit is a wall mounted hutch with locking doors, similar to Indiana Furniture's noted model number, however it is not as wide. Our unit is 36" wide and we could mount (2) units side by side, on the same rail for a width of 72 inches. The price would be \$1,326 for a Qty of 2, in this size. A user could also mount a 36" and a 30" side by side for a total width of 66" if they wanted to. These units come in multiple sizes so there are multiple options available, depending on the user's preference and in both situations our product would be functionally equivalent to Indiana Furniture's model noted.

National acknowledges that the unit it bid is half the size of the unit requested and only bid the price of a single unit. This gave National an unfair advantage in price. Then National suggests that the State should consider its bid equivalent since the State could order two and mount them side-by-side. National was non-responsive to this requirement.

In response to a request for clarification in the Filing, Storage, and Casegoods category, National was asked to explain how its Waveworks Box/Lateral File, model WW173022PUBL was

equivalent to Steelcase's LATRLUNIVPROUDWD1.5H DWR/DWR 18X30, model RLF18301BW. National's response was:

National does not have a (1) drawer unit. The model specified is one of the closest that we have to the Steelcase unit. It has a lateral file drawer which measures 17"D x 30"W x 21"H and is functionally equivalent to the Steelcase drawer however it also does have a box drawer on top of the lateral file drawer. This is an undersurface unit however, so it would need to have a top added to complete it, either as a stand alone, or part of a larger footprint. We could also have specified our (2) drawer lateral file unit, model number WW1830LFF2M which is 18" deep and 30" wide and has a list price of \$697. It would also be functionally equivalent but would have an additional drawer. It can be found in our Casegoods 1 Price List, Pg. 454

https://www.nationalofficefurniture.com/NOF/media/documents/pricelists/casegoods_pricelist.pdf?10252017

In response to another request for clarification in the Filing, Storage, and Casegoods category, National was asked to explain how its Waveworks 4 Drawer Lateral File, model WW2436LFF4LL was equivalent to Steelcase's LAT-1 LU DR 4DWR 18X42X65.5, model RLF18425F. National's response was:

We made an error in our response for this line item. We should have entered our Part Number WW1842LFF5DM, a metal lateral file with 5 drawers, one of them having a recessed door. This unit is more similar and functionally equivalent to the Steelcase model number noted and has a list price of \$1,767. It can be found in our Casegoods 1 Price List, Pg. 454

https://www.nationalofficefurniture.com/NOF/media/documents/pricelists/seating_pricelist.pdf?10252017

Again National admits that the product it bid was not responsive.

In response to a request for clarification in the Filing, Storage, and Casegoods category, National was asked to explain how its Waveworks Metal Storage Cabinet model WW1830PFHM was equivalent to Steelcase's Storage – 4 Adj SHL 18x30x65.5, model RSC18305KF. National's response was:

National does not have a 30" wide metal unit with 4 shelves in our standard line therefore we specified our 18" deep and 30" wide unit with 2 shelves. The

customer could specify a Qty of 2 of these units for the same amount of storage to be functionally equivalent. We could have also entered Part Number 25N3053VSHL, which would be functionally equivalent but is a laminate double door storage cabinet with shelves. This unit has a list price of \$2,168 and can be found in our Casegoods 2 Price List, Pg. 114

https://www.nationalofficefurniture.com/NOF/media/documents/pricelists/casegoods2_pricelist.pdf?10252017

The problem with National's explanation is that it only bid the price for a single unit. This gave it an unfair price advantage.

In every case, National acknowledged that the product bid was not functionally equivalent as defined in the solicitation. That is, having the same or similar materials and dimensions. By bidding products that were not functionally equivalent, National gained an unfair competitive advantage in its bid price.

National suggests that the State's action in determining responsiveness was inconsistent with its definition of a functional equivalent indicating a latent defect in the solicitation. The definition of a functionally equivalent appeared in Amendment 2 which stated:

A functional equivalent shall concentrate on what the product is intended to do, with the same or similar materials and dimensions. If an Offeror has multiple variations in grade or materials available for a particular product, the State advises the Offeror provide the most cost effective model without compromising functional equivalency.

(emphasis added) National suggests that its products were determined to be non-responsive if they were not identical to the brand name product. However as shown above, the products National offered were not of the same or similar materials and dimensions and were properly disqualified. National suggests that an alternate definition for functionally equivalent product as one that performs the same action, serves the same purpose, and does not infringe upon any existing intellectual property right would be more appropriate. National relies on *Appeals by Amdahl Corp. and International Business Machines Corp.*, Panel Case No. 1986-6, where the Procurement Review Panel defined functionally equivalent:

The configurations were equivalent in function. Function is a determination of the tasks the computer can do. All of the listed configurations can perform the functions required by Clemson. Each was expandable, and each was upgradable.

However, in that case, functional equivalency was not defined in the solicitation. Here, the State specifically told bidders how it would determine if a product was functionally equivalent. There was no latent defect in the solicitation and this issue is dismissed.

National also argues that when the State asked it to explain how the product bid was functionally equivalent, it had the right to substitute a product that really was functionally equivalent as long as it did not change its price. National relies on the statement in Attachment M that the State reserves the right to reject any item proposed and require the vendors to provide an alternate product that meets its requirements fails for the reasons stated earlier. This argument fails for several reasons. First the State was seeking an explanation of equivalency; it had not yet rejected National's products. Second, the State reserved the right to itself. That right was not granted to the bidders. Finally, as explained earlier, modification of a bid after opening is prohibited.

National next argues that MMO's interpretation of functional equivalency reflects a latent defect in the solicitation:

Based upon the plain language of the Solicitation, its attachments, and MMO's responses to offerors' questions, it appeared that offerors' bids would be accepted and evaluated as long as it submitted prices in response to each sample item. It further appeared that MMO would accept pricing items as long as they generally did the same thing as the sample products with generally the same and dimensions. At no point were offerors informed that MMO would consider bids to be non-responsive if not functionally equivalent, and at no point were offerors informed that functional equivalence meant that products must be the same in precise ways (i.e., one shelf instead of two).

This was an IFB conducted under Section 11-35-1520. Section 11-35-1520(10) requires the award be made to the lowest priced responsive and responsible bidders. To be responsive a bid must conform to all material aspects of the solicitation. Section 11-35-1410(7). This solicitation utilized a brand name or equal specification. To be responsive a bid must provide the brand name product or an equal product. Products offered as equal had to be functionally equivalent to the brand named products. Functional equivalency was defined as performing the same function

with the same or similar materials and dimensions. Simply submitting a price does not make a bid responsive. Allowing a bidder to submit a low price for an inferior product defeats the purpose of competitive bidding.

The process under which this procurement was conducted was defined in the Code, Regulations, and the solicitation which includes all attachments and amendments. There was no deviation from the prescribed process and there was no latent defect in the solicitation or process.

National also alleges that certain offerors should have been excluded from any award because they were not responsible bidders:

The Solicitation required all offerors to satisfy certain “Special Standards of Responsibility.” One required standard is that all offerors were “Manufacturers,” which the Solicitation defined as the “firm responsible for fabricating or manufacturing the products ordered” (Solicitation § II). To be deemed qualified, the Solicitation also required all offers to be from manufacturers, and it provided that offers from “authorized dealers or resellers, vendors, distributors, or manufacturer brokers” would not be considered for award. (Solicitation § V).

Upon information and belief, National does not believe that all of the companies selected for award are, in fact, “Manufacturers” that have the capability of producing all requested items themselves. National has submitted a FOIA request for the offers of the other bidders’, and it specifically reserves the ability to supplement this protest ground with additional information once a response is received.

National did not identify specific awardees that it feels are not responsible bidders and did not supplement its protest. This issue of protest is dismissed as vague.

8. PROTEST OF HERMAN MILLER, INC.

Herman Miller protests the State’s determination that it was non-responsive to the requirements in the Systems category where the State required a 49 inch utility light and HM bid, as functionally equivalent, a 24 inch utility light as follows:

Herman Miller, Inc. learned from the Procurement Officer that its bid under Subcategory D for systems furniture was rejected as non-responsive. The nonresponsiveness finding was due to one item of the 30 listed in the system furniture and accessories bid sheet. This item was a “utility light.” In a request for

clarification, the Procurement Officer based this finding on the width of the utility light being 24 inches rather than the 49 inches of the example product listed on the bid sheet. The bid sheet did not put the specifications within the Solicitation itself, but rather each vendor had to go outside the IFB and look up the particular item manufactured by another and provided by the State as an example to determine what the specifications might be.

In making her determination of non-responsiveness on this one item, the Procurement Officer requested clarification. In the course of evaluating the clarification email, the Procurement Officer found in a catalog offered by Herman Miller, Inc. with the desired discount specified, an equivalent utility light of the appropriate width. The Procurement Officer did not request that Herman Miller, Inc. clarify if it would bid this utility light.

[Attachment 7]

As stated earlier the State established the salient features in defining “functional equivalent” as:

A functional equivalent shall concentrate on what the product is intended to do, with the same or similar materials and dimensions. If an Offeror has multiple variations in grade or materials available for a particular product, the State advises the Offeror provide the most cost effective model without compromising functional equivalency.

(emphasis added)

The solicitation clearly established that bidders must be responsive to each item in a category to be eligible for award. Arguments that this requirement should be waived if the bidder is not responsive to one, or two, or three of the items in a category fail under Section 11-35-1520(6), which requires bids be evaluated based on the requirements in the IFB. Arguments that the procurement officer should substitute or allow the substitution of an acceptable product from HM’s catalog fail under Section 11-35-1520(6), which requires that bids be accepted unconditionally and without alteration. A bid cannot be made responsive after bid opening. The rejection of HM’s bid was in accordance with the Code and was not arbitrary, capricious, or contrary to law. This issue of protest is denied.

HM alleges that other bidders received further consideration in clarification beyond that extended to HM. However, HM failed to identify specific bidders or instances where these alleged irregularities occurred. This issue of protest is denied.

HM further alleges that other bidders bid items not exactly conforming to the specifications provided by the manufacturers but were found responsive. HM, however, failed to identify specific bidders or instances where these alleged irregularities occurred. This issue of protest is denied.

Finally, HM alleges that certain other awarded bidders do not meet the criteria for responsibility in their ability to provide items that match exactly the samples items on the Bid Sheet for Subcategory D. Again, HM failed to identify specific bidders or instances where these alleged irregularities occurred. This issue of protest is denied.

9. PROTESTS OF ALLSTEEL, INC., AND HON COMPANY LLC

Allsteel and HON Company filed similar letters of protest. [Attachment 8 (Allsteel) and Attachment 9 (HON)] Both protest that the solicitation contained latent defects and issues that were not capable of being known within fifteen days of issuance, that resulted in the State's applying arbitrary criteria to determine functional equivalency. Neither identifies a specific determination by the State affected by this alleged error.

This was an IFB conducted under § 11-35-1520. Section 11-35-1520(10) requires that award be made to the lowest-priced responsive and responsible bidders. To be responsive a bid must conform to all material aspects of the solicitation. S.C. Code § 11-35-1410(7). This solicitation utilized a brand name or equal specification. To be responsive a bid must provide the brand name product or an equal product. Products offered as equal had to be functionally equivalent to the brand named products. Functional equivalency was defined as performing the same function with the same or similar materials and dimensions. Simply submitting a price does not make a bid responsive. Allowing a bidder to submit a low price for an inferior product defeats the purpose of competitive bidding.

The process under which this procurement was conducted was defined in the Code, Regulations, and the solicitation itself, which includes all attachments and amendments. There was no deviation from the prescribed process and there was no latent defect in the solicitation or process. All the information necessary to support these allegations were known to the bidders with the posting of Amendment 2 and could have been timely protested within 15 days of that posting. Accordingly, these issues are barred from consideration as a protest of the award under § 11-35-4210(1)(b), which states:

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, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(emphasis added)

This issue of protest is denied.

Allsteel also protests:

Moreover, it appears that the State improperly changed the bid numbers for certain bidders whose bids were considered in the first Notice of Intent to Award in violation of S.C. Code Ann. § 11-35-1520. In support of this, Allsteel offers a comparison on the Notice of Intent to Award issued on February 9, 2018 ... versus that issued on March 16, 2018 (Allsteel has not yet been provided with a comprehensive list of all intended contract awards from the March 16, 2018 Notice of Intent to Award). The State lists different vendor total scores in the second Notice of Intent to Award evidencing improper changing of bids after submission.⁷

The State provided bidders with a spreadsheet that was Attachment M. The spreadsheet was prepopulated with the market baskets for each category, blank fields for bidders to complete, and

⁷ The State initially awarded contracts on February 9, 2018 and subsequently realized that it had made an administrative error by failing to evaluate all bids received. Those awards were cancelled by the CPO under Regulation 19-445.2085(C). After further evaluation, final awards were issued on March 16, 2018.

formulas for calculating totals. In the Desk and Tables category, there was an error in the formula for calculating the grand total. Some bidders corrected the formula prior to bid submission. The State reviewed every submission to insure that the correct formulas were used to calculate the Grand Total prior to evaluation. This issue of protest is denied.

Finally, Allsteel and HON amended their protests on April 2, 2018, with one additional ground. [Attachments 8A and 9A] They protest that:

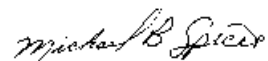
The Solicitation did not give bidder notice that MMO intended to apply the “Functionally Equivalent” standard set forth in Attachment M in a restrictive manner and as a basis to declare a bidder non-responsive.

As shown above, the solicitation clearly explained how the low bid(s) would be calculated. The solicitation put bidders on notice and they should have known that they had to bid each line item in a category and that each line item had to be the brand name or a functional equivalent in order to be considered responsive. This issue of protest is denied.

DECISION

The protests by National Office Furniture, Inc., and Kimball Office, Inc., of irregularities in the evaluation of the Filing, Metal Storage and Wooden Casegoods category and the Seating category are granted. To the extent they protest the evaluation or awards for these categories, the protests of Knoll, Krueger, Allsteel, and HON are dismissed as moot. *See* n. 5, *ante*. All awards for these two categories are cancelled. The State is ordered to proceed to fulfill its needs for these two categories in accordance with the Code. In all other respects, the protests are denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

List of Attachments

<i>No.</i>	<i>Description</i>
1	National Office Furniture, Inc., Protest
1A	National Office Furniture Clarification
2	Kimball Office, Inc., Protest
2A	Kimball Office Clarification
3	Knoll, Inc., Protest
3A	“Complete listing of Knoll non-responsive products,” p. 10
4	Hyer Office Furniture, Inc., Protest
4A	Hyer Determination of non-responsiveness
5	Krueger International Protest
6	Jasper Seating Company, Inc., Protest
7	Herman Miller, Inc., Protest
8	Allsteel, Inc., Protest
8A	Allsteel Amended Protest
9	HON Company, LLC, Protest
9A	HON Amended Protest

Attachment 1

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CERTIFIED CIVIL MEDIATOR

March 26, 2018

BY EMAIL TO protest-mmo@mmo.sc.gov
AND HAND DELIVERY

Mr. Michael Spicer
Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: Protest of Solicitation Number 5400013853
by National Office Furniture, Inc.
Date of Notice of Intent to Award: March 16, 2018

Dear Mr. Spicer:

This firm represents National Office Furniture, Inc. ("National"). Pursuant to *S.C. Code Ann.* §11-35-4210, this is a protest of the award made on Solicitation Number 5400013853 ("the Solicitation"). National has enjoyed working with the South Carolina Materials Management Office (MMO) for more than 15 years. As one of the State of South Carolina's approved furniture suppliers, National prides itself in providing the State and its agencies with first-rate products and service. The State's business has meant a great deal to National, and it was looking forward to working with MMO into the future.

For more than fifteen years, National has provided the State of South Carolina with high-quality furniture at excellent prices. We have had a mutually productive relationship with the State. For example, just last year the Department of Health & Human Services purchased a significant amount of furniture from National. As a result of its sales to State agencies, among other eligible entities, National remits thousands of dollars in administrative fees to MMO each year.

Despite National's years of excellent service to the State of South Carolina, and the submission of a responsive bid that provided the requested products at what National believes are among the lowest offered prices, National was not selected as an awardee of the contracts issued pursuant to the Solicitation.

SLC-8588562-1

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Chief Procurement Officer
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National appreciates your willingness to work with the company in resolving its concerns, and it believes that we can reach a resolution that is fair and beneficial to all parties. National thanks you in advance for your consideration of this protest.

I. SOLICITATION BACKGROUND

A. General Background

MMO issued the Solicitation on September 28, 2017. Amendments were posted on October 16, 2017, and October 26, 2017. The bid process concluded, and MMO issued an initial Notice of Intent to Award on February 9, 2018. Eight bidders, including National, protested the award.

On February 23, 2018, MMO issued a Written Determination canceling the initial awards and ordering the reevaluation of all bids received. MMO issued a new Intent to Award on March 16, 2018.

This letter serves as National's protest of that award for the reasons articulated herein and for such other reasons as may be identified in any amended protest letter submitted pursuant to *S.C. Code Ann.* §11-35-4210(b).

B. Purpose of the Solicitation

The purpose of the Solicitation was to enable MMO to "establish a source or sources of supply for the purchase of new office furniture for all State agencies and local public procurement units within the geographic limits of the State of South Carolina" for a five-year period. (Solicitation § I). Specifically, through the Solicitation, MMO sought bids for sources of four separate categories of furniture: desks and tables; filing, storage and casegoods; seating; and systems. (Solicitation § 3.2.1).

The contracts awarded through the Solicitation were for one-year periods, with four additional one-year options for renewal. (Solicitation § I).

c. Required Submissions

As part of the bid process, offerors were required to submit, among other items:

- The Contractor's Standard Warranty;
- The Contractor's Catalog/Product Line and List Price that was in effect at the time of bid submission;
- A completed version of Attachment M (the Amended Pricing Schedule), and
- A completed version of Attachment F (Material Requirements).

(Solicitation § IV).

As part of their submissions, offerors were required to submit the following information on behalf of themselves and any subcontractor:

- a. The general history and experience of the business in providing work of similar size and scope.
- b. A detailed, narrative statement listing the three most recent, comparable contracts that have been performed. For each contract, describe how the supplies or services provided are similar to those requested by this solicitation, and how they differ.
- c. A list of every business for which supplies or services substantially similar to those sought with this solicitation have been provided, at any time during the past three years.
- d. A list of every South Carolina public body for which supplies or services have been provided at any time during the past three years, if any.
- e. List of failed projects, suspensions, debarments, and significant litigation.

(Solicitation § V).

National submitted all requested items.

D. Qualifications & Responsiveness

The Solicitation provided that an offeror would be considered “non-responsive” if “mandatory minimum qualifications are not met.” The only qualifications outlined in the Solicitation are set forth in Section V. That section required offerors to demonstrate certain elements of financial responsibility and comply with four “Special Standards of Responsibility”:

1. Offers must be from Manufacturers. Offers from authorized dealers or resellers, vendors, distributors, or manufacturer brokers will not be considered for award.
2. Offerors must have capacity to service using governmental units through-out the entire state of South Carolina. . . .
3. [...] There is no limit to how many categories an Offeror may submit an offer to.
4. Approved Authorized Dealer/Resellers named by the Contractor and submitted with the offer must meet the following qualifications:

- Must have showroom(s) and/or office(s) in the State of South Carolina from which it sells and services the full Contractor product line(s) on contract.
- Must employ full time furniture sales, consulting and service personnel.
- Must be able to make field modifications and repairs, on any item ordered from the contract.
- Must have personnel, vehicles and equipment available to make delivery of any item ordered from the contract.

(Solicitation § V). Finally, the Solicitation required offerors to submit information and documentation in support of their qualifications, including narratives describing the offerors' work on similar contracts. (Id.).

National met all of these qualifications, and its bid included all requested documentation.

The pricing proposal (Attachment M to the Solicitation) set forth two additional elements necessary for an offer to be deemed responsive: (1) pricing had to be provided for at least one category and for installation and design; and (2) offerors had to provide pricing information for all of the items within any one category and could not submit "incomplete" bids. National complied with these requirements.

Neither the Solicitation nor the pricing proposal (Attachment M) contained any other requirements for an offer to be deemed as responsive.

E. Award Criteria

Each of the furniture categories were to be awarded separately, with awards being made to up to fifteen vendors per category. (Solicitation § VI). The awards were to be made to the "lowest responsible and responsive bidder(s)," which was to be determined by the "Grand Total" of the calculations. (Solicitation § VI).

The Solicitation included formulas to calculate the low bids which are described as:

For the "Desks and Tables," "Filing; Metal Storage and Wooden Casegoods" and the "Seating" categories, the low bid(s) will be calculated as follows: [In Attachment M – Pricing Schedule] The sum of the Item Price column for all sample furniture items listed in each Category tab (there is a separate tab for each Office Furniture Category) of the Pricing Schedule spreadsheet will be summed to generate a Grand Total for each Office Furniture category which will be represented on the Summary Tab.

For the "Systems" category the low bid(s) will be calculated as follows: [In Attachment M – Pricing Schedule] The sum of the Item Price column for all sample furniture items listed in each Category tab (there is a separate tab for each Office Furniture Category) of the Pricing Schedule spreadsheet will be summed to generate an Item Total. The Item Total

Mr. Michael Spicer
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will be weighted at 85% of the Grand Total. The remaining 15% will be accounted for by the hourly rates as reports on the Installation and Design tab in Attachment M – Pricing Schedule.

(Solicitation § VI).

F. Pricing Formula

Attachment M (the Amended Pricing Schedule) contained lists of “a representative sampling of historically purchased items” for each furniture category. MMO stated that these items would be used “to validate the veracity of each Offeror’s discount for that specific category.” For each “historically purchased item,” Attachment M contained a description of the item, the name of the manufacturer of the item, and the item’s part number. Offerors were required to provide the same information for their “functionally equivalent product,” as well as the offerors’ list price and their price to the State for each item. For example:

Historically Purchased Item*					
Vendor Name	Item Description	Manufacturer Number/Product Code	Vendor Part Number		
STEELCASE INC.	LEGS-POST27HPKG OF 4	GROUPWORK	TS4L27PG4		
Offeror's Functionally Equivalent Product					Item Price
Item Description	Manufacturer Number/Product Code (if applicable)	Vendor Part Number	Location Information	List Price	
Priority Static or Mobile Metal Column Leg (pricing unit = 1 each)	AB2802BC	AB2802BC	PLPRIPriceList pg 310	\$\$\$	\$\$\$

Attachment M provides that the State would “accept items that are functionally equivalent to the items specified.”

Several questions were asked during the Question & Answer period as to how MMO would determine whether an item was “functionally equivalent” to the item listed. In response to Question #39 (Attachment J), MMO stated that a “*functional equivalent shall concentrate on what the product is intended to do, with the same or similar materials and dimensions.*” If an Offeror has multiple variations in grade or materials available for a particular product, the State advises the Offeror provide the most cost effective model without compromising functional equivalency.” (emphasis added).

One offeror asked MMO, “What criteria will be used to determine whether a bidder’s product qualifies as a functionally equivalent [sic] to the corresponding item on the bid list?” (Attachment J at Q&A 49). MMO referred to its response to Question #39.

Question after question sought clarification on functional equivalency, such as whether items needed to have the exact same dimensions or be made of the same materials. In response to each and every request, MMO merely referred to its response to Question #39.

If the State determined that an item was not “functionally equivalent,” Attachment M provided that the State could “reject any item proposed . . . and require the vendors to provide an alternative product that meets its requirements, at the price originally proposed.” At no point – not in the Solicitation, not in Attachment M, and not in response to the Questions & Answers – did MMO ever state that the State could treat an offer as non-responsive if it deemed a single item to be not functionally equivalent to one of the samples.

G. Non-Award to National

National submitted offers under three of the four furniture categories: (1) Desks and Tables, (2) Filing, Storage, and Wooden Casegoods, and (3) Seating. It was not awarded a contract under any category.

As an initial matter, National made a ministerial error in its use of the pricing spreadsheet that resulted in its “Grand Total” on that spreadsheet not including its percentage discount. National brought this error to MMO’s attention prior to the issuance of the notice of award. It is National’s understanding that MMO applied its discretion to correct the mistake and thereby considered National’s correct pricing,¹ which was as follows:

Category	Percentage Discount	Grand Total
Desks and Tables	50.00%	\$16,966.50
Filing, Metal Storage, and Wooden Casegoods	50.00%	\$21,480.00
Seating	50.00%	\$13,125.50

Nonetheless, MMO informed National that – regardless of its pricing – MMO deemed National’s offers under each of the three furniture categories to be non-responsive because it did “not currently meet minimum requirements as multiple items were not functionally equivalent (FE).” MMO provided National with a “Determination of Nonresponsibility” form for these categories.

Specifically, MMO found that National’s pricing proposal contained *one* item in the Seating category, *one* item in the Desks and Tables category, and *two* items in the Filing, Storage, and Wooden Casegoods category that were not functionally equivalent to the sample product that MMO had provided.

¹ National has submitted a FOIA request for MMO’s evaluation materials, but such information has not been received to date. If those materials indicate that MMO did *not* allow National to correct its minor administrative error, then National protests that decision as well.

In the Seating category, which contained 30 sample items for which offerors were required to provide prices for functionally equivalent items, National provided the price for its "Delgado Lounge Chair," which it had interpreted as being functionally equivalent to the "Bindu Mid Back Exec Chair" sold by Steelcase Inc. MMO determined that National's product was not functionally equivalent because National bid a "low back chair" instead of a "mid back chair."

The Desks and Tables category contained 25 sample items. In response to a sample item from Indiana Furniture, National provided what it believed to be a functionally equivalent wall-mounted cabinet that performed the same function and had similar locking doors. National's product was a different length than the sample product, but National explained that two of its units could be placed side-to-side in order to be the same length. Nonetheless, because National's product was not the exact same length as the sample, MMO deemed it to be not functionally equivalent.

In the Filing, Storage, and Wooden Casegoods category (which contained 28 sample items), one of the sample products was a Steelcase Inc. lateral file unit that was made of metal, 30" wide, and contained one drawer. In response, National proposed a lateral file unit that was 30" wide and contained two drawers. MMO deemed National's proposed product to be not functionally equivalent because it lacked the same top that was present in Steelcase's unit.

Finally, in the same storage category, National proposed metal 18" tall, 30" wide storage cabinet with two shelves as a functionally equivalent product to Steelcase Inc.'s 65.5x30 metal unit with four shelves. MMO treated this item as not functionally equivalent due to the difference in size and number of shelves.

In December 2017, MMO sent National a request for clarification, asking National to explain how the items it bid were functionally equivalent to the sample items. In response, National either described how the items were equivalent or explained that it did not interpret the sample items in the same way as MMO. In the latter instances, National provided MMO with examples of alternative items in its catalog that fit the same criteria that MMO apparently desired.

With its revised pricing, National was among the 15 lowest bidders in the Desk and Tables and Filing, Storage, and Wooden Casegoods categories. However, because it submitted one or two items in each category that did not meet the exacting criteria that MMO never specified in the Solicitation, it was deemed to be non-responsive in those categories.

II. TIMELINESS OF PROTEST

This protest is timely within the deadline set by *S.C. Code Ann.* § 11-35-4210(1)(b). MMO posted the Intent to Award on March 16, 2018, and this protest was emailed and hand-delivered to the Chief Procurement Office on March 26, 2018.

III. GROUNDS OF PROTEST

1. MMO's Determination of Non-Responsiveness Was Error. National Is A Responsive Bidder.

In three of the award categories – (1) Filing, Storage, and Wooden Casegoods, (2) Desks and Tables, and (3) Seating – MMO determined that National's bid was non-responsive because MMO deemed one or two of the items submitted by National in each category to be not "functionally equivalent" to the sample item. This was not a proper or disclosed basis for disqualifying an offer as non-responsive, and MMO's non-responsiveness determination should be reversed.

The determination that these items were not functionally equivalent was erroneous. In *In RE: Protest by Amdahl Corporation and International Business Machines Corporation*, Case No. 1986-6, 1986 CPO LEXIS 3, the Procurement Review Panel defined functionally equivalent, holding: "The configurations were equivalent in function. Function is a determination of the tasks the computer can do. All of the listed configurations can perform the functions required by Clemson. Each was expandable, and each was upgradable."

A functionally equivalent product is one that performs the same action, serves the same purpose, and does not infringe upon any existing intellectual property right. Here, the Solicitation sought office furniture, chairs, desks, tables, and the like. National submitted similarly styled items that performed the same function. They were functionally equivalent. Moreover, National also offered additional options that the State could have required it to provide at the same price.

The Solicitation listed several criteria for an offeror to be deemed responsible, responsive, and qualified. (Solicitation § V; Attachment M at "Instructions" tab). The Solicitation *never states* that MMO could reject a bid as non-responsive because it determined that one pricing item was not functionally equivalent to the sample item provided. Instead, the Solicitation says the opposite – that if MMO determined an item to be not functionally equivalent, it "**reserve[d] the right to reject any item proposed for the listed items and require the vendors to provide an alternative product that meets its requirements, at the price originally proposed.**" (Attachment M at "Instructions" tab) (emphasis added).

There is no basis in the Solicitation for deeming National's offer to be non-responsive simply because MMO arbitrarily deemed one pricing item to be too different from the sample, because of minor differences in style or dimension, especially when National told MMO in response to its request for clarification that National could offer the State an alternative product. In the Seating category, National's alternative was the same price as the item it had initially proposed. This is particularly true because the ultimate purchaser is not restricted under the contract to only purchasing items in the pricing proposal; those items were intended as a means of price comparison only.

If MMO believed that two of the items offered by National were not precisely what it wanted, it had several options other than disqualifying National entirely. First and foremost, MMO could have followed the procedure outlined in the Solicitation – reject the item and require the offeror to provide an alternative product at the price proposed. MMO’s December 2017 request for clarification appeared to do just that – ask National for an alternative item that met certain specifications. National provided the requested alternative product. Nonetheless, rather than follow the Solicitation’s procedures, MMO decided to treat National’s entire offer in these two categories as non-responsive.

In the Desks and Tables category, National’s “Grand Total” of its bid was less expensive than two of the offerors who were awarded contracts, and MMO did not fall all 15 possible awards. In the Filing, Storage and Wooden Casegoods category, National’s “Grand Total” was less expensive than five of the other offerors’. Therefore, had MMO evaluated National’s offers, it would have been awarded a contract under these two categories.

National’s offers under these categories provided the State with high quality, low-cost options for its furniture needs. There is no reasonable basis under the terms of the Solicitation for rejecting National’s offers, simply because MMO interpreted the “functional equivalence” of one item in each category differently than National did. The Solicitation had a set procedure for addressing differences in the interpretation of functional equivalency, and MMO chose not to follow those procedures. As a result, its determination of non-responsiveness should be rejected, National’s offers should be deemed responsive, and it should be awarded one of the remaining contracts in the Desks and Tables category and the Filing, Storage, and Wooden Casegoods category.

MMO has arbitrarily found National’s bid to be non-responsive based upon a misapprehension of what constitutes functional equivalence. Moreover, because National is a long-time and lower cost provider, this arbitrary decision will cause harm to the state agencies needing to purchase office furniture when they are unable to acquire quality furniture at lower costs.

2. MMO’s Interpretation of Functional Equivalency Reflects a Latent Defect in the Solicitation.

The Solicitation document itself never references “functional equivalence” or any requirement that every item submitted must be “functionally equivalent.” Rather, the Solicitation merely states that the lowest bids would be calculated by adding the total sum of items provided. (Solicitation § VI).

Attachment M to the Solicitation contains the only reference to “functional equivalence.” The Instructions to Attachment M (and the instructions to each category) provided that the items offered in each category were a “representative sampling of historically purchased items” that

would be “used to validate the veracity of each Offeror’s discount for that specific category.” MMO would “accept items that are functionally equivalent to the items specified.”

There was significant confusion among the offerors in trying to determine what MMO meant by “functionally equivalent items.” The sample items listed were all manufactured by the offerors’ competitors, so the offerors lacked information about the details of the products. As reflected in the Questions & Answers (Attachments J and K to the Solicitation), offerors were also confused as to what elements of a particular product made it functionally equivalent. For example, did a proposed desk need to be the same size as the sample? Did it need to be made out of wood, or was metal acceptable? Did a chair need to have the same upholstery as the sample provided?

One offeror asked, only, that MMO define “Functionally Equivalent.” (Attachment J, #39). MMO responded:

A functional equivalent shall concentrate on what the product is intended to do, with the same or similar materials and dimensions. If an Offeror has multiple variations in grade or materials available for a particular product, the State advises the Offeror provide the most cost effective model without compromising functional equivalency

For every other question asked by an offeror about functional equivalence – whether MMO would accept one item as functionally equivalent to another – MMO merely referred back to this response.

Based upon the plain language of the Solicitation, its attachments, and MMO’s responses to offerors’ questions, it appeared that offerors’ bids would be accepted and evaluated as long as it submitted prices in response to each sample item. It further appeared that MMO would accept pricing items as long as they generally did the same thing as the sample products with generally the same and dimensions. At no point were offerors informed that MMO would consider bids to be non-responsive if not functionally equivalent, and at no point were offerors informed that functional equivalence meant that products must be the same in precise ways (i.e., one shelf instead of two).

If MMO believes that the Solicitation allows it to treat offers as non-responsive for lack of their ability to provide a product identical to that of a competitor, then the Solicitation contained a latent defect – one that National could not recognize or protest in advance of award. It is not to the State’s benefit to disqualify offerors providing the State with the lowest cost products simply because the offerors interpreted the relevant specifications of a competitor’s product in a manner differently than MMO. By rejecting offers due to requirements that MMO was on notice from the Questions submitted were confusing and capable of different interpretations, the State has lost the benefit of the continued services of its vendors and will pay a higher cost for its products.

The Solicitation did not give MMO the authority to deem National's offer as non-responsive simply because MMO believed that two items were not functionally equivalent. However, if it is MMO's position that the Solicitation somehow implicitly did give MMO such authority, then that is a latent defect in the Solicitation that requires the Solicitation to be re-done. It is simply not in the best interests of the State to reject a low-cost offeror for this reason.

This evaluation method is a latent defect that results in the Procurement violating *S.C. Code* §§11-35-20 and 11-35-30. The evaluation method used materially differs from that disclosed in the Solicitation, and the failure to follow the method of determining functional equivalence outlined by the Panel and the common law fatally taints this procurement. The CPO should cancel this solicitation and Order it to be resolicited with appropriate specifications or a clear advisory of the requirements of each item to be priced.

3. MMO Failed To Evaluate The Offerors' Pricing Based Upon The Disclosed Criteria.

The Solicitation provided that the lowest costs would be determined by the "Grand Total" of the offerors' pricing, as calculated by the pricing spreadsheet and reflected on the "Summary" tab of the spreadsheet. (Solicitation § VI). This does not appear to be what MMO did.

Based upon what National has learned from other offerors, the total price listed in the Notice of Award does not match the "Grand Totals" listed in the other offerors' Attachment M pricing spreadsheets. As a result, National assumes that MMO employed some price adjustment or weighting criteria to the Grand Totals in the pricing spreadsheet in order to come up with the prices listed in the Notice of Award and Bid Tabulation document. If MMO did not employ some adjustment, then it has made substantial errors in the pricing it has assigned to the offerors.²

Assuming that MMO did weigh the pricing in some manner, such adjustment was not disclosed to the offerors and not permitted by the terms of the Solicitation. Because MMO did not evaluate the offerors in the manner required by the Solicitation, the awards should be reversed, and the contracts should be re-solicited.

4. Certain Offerors Should Have Been Excluded from Any Award Because They Were Not Responsible Bidders.

The Solicitation required all offerors to satisfy certain "Special Standards of Responsibility." One required standard is that all offerors were "Manufacturers," which the Solicitation defined as the "firm responsible for fabricating or manufacturing the products ordered" (Solicitation § II). To be deemed qualified, the Solicitation also required all offers to be

² National submitted a FOIA request for the other offerors' submissions on February 15, 2018. To date, National has not received the requested materials, although MMO's time to respond is past due. National reiterates its request for the Public information as defined by *S.C. Code Ann.* §11-35-410 that it requested in its February 15, 2018 Freedom of Information Request.

from manufacturers, and it provided that offers from “authorized dealers or resellers, vendors, distributors, or manufacturer brokers” would not be considered for award. (Solicitation § V).

Upon information and belief, National does not believe that all of the companies selected for award are, in fact, “Manufacturers” that have the capability of producing all requested items themselves. National has submitted a FOIA request for the offers of the other bidders, and it specifically reserves the ability to supplement this protest ground with additional information once a response is received.

5. MMO Failed to Evaluate National’s and the Other Offerors’ Submissions Properly.

As a long-time vendor to the State of South Carolina, National believes that it provided the State with the most advantageous, low-cost offer. Through its multiple years of service, National knows which products the State and its agencies use and require, and its offer accurately proposed pricing for those items.

National has submitted a FOIA request to MMO for information about its evaluation process and the submissions of the other offerors. Upon receiving additional information from MMO, National reserves the ability to timely supplement this protest with additional reasons why it should have been selected for award.

IV. RELIEF REQUESTED

In light of the arguments raised herein, National requests the following relief:

- That the CPO issue an Order reversing MMO’s determination that National’s offer was non-responsive in the Seating, Desks, and Tables, and Filing, Storage and Wooden Casegoods categories, and issue an Order awarding National one of the remaining contracts under those categories;
- That the CPO recognize the latent defect in the Solicitation and find that the Solicitation was defective and issue an Order compelling MMO to re-bid the Solicitation utilizing a Solicitation that does not include any latent defect that allows MMO to disqualify offerors for minor differences in the sample products provided;
- That the CPO issue an Order compelling MMO to re-bid the Solicitation in order to inform the offerors of the pricing formulas that MMO intended to employ; and/or
- That the CPO issue its Order finding offerors who were not manufacturers to be not responsive or responsible and canceling awards to each vendor found to be nonresponsive or not responsible.

Mr. Michael Spicer
Chief Procurement Officer
March 26, 2018
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V. CONCLUSION

Several major agencies within the State of South Carolina currently use National products in their facilities. In order to protect their investment and have the ability to match existing products, it is critically important that National remain a current vendor. National's proposal to MMO under each category should have been accepted, and National should be permitted to continue to provide the high standard of services and products that it has had the pleasure of delivering for the over 15 years.

National appreciates MMO's consideration of this protest. National respectfully requests that MMO re-consider National's offer and MMO's award, and either award National a contract under each of the furniture categories for which it submitted a proposal or re-bid the solicitation.

Sincerely,

MONTGOMERY WILLARD, LLC



Michael H. Montgomery

Attachment 1A

South Carolina Office Furniture IFB: #5400013853

6/1/2018

Round 2 Clarifications

Instructions

Thus far, the State has been unable to determine that several of the items in your bid represent functional equivalents to their corresponding items in the Pricing Schedule (Attachment M). Per the Question and Answer document, "a functional equivalent shall concentrate on what the product is intended to do, with the same or similar materials and dimensions." Also as a reminder, from the Instruction Tab on the Pricing Schedule (Attachment M), "The State will accept items that are functionally equivalent to the items specified" and "OFFERORS MUST BID ON 100% OF THE ITEMS FOR ANY ONE CATEGORY." Offers not complying with the aforementioned rules risk being deemed non-responsive.

Please provide the State with the following clarifications:

- Explanation as to how the item is a functional equivalent
- One attached document containing a picture, description, and dimensions for all items listed below. Do NOT include extraneous information or pages from Price Lists that are irrelevant to the items in question.
- Acknowledgement that you have read and understood the purpose of this clarification
- Bidder must complete ALL cells shaded in yellow and ONLY the cells in yellow. Please do NOT modify any of the other information provided

State-provided information					Bidder-provided Information					
Furniture Category	Expiring Contract Vendor	Vendor Provided Item Description	Manufacturer Number/Product Code	Vendor Part #	Clarification on How the Item is a Functional Equivalent	Item Description	Manufacturer Number/Product Code (if applicable)	Vendor Part Number	List Price	Choose "Yes" to Acknowledge You Have Read and Complied with the Instructions
Seating	STEELCASE INC.	BINDU MID BACK EXEC CHAIR CASTERS	BINDU SEATING	CO300	We made an error in our response for this line item. We should have entered our Delgado Model, Part Number N33GU/SLMC, which has a 5-prong mobile base with casters, similar and functionally equivalent to the noted Steelcase model number. The price remains the same at \$1,400.00 in our Seating 3 Price List, Pg. 581 https://www.nationalofficefurniture.com/NOF/media/documents/pricelists/seating_pricelist.pdf?10252017	Delgado Lounge Chair	National Office Furniture	N33CUMD	\$ 1,400.00	Yes
Desks and Tables	INDIANA FURNITURE	HUTCH	SP65-1566TWDND	SP65-1566TWDND	National's unit is a wall mounted hutch with locking doors, similar to Indiana Furniture's noted model number, however it is not as wide. Our unit is 36" wide and we could mount (2) units side by side, on the same rail for a width of 72 inches. The price would be \$1,326 for a Qty of 2, in this size. A user could also mount a 36" and a 30" side by side for a total width of 66" if they wanted to. These units come in multiple sizes so there are multiple options available, depending on the user's preference and in both situations our product would be functionally equivalent to Indiana Furniture's model noted.	Waveworks Wall Mount Cabinet	National Office Furniture	WW3618SOHML	5 663.00	Yes

Filing, Storage, Casegoods	STEELCASE INC.	LATRLUNIVPRO UDWD1.5H DWR/DWR 18X30	UNIV LATERAL FILES	RLF18301BW	National does not have a (1) drawer unit. The model specified is one of the closest that we have to the Steelcase unit. It has a lateral file drawer which measures 17"D x 30"W x 21"H and is functionally equivalent to the Steelcase drawer however it also does have a box drawer on top of the lateral file drawer. This is an undersurface unit however, so it would need to have a top added to complete it, either as a stand alone, or part of a larger footprint. We could also have specified our (2) drawer lateral file unit, model number WW1830LFF2M which is 16" deep and 30" wide and has a list price of \$697. It would also be functionally equivalent but would have an additional drawer. It can be found in our Casegoods 1 Price List, Pg. 454 https://www.nationalofficefurniture.com/NOF/media/documents/pricelists/casegoods_pricelist.pdf?10252017	Waveworks Box/Lateral File	National Office Furniture	WW173022PLBL	\$	791.00	Yes
Filing, Storage, Casegoods	STEELCASE INC.	LAT-1 LU DR 4DWR 18X42X65.5	UNIV LATERAL FILES	RLF18425F	We made an error in our response for this line item. We should have entered our Part Number WW1842LFF5DM, a metal lateral file with 5 drawers, one of them having a recessed door. This unit is more similar and functionally equivalent to the Steelcase model number noted and has a list price of \$1,767. It can be found in our Casegoods 1 Price List, Pg. 454 https://www.nationalofficefurniture.com/NOF/media/documents/pricelists/seating_pricelist.pdf?10252017	Waveworks 4 Drawer Lateral File	National Office Furniture	WW2436LFF4LL	\$	1,703.00	Yes
Filing, Storage, Casegoods	STEELCASE INC.	STORAGE - 4 ADJ SHL 18X30X65.5	UNIV STORAGE CABINETS	RSC18305KF	National does not have a 30" wide metal unit with 4 shelves in our standard line therefore we specified our 18" deep and 30" wide unit with 2 shelves. The customer could specify a Qty of 2 of these units for the same amount of storage to be functionally equivalent. We could have also entered Part Number 25N3053VSHL, which would be functionally equivalent but is a laminate double door storage cabinet with shelves. This unit has a list price of \$2,168 and can be found in our Casegoods 2 Price List, Pg. 114 https://www.nationalofficefurniture.com/NOF/media/documents/pricelists/casegoods2_pricelist.pdf?10252017	Waveworks Metal Storage Cabinet	National Office Furniture	WW1830PFHM	\$	629.00	Yes

Attachment 2

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March 26, 2018

BY EMAIL TO protest-mmo@mmo.sc.gov
AND HAND DELIVERY

Mr. Michael Spicer
Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

**Re: Protest of Solicitation Number 5400013853
by Kimball Office Inc.
Date of Notice of Intent to Award: March 16, 2018**

Dear Mr. Spicer:

This firm represents Kimball Office Inc. ("Kimball"). Pursuant to *S.C. Code Ann.* §11-35-4210, this is a protest of the award made on Solicitation Number 5400013853 ("the Solicitation"). Kimball has enjoyed working with the South Carolina Materials Management Office (MMO) for the last 15 years. As one of the State of South Carolina's approved furniture suppliers, Kimball prides itself in providing the State and its agencies with first-rate products and service. The State's business has meant a great deal to Kimball, and it was looking forward to working with MMO into the future.

Over the course of the last 15 years, Kimball has provided the State of South Carolina with high-quality products at excellent prices. Several State and local agencies within South Carolina, including the University of South Carolina, Clemson University, and the Calhoun County Courthouse currently use Kimball's products. As a result of its sales to State agencies, Kimball remits thousands of dollars in administrative fees to MMO each year.

Kimball is an important product to its local dealers, all of which are small businesses within the State of South Carolina. Working with the Kimball product provides assurance to these small businesses that the products will perform to the State's standards and beyond, relieving them of unnecessary expenses relative to quality issues. Kimball dealers believe that their ability to service the State with the best value furniture solutions will be compromised without the ability to use Kimball products.

Mr. Michael Spicer
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Kimball provides a fair and competitive discount to the State of South Carolina, in consideration for the business it earns. The discounts provided on Kimball's response reflect its base starting point without regard for projects with significant volume. Kimball has consistently provided additional discounting on projects to further support its commitment to the State for offering high quality/low pricing.

Standardization programs are important to all companies, including State/local agencies. By standardizing products, the agency reflects a consistency to their employees and clients. Standards programs build support from the manufacturer to the agency providing an overall improved level of service and pricing considerations.

Despite Kimball's years of excellent service to the State of South Carolina, and the submission of a bid that complied in full with the Invitation for Bid and provided the requested products at what we believe are the lowest offered prices, Kimball was not selected as an awardee for three of the four categories of furniture contracts issued pursuant to the Solicitation.

Kimball appreciates your willingness to work with the company in resolving its concerns, and it believes that we can reach a resolution that is fair and beneficial to all parties. Kimball thanks you in advance for your consideration of this protest.

I. SOLICITATION BACKGROUND

A. General Background

MMO issued the Solicitation on September 28, 2017. Amendments were posted on October 16, 2017 and October 26, 2017. The bid process concluded, and MMO issued an initial Notice of Intent to Award on February 9, 2018. Eight bidders, including Kimball, protested the award.

On February 23, 2018, MMO issued a Written Determination canceling the initial awards and ordering the reevaluation of all bids received. MMO issued a new Intent to Award on March 16, 2018.

This letter serves as Kimball's protest of that award for the reasons articulated herein and for such other reasons as may be identified in any amended protest letter submitted pursuant to *S.C. Code Ann.* §11-35-4210(b).

B. Purpose of the Solicitation

The purpose of the Solicitation was to enable MMO to "establish a source or sources of supply for the purchase of new office furniture for all State agencies and local public procurement units within the geographic limits of the State of South Carolina" for a five-year period. (Solicitation § I). Specifically, through the Solicitation, MMO sought bids for sources of four

separate categories of furniture: desks and tables; filing, storage and casegoods; seating; and systems. (Solicitation § 3.2.1).

The contracts awarded through the Solicitation were for one-year periods, with four additional one-year options for renewal. (Solicitation § I).

C. Required Submissions

As part of the bid process, offerors were required to submit, among other items:

- The Contractor's Standard Warranty;
- The Contractor's Catalog/Product Line and List Price that was in effect at the time of bid submission;
- A completed version of Attachment M (the Amended Pricing Schedule), and
- A completed version of Attachment F (Material Requirements).

(Solicitation § IV).

As part of their submissions, offerors were required to submit the following information on behalf of themselves and any subcontractor:

- a. The general history and experience of the business in providing work of similar size and scope.
- b. A detailed, narrative statement listing the three most recent, comparable contracts that have been performed. For each contract, describe how the supplies or services provided are similar to those requested by this solicitation, and how they differ.
- c. A list of every business for which supplies or services substantially similar to those sought with this solicitation have been provided, at any time during the past three years.
- d. A list of every South Carolina public body for which supplies or services have been provided at any time during the past three years, if any.
- e. List of failed projects, suspensions, debarments, and significant litigation.

(Solicitation § V).

Kimball submitted all requested items.

D. Qualifications & Responsiveness

The Solicitation provided that an offeror would be considered “non-responsive” if “mandatory minimum qualifications are not met.” The only qualifications outlined in the Solicitation are set forth in Section V. That section required offerors to demonstrate certain elements of financial responsibility and comply with four “Special Standards of Responsibility”:

1. Offers must be from Manufacturers. Offers from authorized dealers or resellers, vendors, distributors, or manufacturer brokers will not be considered for award.
2. Offerors must have capacity to service using governmental units through-out the entire state of South Carolina. . . .
3. [...] There is no limit to how many categories an Offeror may submit an offer to.
4. Approved Authorized Dealer/Resellers named by the Contractor and submitted with the offer must meet the following qualifications:
 - Must have showroom(s) and/or office(s) in the State of South Carolina from which it sells and services the full Contractor product line(s) on contract.
 - Must employ full time furniture sales, consulting and service personnel.
 - Must be able to make field modifications and repairs, on any item ordered from the contract.
 - Must have personnel, vehicles and equipment available to make delivery of any item ordered from the contract.

(Solicitation § V). Finally, the Solicitation required offerors to submit information and documentation in support of their qualifications, including narratives describing the offerors’ work on similar contracts. (Id.).

Kimball met all of these qualifications, and its bid included all requested documentation.

The pricing proposal (Attachment M to the Solicitation) set forth two additional elements necessary for an offer to be deemed responsive: (1) pricing had to be provided for at least one category and for installation and design; and (2) offerors had to provide pricing information for all of the items within any one category and could not submit “incomplete” bids. Kimball complied with these requirements.

Neither the Solicitation nor the pricing proposal (Attachment M) contained any other requirements for an offer to be deemed as responsive.

E. Award Criteria

Each of the furniture categories were to be awarded separately, with awards being made to up to fifteen vendors per category. (Solicitation § VI). The awards were to be made to the “lowest

Mr. Michael Spicer
Chief Procurement Officer
March 26, 2018
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responsible and responsive bidder(s),” which was to be determined by the “Grand Total” of the calculations. (Solicitation § VI).

The Solicitation included formulas to calculate the low bids, which are described as:

For the “Desks and Tables,” “Filing; Metal Storage and Wooden Casegoods” and the “Seating” categories, the low bid(s) will be calculated as follows: [In Attachment M – Pricing Schedule] The sum of the Item Price column for all sample furniture items listed in each Category tab (there is a separate tab for each Office Furniture Category) of the Pricing Schedule spreadsheet will be summed to generate a Grand Total for each Office Furniture category which will be represented on the Summary Tab.

For the “Systems” category the low bid(s) will be calculated as follows: [In Attachment M – Pricing Schedule] The Item Price column for all sample furniture items listed in each Category tab (there is a separate tab for each Office Furniture Category) of the Pricing Schedule spreadsheet will be summed to generate an Item Total. The Item Total will be weighted at 85% of the Grand Total. The remaining 15% will be accounted for by the hourly rates as reports on the Installation and Design tab in Attachment M – Pricing Schedule.

(Solicitation § VI).

F. Pricing Formula

Attachment M (the Amended Pricing Schedule) contained lists of “a representative sampling of historically purchased items” for each furniture category. MMO stated that these items would be used “to validate the veracity of each Offeror’s discount for that specific category.” For each “historically purchased item,” Attachment M contained a description of the item, the name of the manufacturer of the item, and the item’s part number. Offerors were required to provide the same information for their “functionally equivalent product,” as well as the offerors’ list price and their price to the State for each item. For example:

Historically Purchased Item*					
Vendor Name	Item Description	Manufacturer Number/Product Code	Vendor Part Number		
STEELCASE INC.	LEGS-POST27HPKG OF 4	GROUPWORK	TS4L27PG4		
Offeror's Functionally Equivalent Product					
Item Description	Manufacturer Number/Product Code (if applicable)	Vendor Part Number	Location Information	List Price	Item Price
Priority Static or Mobile Metal Column Leg (pricing unit = 1 each)	AB2602BC	AB2602BC	PLPB/Price List pg 310	\$\$\$	\$\$\$

Attachment M provides that the State would “accept items that are functionally equivalent to the items specified.”

Several questions were asked during the Question & Answer period as to how MMO would determine whether an item was “functionally equivalent” to the item listed. In response to Question #39 (Attachment J), MMO stated that a “*functional equivalent shall concentrate on what the product is intended to do, with the same or similar materials and dimensions*. If an Offeror has multiple variations in grade or materials available for a particular product, the State advises the Offeror provide the most cost effective model without compromising functional equivalency.” (emphasis added).

One offeror asked MMO, “What criteria will be used to determine whether a bidder’s product qualifies as a functionally equivalent [sic] to the corresponding item on the bid list?” (Attachment J at Q&A 49). MMO referred to its response to Question #39.

Question after question sought clarification on functional equivalency, such as whether items needed to have the exact same dimensions or be made of the same materials. In response to each and every request, MMO merely referred to its response to Question #39.

If the State determined that an item was not “functionally equivalent,” Attachment M provided that the State could “reject any item proposed . . . and require the vendors to provide an alternative product that meets its requirements, at the price originally proposed.” At no point – not in the Solicitation, not in Attachment M, and not in response to the Questions & Answers – did MMO ever state that the State could treat an offer as non-responsive if it deemed a single item to be not functionally equivalent to one of the samples.

G. Non-Award to Kimball

Kimball was awarded a contract under one of the four furniture categories (Filing, Storage, and Wooden Casegoods), but it was not selected for award under the other three categories.

In the Seating category, MMO informed Kimball that it was not among the 15 lowest offerors. In the bid tabulation provided to Kimball by MMO after the notice of award, Kimball’s “Grand Total” price was listed as \$13,325.76. This was not Kimball’s “Grand Total” for Seating contained in its Attachment M pricing proposal.

In the other two categories – Systems, and Desks and Tables – MMO notified Kimball after the notice of award that MMO had deemed those bids to be “non-responsive,” because it did “not currently meet minimum requirements as an item was not functionally equivalent (FE).” MMO provided Kimball with a “Determination of Nonresponsibility” form for these two categories.

Specifically, MMO found that Kimball's pricing proposal contained *one* item in each of these two furniture categories that was not functionally equivalent to the sample product that MMO had provided.

The Desks and Tables category contained 25 sample items for which offerors were required to provide prices for functionally equivalent items. In response to a sample item from Krueger International, Inc., Kimball provided what it believed to be a functionally equivalent table that was approximately the same size and shape as the sample provided (a "Dock Training Rectangle Table Top"). What was not apparent from the Solicitation is that MMO believed that a functionally equivalent product not only had to be the same size and shape, but also had to have *two* grommets on the top and not just one. Because Kimball's product contained one grommet, MMO deemed it to be not functionally equivalent.

Likewise, in the Systems category (which contained 30 sample items), Kimball submitted a price for its "Dock Training Perimeter Single-Circuit Smart Box Power In-Feed" as functionally equivalent to a "Relocatable Power Tap" made by Krueger International, Inc. Kimball had interpreted its competitor's product to include a power infeed, but MMO determined that to be "functionally equivalent," the product requested was simply a duplex outlet.

On February 15, 2018, MMO sent Kimball a request for clarification, asking Kimball to explain how the items it bid were functionally equivalent to the sample items. In response, Kimball explained that it did not interpret the sample items in the same way as MMO – i.e., it did not understand, from the information provided, that MMO believed the table needed two grommets in order to be functionally equivalent. Kimball provided MMO with an example of a product that included the two grommets that MMO apparently desired. The resulting price was slightly higher, but it did not adversely affect Kimball's overall total for that category.

Kimball was among the 15 lowest bidders in the Systems and Desk and Tables category. However, because it submitted one item in each category that did not meet the exacting criteria that MMO never specified in the Solicitation, it was deemed to be non-responsive in those categories.

II. TIMELINESS OF PROTEST

This protest is timely within the deadline set by *S.C. Code Ann.* § 11-35-4210(1)(b). MMO posted the Intent to Award on March 16, 2018, and this protest was emailed and hand-delivered to the Chief Procurement Office on March 26, 2018.

III. GROUNDS OF PROTEST

1. MMO's Determination of Non-Responsiveness Was Error. Kimball Is A Responsive Bidder.

In two of the award categories – (1) Systems and (2) Desks and Tables – MMO determined that Kimball's bid was non-responsive because MMO deemed one of the items submitted by Kimball in each category to be not "functionally equivalent" to the sample item. This was not a proper or disclosed basis for disqualifying an offer as non-responsive, and MMO's non-responsiveness determination should be reversed.

The determination that these items were not functionally equivalent was erroneous. In *In RE: Protest by Amdahl Corporation and International Business Machines Corporation*, Case No. 1986-6, 1986 CPO LEXIS 3, the Procurement Review Panel defined functionally equivalent, holding: "The configurations were equivalent in function. Function is a determination of the tasks the computer can do. All of the listed configurations can perform the functions required by Clemson. Each was expandable, and each was upgradable."

A functionally equivalent product is one that performs the same action, serves the same purpose, and does not infringe upon any existing intellectual property right. Here, the Solicitation sought office furniture, chairs, desks, tables, and the like. Kimball submitted similarly styled items that performed the same function. They were functionally equivalent. Moreover, Kimball also offered additional options that the State could have required it to provide at the same price.

The Solicitation listed several criteria for an offeror to be deemed responsible, responsive, and qualified. (Solicitation § V; Attachment M at "Instructions" tab). The Solicitation *never states* that MMO could reject a bid as non-responsive because it determined that one pricing item was not functionally equivalent to the sample item provided. Instead, the Solicitation says the opposite – that if MMO determined an item to be not functionally equivalent, it "**reserve[d] the right to reject any item proposed for the listed items and require the vendors to provide an alternative product that meets its requirements, at the price originally proposed.**" (Attachment M at "Instructions" tab) (emphasis added).

There is no basis in the Solicitation for deeming Kimball's offer to be non-responsive simply because MMO arbitrarily deemed one pricing item to be too different from the sample because of minor differences in style or dimension, especially when Kimball told MMO in response to its request for clarification that Kimball could offer the State an alternative product. In the Systems category, Kimball's alternative was substantially *less* expensive than the item it bid: the alternative product was \$70, and the bid item was \$248. This is particularly true because the ultimate purchaser is not restricted under the contract to only purchasing items in the pricing proposal; those items were intended as a means of price comparison only.

If MMO believed that two of the items offered by Kimball were not precisely what it wanted, it had several options other than disqualifying Kimball entirely. First and foremost, MMO could have followed the procedure outlined in the Solicitation – reject the item and require the offeror to provide an alternative product at the price proposed. MMO’s February 15, 2018 request for clarification appeared to do just that – ask Kimball for an alternative item that met certain specifications. Kimball provided the requested alternative product. Nonetheless, rather than follow the Solicitation’s procedures, MMO decided to treat Kimball’s entire offer in these two categories as non-responsive.

In the Systems category, Kimball’s “Grand Total” of its bid was less expensive than seven of the offerors who were awarded contracts. MMO only awarded 9 of the available 15 contracts under this category. In the Desks and Tables category, Kimball’s “Grand Total” was less expensive than one of the other offerors’, and MMO only awarded 10 of the available contracts. Therefore, had MMO evaluated Kimball’s offers, it would have been awarded a contract under these two categories.

Kimball’s offers under these categories provided the State with high quality, low cost options for its furniture needs. There is no reasonable basis under the terms of the Solicitation for rejecting Kimball’s offers, simply because MMO interpreted the “functional equivalence” of one item in each category differently than Kimball did. The Solicitation had a set procedure for addressing differences in the interpretation of functional equivalency, and MMO chose not to follow those procedures. As a result, its determination of non-responsiveness should be rejected, Kimball’s offers should be deemed responsive, and it should be awarded one of the remaining contracts in the Systems and Desks and Tables categories.

MMO has arbitrarily found Kimball’s bid to be non-responsive based upon a misapprehension of what constitutes functional equivalence. Moreover, because Kimball is a long-time and lower cost provider, this arbitrary decision will cause harm to the state agencies needing to purchase office furniture when they are unable to acquire quality furniture at lower costs.

2. MMO’s Interpretation of Functional Equivalency Reflects a Latent Defect in the Solicitation.

The Solicitation document itself never references “functional equivalence” or any requirement that every item submitted must be “functionally equivalent.” Rather, the Solicitation merely states that the lowest bids would be calculated by adding the total sum of items provided. (Solicitation § VI).

Attachment M to the Solicitation contains the only reference to “functional equivalence.” The Instructions to Attachment M (and the instructions to each category) provided that the items offered in each category were a “representative sampling of historically purchased items” that

would be “used to validate the veracity of each Offeror’s discount for that specific category.” MMO would “accept items that are functionally equivalent to the items specified.”

There was significant confusion among the offerors in trying to determine what MMO meant by “functionally equivalent items.” The sample items listed were all manufactured by the offerors’ competitors, so the offerors lacked information about the details of the products. As reflected in the Questions & Answers (Attachments J and K to the Solicitation), offerors were also confused as to what elements of a particular product made it functionally equivalent. For example, did a proposed desk need to be the same size as the sample? Did it need to be made out of wood, or was metal acceptable? Did a chair need to have the same upholstery as the sample provided?

One offeror asked, only, that MMO define “Functionally Equivalent.” (Attachment J, #39). MMO responded:

A functional equivalent shall concentrate on what the product is intended to do, with the same or similar materials and dimensions. If an Offeror has multiple variations in grade or materials available for a particular product, the State advises the Offeror provide the most cost effective model without compromising functional equivalency

For every other question asked by an offeror about functional equivalence – whether MMO would accept one item as functionally equivalent to another – MMO merely referred back to this response.

Based upon the plain language of the Solicitation, its attachments, and MMO’s responses to offerors’ questions, it appeared that offerors’ bids would be accepted and evaluated as long as it submitted prices in response to each sample item. It further appeared that MMO would accept pricing items as long as they generally did the same thing as the sample products with generally the same and dimensions. At no point were offerors informed that MMO would consider bids to be non-responsive if not functionally equivalent, and at no point were offerors informed that functional equivalence meant that products must be the same in precise ways (i.e., one grommet instead of two).

If MMO believes that the Solicitation allows it to treat offers as non-responsive for lack of their ability to provide a product identical to that of a competitor, then the Solicitation contained a latent defect – one that Kimball could not recognize or protest in advance of award. It is not to the State’s benefit to disqualify offerors providing the State with the lowest costs simply because the offerors interpreted the relevant specifications of a competitor’s product in a manner differently than MMO. By rejecting offers due to requirements that MMO was on notice from the Questions submitted were confusing and capable of different interpretations, the State has lost the benefit of the continued services of its vendors and will pay a higher cost for its products.

The Solicitation did not give MMO the authority to deem Kimball's offer as non-responsive simply because MMO believed that two items were not functionally equivalent. However, if it is MMO's position that the Solicitation somehow implicitly did give MMO such authority, then that is a latent defect in the Solicitation that requires the Solicitation to be re-done. It is simply not in the best interests of the State to reject a low-cost offeror for this reason.

This evaluation method is a latent defect that results in the Procurement violating *S.C. Code* §§11-35-20 and 11-35-30. The evaluation method used materially differs from that disclosed in the Solicitation, and the failure to follow the method of determining functional equivalence outlined by the Panel and the common law fatally taints this procurement. The CPO should cancel this solicitation and Order it to be resolicited with appropriate specifications or a clear advisory of the requirements of each item to be priced.

3. MMO Failed To Evaluate The Offerors' Pricing Based Upon The Disclosed Criteria.

The Solicitation provided that the lowest costs would be determined by the "Grand Total" of the offerors' pricing, as calculated by the pricing spreadsheet and reflected on the "Summary" tab of the spreadsheet. (Solicitation § VI). This does not appear to be what MMO did.

Kimball's "Grand Total" in the Seating category, as reflected in the Summary tab of the pricing spreadsheet is different than what is in the "Bid Tabulation" documents provided by MMO after the notice of award.

Likewise, Kimball's Grand Total in the Summary tab of Attachment M for the Filing, Metal Storage, and Wooden Casegoods category was different from that in the Notice of Award.

Kimball assumes that MMO employed some price adjustment or weighting criteria to the Grand Totals in the pricing spreadsheet in order to come up with the prices listed in the Notice of Award and Bid Tabulation document. If MMO did not employ some adjustment, then it has made substantial errors in the pricing it has assigned to Kimball (and, presumably, the other offerors).¹

Assuming that MMO did weigh the pricing in some manner, such adjustment was not disclosed to the offerors and not permitted by the terms of the Solicitation. Because MMO did not evaluate the offerors in the manner required by the Solicitation, the awards should be reversed and the contracts should be re-solicited.

4. Certain Offerors Should Have Been Excluded from Any Award Because They Were Not Responsible Bidders.

¹ Kimball submitted a FOIA request for the other offerors' submissions on February 15, 2018. To date, Kimball has not received the requested materials, although MMO's time to respond is past due. Kimball reiterates its request for the Public information as defined by *S.C. Code Ann.* §11-35-410 that it requested in its February 15, 2018 Freedom of Information Request.

The Solicitation required all offerors to satisfy certain “Special Standards of Responsibility.” One required standard is that all offerors were “Manufacturers,” which the Solicitation defined as the “firm responsible for fabricating or manufacturing the products ordered” (Solicitation § II). To be deemed qualified, the Solicitation also required all offers to be from manufacturers, and it provided that offers from “authorized dealers or resellers, vendors, distributors, or manufacturer brokers” would not be considered for award. (Solicitation § V).

Upon information and belief, Kimball does not believe that all of the companies selected for award are, in fact, “Manufacturers” that have the capability of producing all requested items themselves. Kimball has submitted a FOIA request for the offers of the other bidders, and it specifically reserves the ability to supplement this protest ground with additional information once a response is received.

5. MMO Failed to Evaluate Kimball’s and the Other Offerors’ Submissions Properly.

As a long-time vendor to the State of South Carolina, Kimball believes that it provided the State with the most advantageous, low-cost offer. Through its multiple years of service, Kimball knows which products the State and its agencies use and require, and its offer accurately proposed pricing for those items.

Kimball has submitted a FOIA request to MMO for information about its evaluation process and the submissions of the other offerors. Upon receiving additional information from MMO, Kimball reserves the ability to timely supplement this protest with additional reasons why it should have been selected for award.

IV. RELIEF REQUESTED

In light of the arguments raised herein, Kimball requests the following relief:

- That the CPO issue an Order reversing MMO’s determination that Kimball’s offer was non-responsive in the Systems and Desks and Tables categories, and award Kimball one of the remaining contracts under those categories;
- That the CPO recognize the latent defect in the Solicitation and find that the Solicitation was defective and issue an Order compelling MMO to re-bid the Solicitation utilizing a Solicitation that does not include any latent defect that allows MMO to disqualify offerors for minor differences in the sample products provided;
- That the CPO issue an Order compelling MMO to re-bid the Solicitation in order to inform the offerors of the pricing formulas that MMO intended to employ; and/or

Mr. Michael Spicer
Chief Procurement Officer
March 26, 2018
Page 13

- That the CPO issue its Order finding offerors who were not manufacturers to be not responsive or responsible and canceling awards to each vendor found to be nonresponsive or not responsible.

V. CONCLUSION

Several major agencies within the State of South Carolina currently use Kimball products in their facilities. In order to protect their investment and have the ability to match existing products, it is critically important that Kimball remain a current vendor. Kimball's proposal to MMO under each category should have been accepted, and Kimball should be permitted to continue to provide the high standard of services and products that it has had the pleasure of delivering for the last six years.

Kimball appreciates MMO's consideration of this protest. Kimball respectfully requests that MMO re-consider Kimball's offer and MMO's award, and either award Kimball a contract under each of the furniture categories for which it submitted a proposal or re-bid the solicitation.

Sincerely,

MONTGOMERY WILLARD, LLC

A handwritten signature in black ink, appearing to read "Michael H. Montgomery", with a long, sweeping horizontal line extending to the right.

Michael H. Montgomery

Attachment 2A

JUSTIFICATION FOR DETERMINATION OF NONRESPONSIBILITY

Solicitation 5400013853 Statewide Contract for Office Furniture

Based upon the standards of Responsiveness set forth by the solicitation, the following determination concerning the bid's conformity to the mandatory or essential requirements contained in the solicitation.

(1)

Kimball

Jasper, Indiana

Tonja Blackgrove

E-mail: kogov@kimball Telephone: (800) 482-1616

(2)

The Bid is determined non-responsive because it does not currently meet minimum requirements as an item was not functionally equivalent (FE).

As a part of Amendment 2, Bidders were asked to provide a list of items from the bid schedule, which may be unduly restrictive.

February 12, 2018

DATE

State Fiscal Accountability Authority, DPS

GOVERNMENTAL BODY

SIGNATURE

Procurement Manager

TITLE

**JUSTIFICATION FOR
DETERMINATION OF NONRESPONSIBILITY**

Solicitation 5400013853 Statewide Contract for Office Furniture

Summary of Clarifications

Kimball									
Functional Equivalence for Desks and Tables Category									
Date: 3/7/2018									
Expiring Contract Vendor	Vendor Provided Item Description	Manufacturer Number/Product Code	Vendor Part #	Item Description (If so Added)	Functional Equivalent?	Item Description	Manufacturer Number/Product Code (if applicable)	Vendor Part Number	Location Information
KRUEGER INTERNATIONAL, INC.	IVWS3060/74P/N/O/V/N B/SX/LF-92758/ECG	IN TANDEM	IVWS/512109	Rectangular - Two Grommets D: 30" W: 60"	Confirmed non-FE because grommets were not originally bid in the item and they are an additional charge	Dock Training Rectangle Table Top	75K3060RT	75K3060RT	PLMC Price List pg 169

Kimball										
Check for Functional Equivalence										
Date: 3/8/2018										
									Discount	62.00%
Expiring Contract Vendor	Vendor Provided Item Description	Manufacturer Number/Product Code	Vendor Part #	Functional Equivalent?	Item Description	Manufacturer Number/Product Code	Vendor Part Number	Location Information	List Price	Item Price
KRUEGER INTERNATIONAL, INC.	RELOCATABLE POWER TAP ACTIV8-INTANDEM	ACTIV8	AC8RPTIT.12	Confirmed non-FE due to Vendor mistake. Vendor bid a power infeed instead of a duplex outlet.	Dock Training Perimeter Single-Circuit Smart Box Power In-feed	KCEP1IF	KCEP1IF	PLMC price list pg 187	\$ 248.00	\$94.24

**JUSTIFICATION FOR
DETERMINATION OF NONRESPONSIBILITY**

Kimball's Response to Clarifications

Kimball Clarifications (5) [Read-Only]									
	A	B	C	D	E	F	G	H	I
7	State-provided information					Bidder-provided Information			
8	Furniture Category	Expiring Contract Vendor	Vendor Provided Item Description	Manufacturer Number/Product Code	Vendor Part #	Clarification on How the Item is a Functional Equivalent	Item Description	Manufacturer Number/Product Code (if applicable)	Vendor Part Number
9	Desks and Tables	KRUEGER INTERNATIONAL, INC.	IVWS3060/74P/N/OV/NB/SX/LF-92758/ECG	IN TANDEM	IVWS/512109	Kimball model is a 30x60 table top with a 3mm rim. A closer look at the KI price list shows that the top should have 2 grommets. Our revised list price would be \$525. for the top with 2 grommets	Dock Training Rectangle Table Top	75K3060RT	75K3060RT
10	Systems Furniture and Accessories	KRUEGER INTERNATIONAL, INC.	RELOCATABLE POWER TAP ACTIV8-INTANDEM	ACTIV8	AC8RPTIT.12	We did not interpret the model number correctly and provided a power infeed. We understand now that the requirement was for a duplex outlet, within a single circuit power system. Our equivalent product would list for \$70.	Dock Training Perimeter Single-Circuit Smart Box Power In-feed	KCEP1IF	KCEP1IF

Attachment 3

200 S. Biscayne Boulevard
Suite 1700
Miami, FL 33131
Tel 305 571-0903
Cell 215 519-9109
Fax 305 571-0930

March 20, 2018

State of South Carolina
Chief Procurement Officer
Materials Management Office
Capital Center
1201 Main Street, Suite 600
Columbia, SC 29201
Delivered via email to: protest-mmo@mmo.sc.gov

The Knoll logo is displayed in a bold, red, sans-serif font.

Re: Knoll, Inc. Protest Solicitation Number: 5400013853 Office Furniture Statewide Term Contract

Dear Mr. Spicer:

Knoll is submitting this timely protest within the 10 day period specified under Code 11-35-4210 based upon the award notification received on 3/16/18. The following letter outlines Knoll's grounds for protest and relief requested:

Knoll submitted a timely bid response to Solicitation #5400013853 for each of the four furniture categories requested:

Desks & Tables
Filing Storage & Wooden Casegoods
Seating
Systems

We were awarded Systems only.


We are submitting this protest because we believe our submittals meet the State's requirement for "Functional Equivalents" on Desks & Tables, Filing Storage & Wooden Casegoods & Seating as described in your initial bid documents. We request that the Procurement Management Committee review those submittals again and provide a written response outlining why these categories were deemed to be non-compliant. We have attached a copy of the Attachment M Price Schedule with this email for your convenience.

1. **Functional Equivalents:** Upon review of the bid documents and the offer submitted Knoll feels strongly our submittal meets the States intended definition of Functional equivalent. Knoll provided the lowest cost item in each category as guided in the Q&A.
2. **Best Price to State & State Customers:** Knoll provided competitive discounts to the State which exceed the discounts documented in the State's "Intent to Award" letter of February 9, 2018. The State is entitled to purchase all Knoll items in each of the given categories at the discount levels offered. We included Knoll Commercial Price Lists with our Submittal. This will result in extremely competitive pricing on all projects across all categories.

3. **Experience and Past Performance:** Knoll has been a longtime contract holder and supplier of office furniture to the State of Carolina for over 10 years. We value your business not only for Knoll but for our State of Carolina Small Business partners: CBI Greenville, CBI Charleston, Talotta & Corporate Concepts. Over the years we have built strong business relationships and have an installed base of furniture with many customers including: Medical University of South Carolina, Clemson University and University of South Carolina. These customers often need to add product and match existing and therefore require Knoll to be offered on the State Contract.
4. **Investment and Commitment to the State of South Carolina** Knoll has invested considerable time and materials into the bid response submitted including the Design of a Website for all State Customers. Capital Improvement projects are often planned 5 years in advance and we have been tracking some projects with SC Facilities Departments & Architectural Firms for several years assisting them with their market research.

Knoll hereby requests the following relief, we request a review of the Pricing Schedules submitted herewith and either an award of the Desks & Tables, Filing & Storage & Seating OR specific documentation on why these categories were not awarded. Please don't hesitate to contact me if you have any questions regarding our submittal. We also request a stay of performance during the protest review. Thank you for your consideration.

Sincerely



Karen Bastian
Director Government Sales

Attachment 3A

JUSTIFICATION FOR DETERMINATION OF NONRESPONSIBILITY

Solicitation 5400013853 Statewide Contract for Office Furniture

Based upon the standards of Responsiveness set forth by the solicitation, the following determination concerning the bid's conformity to the mandatory or essential requirements contained in the solicitation.

(1)

Knoll

East Greenville, PA

Erin Cole

E-mail: ecole@knoll.com Telephone: (843) 609-3416

(2)

The Bid is determined non-responsive because it does not currently meet minimum requirements as multiple items were not functionally equivalent (FE).

As a part of Amendment 2, Bidders were asked to provide a list of items from the bid schedule, which may be unduly restrictive.

Knoll appears to have offered items from Attachment E with items from Attachment M.

February 12, 2018

DATE

State Fiscal Accountability Authority, DPS

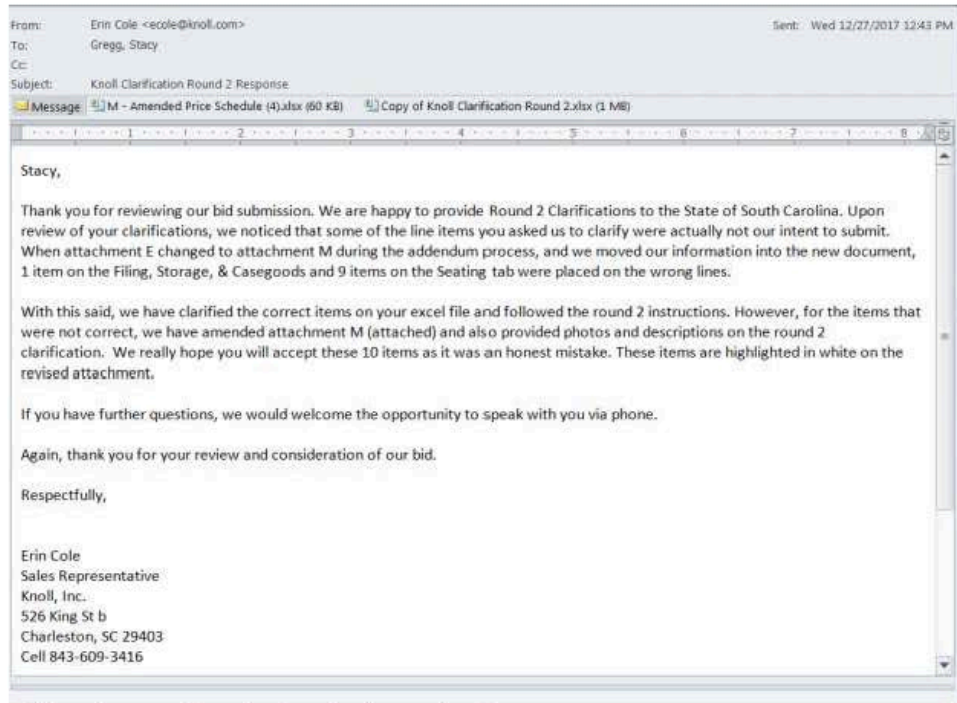
GOVERNMENTAL BODY

SIGNATURE

Procurement Manager

TITLE

**JUSTIFICATION FOR
DETERMINATION OF NONRESPONSIBILITY**



JUSTIFICATION FOR DETERMINATION OF NONRESPONSIBILITY

Solicitation 5400013853 Statewide Contract for Office Furniture

Knoll										
Functional Equivalence for Desks and Tables Category										
Date: 3/14/2018										
								Discount	57%	
Expiring Contract Vendor	Vendor Provided Item Description	Manufacturer Number/Product Code	Vendor Part #	Functional Equivalent?	Item Description	Manufacturer Number/Product Code (if applicable)	Vendor Part Number	Location Information	List Price	Item Price
INDIANA FURNITURE	RETURN	29-2445RF	29-2445RF	Confirmed non-FE because vendor bid a work surface instead of a single pedestal desk. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	WORKSURFACE 24D X 42W	ANTENNA	YT4224	https://www.knoll.com/product/antenna-workspaces?section=design	\$277	\$ 120.50
NATIONAL OFFICE FURNITURE (NOI)	CONFERENCE, BASE, T LEG, MOBILE, PLATINUM		CBV2128TLM2S	Confirmed non-FE because vendor bid height adjustable leg instead of a T-leg base with casters. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	HEIGHT ADJ TONE C LEG BASE 42W x 24D	TONE	TBCEF3522	https://www.knoll.com/product/one-height-adjustable-tables?section=design	\$2,666	\$ 1,159.71
INDIANA FURNITURE	VISUAL BOARD	65-4848VB	65-4848VB	Confirmed non-FE because tack board not represented on each side.	MARKER BOARD 42W X 30H	KNOLLEXTRA	OR-WB-42-30	https://www.knoll.com/product/universal-markerboard?section=design	\$696	\$ 302.76

**JUSTIFICATION FOR
DETERMINATION OF NONRESPONSIBILITY**

Expiring Contract Vendor	Vendor Provided Item Description	Manufacturer Number/Product Code	Vendor Part #	Functional Equivalent?	Item Description	Manufacturer Number/Product Code (if applicable)	Vendor Part Number	Location Information	List Price	Item Price
NATIONAL OFFICE FURNITURE (NOF)	UNIVERSAL PULL UP TABLE LAMINATE		10N1623RTPUL	Confirmed Non-FE. We requested 28" and they bid 15". SG to get feedback from other procurement managers regarding dimensional issues.	PULL UP TABLE	TCEOGGAN	ACT-TB-3-GL	https://www.kroll.com/product/tceoggan-pull-up-table?section=design	\$636	\$ 276.66
INDIANA FURNITURE	RETURN	29-244SLF	29-244SLF	Confirmed non-FE because vendor bid a work surface instead of a single pedestal desk. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	WORK SURFACE 24D X 42W	ANTENNA	YT4224	https://www.kroll.com/product/antenna-workspaces?section=design	\$277	\$ 120.50
KRUEGER INTERNATIONAL, INC.	IVW5306074PINOWNB SXILF 32759ECG	IN TANDEM	IVW5512109	Confirmed non-FE because vendor bid a table and we requested a work surface with grommets. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	FUP TOP TABLE 180 X 60W	PIXEL	KCPW6078-C	https://www.kroll.com/product/pixel-bo-meta-bruin?section=design#1	\$1,919	\$ 834.77

**JUSTIFICATION FOR
DETERMINATION OF NONRESPONSIBILITY**

Knoll										
Functional Equivalence for Seating										
Date: 3/9/2018								Discount		58.00%
Expiring Contract Vendor	Vendor Provided Item Description	Manufacturer Number/Product Code	Vendor Part #	Functional Equivalent?	Item Description	Manufacturer Number/Product Code	Vendor Part Number	Location Information	List Price	Item Price
KRUEGER INTERNATIONAL, INC.	SYCFQSCG/BCG /GNDINFR*27.144, 304BK/27.185.1225 T	SWAY	SYCFQ450988	Confirmed non-FE because vendor item bid is a stackable plastic chair. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	STACKING CHAIR ON GLIDES W/ FIXED ARMS	MULTIGENERATION	2-S-A-N-X-GL	https://www.knoll.com/product/multigeneration-by-knoll-stacking-base?section=design	\$333	\$139.86
INDIANA FURNITURE	CHAIR	986	986	Confirmed non-FE because vendor item bid is an upholstered task chair. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	WORK CHAIR W/ PLASTIC LCOP ARM	REMIX WORK	66-W-PL-2-S-X-G	https://www.knoll.com/product/remix?section=design	\$992	\$416.64
STEELCASE INC.	QIVI-5 STARNET BACK	QIVI	428510	Confirmed non-FE because vendor item bid is a stackable metal/fabric chair. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	SIDE CHAIR	MOMENT	9-A-SL-S	https://www.knoll.com/product/moment?section=design	\$555	\$233.10

**JUSTIFICATION FOR
DETERMINATION OF NONRESPONSIBILITY**

KRUEGER INTERNATIONAL , INC.	GP0NAUBU/PBT/ NFRIC/VPBK	GRAZIE TASK	GPDU455768-15	Confirmed non-FE because vendor item bid is a modular lounge set. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	MODULAR SEATING	K. LOUNGE	KL4	<a href="https://www.knoll.com/pr-
oduct/k-
lounge?section=design">https://www.knoll.com/pr- oduct/k- lounge?section=design	\$1,740	\$730.80
KRUEGER INTERNATIONAL , INC.	BD6200NFR/27.16 2.031P	6200 SERIES SEATING	B6200500287	Confirmed non-FE because vendor item bid is an ottoman. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	OTTOMAN	K. LOUNGE	KL9	<a href="https://www.knoll.com/pr-
oduct/k-
lounge?section=design">https://www.knoll.com/pr- oduct/k- lounge?section=design	\$1,056	\$443.52
KRUEGER INTERNATIONAL , INC.	GP0NAUBU/PBU/ NFRIC	GRAZIE TASK	GPDP450841	Confirmed non-FE because vendor item bid is a regular task chair. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	LIGHT TASK CHAIR w/ FIXED ARMS	MULTIGENERATION	2-5-S-A-N-2-HC	<a href="https://www.knoll.com/pr-
oduct/multigeneration-
by-knoll-light-
task?section=design">https://www.knoll.com/pr- oduct/multigeneration- by-knoll-light- task?section=design	\$550	\$231.00

**JUSTIFICATION FOR
DETERMINATION OF NONRESPONSIBILITY**

STEELCASE INC.	LOUNGE-SW_1HIGHBACK 4STARGLIDES	SW_1 SEATING	COW712	Confirmed non-FE because vendor item bid is a regular task chair. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	LIGHT TASK CHAIR W/ FIXED ARMS	MULTIGENERATION LIGHT TASK CHAIR	2-S-A-N-2-HC	https://www.knoll.com/product/multigeneration-by-knoll-light-task?section=design	\$550	\$231.00
INDIANA FURNITURE	CHAIR	395	395	Confirmed non-FE because vendor item bid is a regular task chair. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	REMIX WORK CHAIR W/ PLASTIC LOOP ARM ON GLIDES	REMIX WORK CHAIR W/ PLASTIC LOOP ARM ON GLIDES	66-W-PL-2-S-X-G	https://www.knoll.com/product/remix?section=design	\$992	\$416.64
STEELCASE INC.	BINDU MID BACK EXEC CHAIR CASTERS	BINDU SEATING	CO300	Confirmed non-FE because vendor item bid is a regular task chair. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	HIGH BACK ARMLESS ON CASTERS	REMIX HIGH BACK	67-H-NA-2-S-X-G	https://www.knoll.com/product/remix?section=design	\$1,068	\$448.56
STEELCASE INC.	OTTOMAN-ALIGHTROUND	ALIGHT	TS34401	Confirmed non-FE because vendor item bid is not an ottoman. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	SIDE CHAIR ON GLIDES W/ ARMS	MULTIGENERATION	2-S-A-N-X-GL	https://www.knoll.com/product/multigeneration-by-knoll-stacking-base?section=design	\$333	\$139.86

**JUSTIFICATION FOR
DETERMINATION OF NONRESPONSIBILITY**

Functional Equivalence for Filing Category										Discount	
Date: 3/14/2018										59.50%	
Expiring Contract Vendor	Vendor Provided Item Description	Manufacturer Number/Product Code	Vendor Part #	Functional Equivalent?	Item Description	Manufacturer Number/Product Code	Vendor Part Number	Location Information	List Price	Item Price	
INDIANA FURNITURE	LATERAL FILE	29-2036L4	29-2036L4	Confirmed non-FE because vendor bid a mobile pedestal and we requested a lateral file. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	MOBILE PEDESTAL 15W X 24D	SERIES 2	DS4PML24A	https://www.knoll.com/product/series-2?section=design	\$782	\$ 316.71	
STEELCASE INC.	UNIVERSAL-TOWERDOOR/DRAWER18X24X52 WOO	UNIV TOWERS	RDD18244LBW	Confirmed non-FE because vendor bid a single door tower with one drawer and we requested a dual door tower with three drawers. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	FILE STORAGE TOWER 24D X 24W X 50H	SERIES 2	DT45LH5024WL	https://www.knoll.com/product/series-2?section=design	\$1,688	\$ 683.64	

**JUSTIFICATION FOR
DETERMINATION OF NONRESPONSIBILITY**

	A	B	C	D	E	F	G	H	I	J	K
	Expiring Contract Vendor	Vendor Provided Item Description	Manufacturer Number/Product Code	Vendor Part #	Functional Equivalent?	Item Description	Manufacturer Number/Product Code	Vendor Part Number	Location Information	List Price	Item Price
6	INDIANA FURNITURE	LATERAL FILE	66-2436L4	66-2436L4	Confirmed non-FE because vendor bid 2 drawer lateral file and we requested a 4 drawer lateral file. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	2 DWR LAT FILE 18D X 30W	CALIBRE	S2F2730ECC	https://www.knoll.com/product/calibre?section=design	\$844	\$ 341.82
21	STEELCASE INC.	UNIVERSAL-TOWER/DOOR/DRAWER 18X24X48FLU	UNIV TOWERS	RDD24245RCW	Confirmed non-FE because vendor item bid is missing drawers. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	STORAGE TOWER 24D X 24W X 50H	SERIES 2	DT4SLH5024WL	https://www.knoll.com/product/calibre?section=design	\$1,628	\$ 659.34
24	NATIONAL OFFICE FURNITURE (NOI)	WAVEWORKS,STOR OVERHEAD,EX MT, GLSSWD		WW3030SOHTGW	Confirmed non-FE because vendor item bid is missing cupboard space, shelves and is wrong material. [Likely reason for mistake: Vendor submitted Attachment E formatting inside of Attachment M.]	FLIP TOP OVRHD 30W X 15H	SERIES 2	DS2UM30L	https://www.knoll.com/product/calibre?section=design	\$747	\$ 302.54
28											

BEFORE THE CHIEF PROCUREMENT OFFICER
SOUTH CAROLINA MATERIALS MANAGEMENT OFFICE

[illegible]

Hyer Office Furniture, Inc. (“Hyer”) protests its exclusion from the re-awards¹ made in this procurement on the grounds that (1) treating the sample products used by the State for Attachment M – Amended Pricing Schedule as specifications resulted in overly restrictive specifications, and (2) the procurement officer erred in finding Hyer’s proposed sample product is not “functionally equivalent” to the sample product listed on Attachment M – Amended Pricing Schedule.

1. BACKGROUND

Amendment 2 of the above-referenced solicitation was issued October 26, 2018, and included Attachment M. Under Attachment M,

The State will accept items that are functionally equivalent to the items specified. ... The items listed ARE NOT an indication of future purchases. HISTORICAL 1) VENDOR NAMES, 2) ITEM DESCRIPTIONS, 3) MANUFACTURER NUMBER / PRODUCT CODES, AND 4) VENDOR PART NUMBERS ARE LISTED ONLY TO AID OFFERORS IN THEIR EFFORTS TO PRODUCE FUNCTIONAL EQUIVALENTS FOR EACH ITEM AND IN NO WAY INDICATE BRAND-SPECIFIC REQUIREMENTS OR ANY FUTURE PURCHASES BY THE STATE. (caps in original).

In the first Q&A issued, the State said, “A functional equivalent shall concentrate on what the product is intended to do, with the same or similar materials and dimensions. If an Offeror has multiple variations in grade or materials available for a particular product, the State advises the Offeror provide the most cost-effective model without compromising functional equivalency.”

¹ See, Written Determination of February 23, 2018 (CPO case # 2018-146).

(Attachment J, No. 39). The procurement officer found Hyer's bid to be "non-responsive because it does not currently meet minimum requirements as multiple items were not functionally equivalent (FE)."² Specifically, after a clarification exchange, the sole product noted is Hyer's proposed equivalent for Steelcase Inc. "LIGHT-UTIL 2 ELEC HPF BLST T8 9 FT CRD 49." It appears that but for this finding, Hyer's bid would be accepted, allowing it to join the approximately 29 other awardees in offering products to end-users in State and participating local governments.

2. USING ATTACHMENT M SAMPLE PRODUCTS AS A SPECIFICATION RESULTED IN OVERLY RESTRICTIVE SPECIFICATIONS

To the extent the State relies upon its list of sample products in Attachment M to make a nonresponsiveness finding as to Hyer, such reliance is in error. In effect, the examples in Attachment M were inappropriately allowed to become specifications themselves, resulting in unduly restrictive specifications. As shown below, Hyer is responsive to the State's call for a pricing discount and has adequately shown the "veracity" of its discount.

The office products solicited are not found on Attachment M; they are found in § 3.2.1 of the Solicitation. That section contains a very broad list of "Desks and Tables," "Filing, Metal Storage and Wooden Case Goods," "Seating," and "Systems." (Id.). The awards are also done by these categories, not specific products. Solicitation Art. VI. Purchases are made from the "published catalog." Solicitation § 3.1.1. Article IV, § 3 of the solicitation required submitting the "Contractor's Catalog/Product Line and List Price, in effect at the time of bid submission"

² The procurement officer used forms for "Determination of Nonresponsibility" for this finding. Hyer assumes reference to "responsibility" in places on the form is erroneous, but if such a finding was made, Hyer also protests that finding.

The actual bid price of any product is determined by the response to the requirement that, “Offerors must provide a discount percentage in cell K5 to apply to the entire category (i.e., discount off list price for all proposed items AND ALL OTHER ITEMS within your catalog for that category.)” (Attachment M.)

Upgrading sample products to specifications, especially when the State expressly made no commitment to buy any of the sample products listed, was error. The General Assembly requires that, “All specifications shall be drafted so as to assure cost effective procurement of the state's actual needs and shall not be unduly restrictive.” S.C. Code Ann. § 11-35-2730. S.C. Code of Regulations R. 19-445.2140 seeks to implement the statute. In subsection B thereof, the regulation requires,

The purpose of a specification is to serve as a basis for obtaining a supply, service, information technology, or construction item adequate and suitable for the State's needs in a cost-effective manner, taking into account, to the extent practicable, the cost of ownership and operation as well as initial acquisition costs. It is the policy of the State that specifications permit maximum practicable competition consistent with this purpose. Specification shall be drafted with the objective of clearly describing the State's requirements. All specifications shall be written in a nonrestrictive manner as to describe the requirements to be met.

S.C. Code Reg. § 19-445.2140(B). Further,

Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the State. To facilitate the use of such criteria, using agencies shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met. It is recognized, however, that the preference for use of functional or performance specifications is primarily applicable to the procurement of supplies, services, and information technology. (Id. At (C)).

As the South Carolina Procurement Review Panel has said, “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 Re: Protest of Cambex Corporation*, SCPD 1992-7 (1992). The Panel has noted the need to provide realistic opportunities to meet State needs through alternative products:

The Panel further finds that the specifications were unduly restrictive not because the consultant used a Cleaver-Brooks publication in drafting the specifications, but because the consultant and USC failed to draft specifications which actually could be construed to include the opportunity for approved equals to be bid.

In Re: Protest of B&D Marine and Industrial Boilers, SCPD 2000-12 (2001).

Without Attachment M, the State had a specification that met its need for a competition for list-price discounts on future purchases of office furnishings. The goal and only “deliverable” to the State in this solicitation is the price discount itself. Not a single piece of office furniture is purchased upon award. Certainly, the State could ask bidders to *illustrate* the effect of discount pricing. What the State should not have done, however, was to make responsiveness turn, especially in a vacuum of functional needs information, upon a variety of products chosen for the illustration.

3. FUNCTIONAL EQUIVALENT ANALYSIS

The purpose of the specific items listed on Attachment M is stated as, “The items listed are a representative sampling of historically purchased items and will be used to validate the veracity of each Offeror’s discount for that specific category.” The procurement officer noted in finding nonresponsiveness that, “Confirmed non-FE because the Vendor bid a light that is W29 when the state requested for W49.” Even if the Attachment M product list is treated as a specification, Hyer offered functional equivalents to the stated needs.

Procurement decisions underscore the inappropriateness of having a “sample” product’s dimensions cause a nonresponsive bid to the broad scope of State requirements, absent some justification of needs for the dimensional requirements:

The overriding consideration in determining the equality or similarity of another commercial product to the named product for purposes of acceptability in this type of procurement is whether its performance capabilities can be reasonably equated to the brand name product referenced, that is, whether the ‘equal’ product offered can do the same job in a like manner and with the desired results, not necessarily whether certain design features of the named product are present in the ‘equal’ product. 45 Comp. Gen. 462 (1966). It is inappropriate for an agency to use design specifications where the agency is capable of stating its minimum needs in terms of performance specifications that could be met by alternate designs. *Viereck Company*, B-209215, March 22, 1983, 83-1 CPD ¶287. Nothing in the record demonstrates that the incorporated design features were necessary to meet MSCP’s basic requirements.

Lista International Corporation, 63 Comp. Gen. 447, 1984 WL 43541 (1984). Moreover,

If a solicitation requirement violates the prohibition against restrictive terms that are not required to meet the government’s minimum needs, the requirement is deemed to be unduly restrictive and an agency’s decision to include the requirement in the solicitation will be found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Parcel 49C Limited Partnership v. United States, 130 Fed.Cl. 109, 125 (2016).

There are two problems with the procurement officer’s nonresponsibility finding applying “Steelcase Light Util 2 Elec HPF Blst T8 9 FY CRD 49.”

First, there is no statement of the State’s need for the specific lighting fixture that can only be met by a “W49” product. There is nothing indicating a light must be 49” wide to suitably function in its application. One would expect some reason a 49” light makes things visible that cannot be accomplished by a 29” fixture, and how the difference is essential to State government.³

³ This illustrates the point and advantage of having a catalogue approach – whoever needs a light can figure out the best one when it is time to order. If nobody is presently buying the 49” light, why elevate its importance to the point of excluding an entire vendor?

However, unlike *Cambex*, in this solicitation the State has not provided any specific needs or purposes of the State other than it wants the broad categories of office furnishings listed in Solicitation § 3.2.1. Suitability of products for a specific office has, quite rightfully, been left to the discretion of the public office making selections from the 29+ available vendor catalogues on the office furniture contract.

Second, the only need or purpose the State did give as to why items were placed on Attachment M has nothing to do with use of any of these products in an office. Instead it is “to validate the veracity of each Offeror’s discount for that specific category.” The actual *function* of the Attachment M products listing of Steelcase’s W49 lighting fixture is for the bidder to show the State its *discount*. Hyer succeeded when it stated its list price was \$414.00 and its bid price was \$149.94. The W29 functioned adequately as an equivalent, as did all the other pricing illustrations in Hyer’s Attachment M.

4. CONCLUSION

For the above-stated reasons, Hyer respectfully requests that Hyer receive an award in accordance with its bid.

March 23, 2018

Respectfully submitted,

DUFF & CHILDS LLC



Keith R. Powell #69292
kpowell@duffchilds.com

Attachment 4A

JUSTIFICATION FOR DETERMINATION OF NONRESPONSIBILITY

Solicitation 5400013853 Statewide Contract for Office Furniture

Based upon the standards of Responsiveness set forth by the solicitation, the following determination concerning the bid's conformity to the mandatory or essential requirements contained in the solicitation.

(1) Hyer Office Furniture, Inc.
6925 Gilleland Lane
Atlanta, GA 30360
E-mail: bob@hyerusa.com Telephone: 678-990-6844

(2)

The Bid is determined non-responsive because it does not currently meet minimum requirements as multiple items were not functionally equivalent (FE).

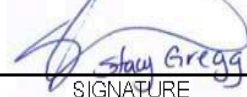
As a part of Amendment 2, Bidders were asked to provide a list of items from the bid schedule, which may be unduly restrictive. The items submitted were removed from the solicitation in the subsequent amendment.

February 12, 2018

DATE

State Fiscal Accountability Authority, DPS

GOVERNMENTAL BODY



SIGNATURE

Procurement Manager

TITLE

JUSTIFICATION FOR DETERMINATION OF NONRESPONSIBILITY

Solicitation 5400013853 Statewide Contract for Office Furniture

Summary of Determination

<div> <div>Hyer Office Furniture, Inc.</div> <div>Check for Functional Equivalence</div> <div> <div>Date</div> <div>3/9/2018</div> </div> </div>										<div>Discount</div> <div>64.00%</div>
Expiring Contract Vendor	Vendor Provided Item Description	Manufacturer Number/Product	Vendor Part #	Functional Equivalent?	Item Description	Manufacturer Number/Product	Vendor Part Number	Location Information	List Price	Item Price
STEELCASE INC.	LGHT-UTIL 2 ELEC HPF BLST T8 9 FT CPD 49	UTILITY LIGHTING	LSB49K2	Confirmed non-FE because the Vendor bid a light that is W/28 when the State requested for W/49"	Task Light	LCVT19-062	LCVT19-062	HYERSYSTEMS.PRBK.PG II	\$ 414.00	\$149.04

JUSTIFICATION FOR DETERMINATION OF NONRESPONSIBILITY

Hyer's Clarification

Furniture Category	Expiring Contract Vendor	Vendor Provided Item Description	Manufacturer Number/Product Code	Vendor Part #	Clarification on How the Item is a Functional Equivalent	Item Description	Manufacturer Number/Product Code (if applicable)	Vendor Part Number	List Price	Choose "Yes" to Acknowledge You Have Read and Complied with the Instructions
Systems Furniture and Accessories	STEELCASE INC.	LGHT-UTIL 2 ELEC HPF BLST TS 9 FT CRD 49	UTILITY LIGHTING	LSB48K2	Steelcase Task Light- Function- Mounts with brackets in a fixed position under shelf or cabinet to light work surface underneath, 6-7/8" X 49" X 1-5/8". Hyer Task Light Mounts with brackets in a fixed position under shelf or cabinet to light work surface underneath, 7" X 18" X 1-3/4".	Task Light	LCVT18-062	LCVT18-062	\$ 414.00	Yes



What's Special

Special size bin.

Standard Includes

► See GSA Volume 2 Specification Guide

Specification Information

Dimensions			Number of Doors	Style Number
D	W	H		
15 3/4"	54"	16 1/4"	2	RBB60QTAK

Task Lights

LED Pemo	10	10	433	20" LED Task Light with occupancy sensor
LCVT18-062	18	7	414	24" - 28" Shelf Size (60-70) (Gray)
LED Prime	10	10	575	20" LED Task Light

Attachment 5

From: [Andy Vanstraten](#)
To: [Protest-MMO; itmo_protest](#)
Cc: [Angel Burgess](#); [Suzanne Kimps](#); [Mark Thompson](#)
Subject: SC Office Furniture Statewide contract notification of protest
Date: Friday, March 23, 2018 3:53:07 PM

Good Afternoon,

Krueger International, Inc. (KI) would like to protest the awards for Solicitation 5400013853 for Office Furniture for the State of South Carolina.

After reviewing the submissions from the Intent to Award posted March 16th, 2018, it appears that KI was lower than other bidders within the un-awarded categories of Desking and Tables/ Files Storage and Case Goods.

In the Desking and Tables categories KI was lower than 4 other manufacturers.

In the Files, Storage, and Case Goods categories KI was lower than 9 other manufacturers.

There was a lot of confusion in the product specifications and items that could be misinterpreted in the original solicitation document.

With that said KI feels strongly that our products meet or exceeds the functionality description and requirements for all of these items.

Seven of the manufacturers who have historically provided higher end durable seating solutions for the state were left off due to price.

We feel that KI products offer the State members a quality product over and above the performance of some of the awarded manufactures in these categories.

Based on the need for durable and sustainable office, lobby and conference seating, KI feels that the seating category should be expanded to allow for more options for state agencies.

We would like to request that the State include KI in the Seating, Desking and Tables and the Files, Storage, and Case Goods categories.

We greatly value the State's business and have always worked hard to make sure we have earned your trust.

We look forward to hearing from you.

Cordially,

 **ANDY VANSTRATEN** | Contract / Bid Manager
P: 920.468.2394 | E: andy.van.straten@ki.com | ki.com


KI - Affina



As a trusted market resource, KI furnishes more than furniture. We furnish knowledge. www.ki.com

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Attachment 6



CORPORATE OFFICE
225 Clay Street
P.O. Box 231
Jasper, Indiana 47547-0231

800.622.5681 TOLL FREE
812.482.3204 OFFICE
812.482.1548 FAX

JASPERGROUP.US.COM

March 25, 2018

Stacy Gregg, Chief Procurement Office
Materials Management Office
SFAA, Div of Procurement Services
PO Box 101103
Columbia, SC 29211

RE: Office Furniture Statewide Contract Award for BID # 5400013853

Dear Ms Gregg:

Please accept this as official protest to the above Bid.

I again request that the State reconsider their decision and award Jasper Group the ability to purchase from the Desk & Tables category in conjunction with the Filing, Storage & Casegoods for the following reasons:

- (1) Having a category of Filing, Storage & Casegoods, with the exclusion of Desks and Tables, eliminates the ability to provide a complete office solution to the State of Carolina customers.
- (2) Ten manufacturers were awarded to the Desk and Tables Category. Per the State's response to question # 50, "the State will award to no more than 15 vendors per category."
- (3) Jasper Group's feels that it has adequately demonstrated its product to be competitively priced and functionally equivalent to the 10 awarded manufacturers of the Desk and Tables Category and requests to be award to the category if our pricing allows for a position of one of the 15 maximum allowed.
- (4) The category method that this bid was evaluated, only proves a snapshot comparison between random items in the manufacturer brands, and is not a fair evaluation of pricing for a total solution workspace. A complete office typical provides the State with a different cost value than random selected items. See the attached pricing comparisons between JSI, OFS and Indiana Furniture. Jasper Group feels that the category method of evaluation is not in the best interest of the State for administrative use.
- (5) If this contract is allowed to proceed as is, the State of South Carolina customers will be left with gaps in procurement options, and no recourse to add to existing furniture installations.

JASPER GROUP BRANDS



JSI



KLEM



COMMUNITY

Please accept the above information and reconsider award to Jasper Group for Category 1-Desk and tables.

Sincerely,

A handwritten signature in cursive script that reads "Kathy R. Vonderheide".

Kathy R. Vonderheide
Contract Sales Manager

Attachments:

- 2/14/18 Protest Letter
- Desk and Tables Tabulations
- Price comparison of a Traditional U-unit Office Desk with Hutch
- Price comparison of a Contemporary U-unit Office Desk with Hutch

NEXSEN|PRUET

Marcus A. Manos
Member
Admitted in S.C., NC, DC

March 26, 2018

VIA HAND DELIVERY AND ELECTRONIC MAIL

mspicer@mmo.sc.gov

Michael B. Spicer, Chief Procurement Officer
Information Technology Management Office
Procurement Services Division
State Fiscal Accountability Authority
1201 Main Street, Suite 600
Columbia, South Carolina 29201

**RE: Protest of Herman Miller, Inc.
Statewide Term Contract for Office Furniture
Invitation for Bids ("IFB") Solicitation No. 5400013853**

Charleston

Charlottesville

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Dear Mr. Spicer:

I along with Nexsen Pruet, LLC represent Herman Miller, Inc., an incumbent vendor in all categories of the Statewide Term Contract for Office Furniture and bidder on IFB Solicitation No. 5400013853 for the next Statewide Term Contract for Office Furniture. Herman Miller, Inc. is a disappointed bidder under Category D Systems Furniture as the award posted March 16, 2018 did not allow Herman Miller, Inc. to provide systems furniture to the State and its political subdivisions for the next five years.

The Solicitation originally issued on September 28, 2017. An earlier set of awards to various vendors, including Herman Miller, Inc., issued in February of 2018. Your office cancelled these awards and re-evaluation occurred. The IFB allows for clarification of bids at Page 16. As a result, the Procurement Officer must give every bidder an equal opportunity to clarify. Herman Miller, Inc. only protests the failure of the Procurement Services Division SFAA to award it the right to provide systems furniture under Subcategory D of the IFB. Herman Miller, Inc. does not protest the awards issued under Subcategories A, B, and C.

1201 Main Street
Suite 700 (29201)
PO BOX 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.253.8275
F 803.727.1467
E MManos@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

Michael B. Spicer, Chief Procurement Officer
March 26, 2018
Page 2

Herman Miller, Inc. learned from the Procurement Officer that its bid under Subcategory D for systems furniture was rejected as non-responsive. The non-responsiveness finding was due to one item of the 30 listed in the system furniture and accessories bid sheet. This item was a "utility light." In a request for clarification, the Procurement Officer based this finding on the width of the utility light being 24 inches rather than the 49 inches of the example product listed on the bid sheet. The bid sheet did not put the specifications within the Solicitation itself, but rather each vendor had to go outside the IFB and look up the particular item manufactured by another and provided by the State as an example to determine what the specifications might be.

In making her determination of non-responsiveness on this one item, the Procurement Officer requested clarification. In the course of evaluating the clarification email, the Procurement Officer found in a catalog offered by Herman Miller, Inc. with the desired discount specified, an equivalent utility light of the appropriate width. The Procurement Officer did not request that Herman Miller, Inc. clarify if it would bid this utility light.

Herman Miller, Inc. protests the failure to award it a place in the Statewide Term Contract for Office Furniture, Subcategory D Systems Furniture on the following grounds:

1. The clarification materials before the Procurement Officer clearly established a responsive product listed in a Herman Miller, Inc. catalog with a provided discount and, therefore, materially complied with the Solicitation. The non-responsive finding is, therefore, arbitrary, capricious, and contrary to law.
2. Even if Herman Miller, Inc.'s Systems Furniture Bid Sheet was found non-responsive on the one line item, the bid is self-correcting and the other 29 items are responsive and could be purchased separately by users of the Statewide Term Contract if they desired. The non-responsive finding is arbitrary and capricious.
3. Assuming the Procurement Officer's finding on non-responsiveness based on a 24-inch wide utility light versus a 49-inch wide utility light is correct, it relates to one of thirty items bid in this category. One of 30 is *de minimus*, particularly in a term contract that allows state and local government participants to purchase from any bidder's various items

Michael B. Spicer, Chief Procurement Officer
 March 26, 2018
 Page 3

bid. No harm would come to the State and this is not a material deviance from the requirements of the Solicitation. Responsiveness only requires that a bid conform in all material aspects to the IFB. S.C. Code Ann. § 11-35-1410(7). Therefore, the finding of non-responsiveness and refusal to award to Herman Miller, Inc. based upon that finding is arbitrary, capricious, and contrary to law.

4. The Procurement Officer erred in finding that the provision of a 24-inch wide utility light provided a competitive advantage to Herman Miller, Inc. Each using governmental unit will make the decision on which portions of the items bid by which vendors to purchase, and if a 24-inch utility light met the needs for that using governmental unit, it would not place any other bidder at a disadvantage. The non-responsive decision was arbitrary and capricious for these reasons.
5. Based upon the information it has at this time, Herman Miller, Inc. believes other bidders received further consideration in clarification beyond that extended to Herman Miller, Inc. The award violates S.C. Code Ann. § 11-35-1520(8) as all bids were not accorded the same opportunity for clarification and Subcategory D should be resolicited or reevaluated after further clarification.
6. Based upon the limited information it has at this time, Herman Miller, Inc. believes other vendors bid items not exactly conforming to the specifications provided by the manufacturers' examples listed in the bid sheet but were found responsive and awarded under the Contract. Thus, the failure to award to Herman Miller, Inc. under Subcategory D Systems Furniture is arbitrary, capricious, and contrary to law. If, in fact, the Chief Procurement Officer finds that the non-responsiveness finding is correct, then other vendors with similar disparities between their bid products and the sample product are non-responsive for Subcategory D and the Solicitation rebid for that subcategory.
7. Based upon the information that it has at this time, Herman Miller, Inc. believes certain other awarded bidders do not meet the criteria for responsibility in their ability to provide items that match exactly the sample items listed on the Bid Sheet for Subcategory D. Thus, the

Michael B. Spicer, Chief Procurement Officer
March 26, 2018
Page 4

CPO should cancel the award to those bidders and rebid the solicitation for Subcategory D.

Herman Miller, Inc. submits this Protest pursuant to S.C. Code Ann. § 11-35-4210(b). Herman Miller, Inc. reserves the right to amend this Protest as provided by the code within 15 days from the date of award based upon information it expects to receive pursuant to its Freedom of Information Act request and its investigation of the bids by others. S.C. Code Ann. § 11-35-4210(2)(b).

Respectfully submitted,



Marcus A. Manos

MAM/hjr

cc: Stacy Gregg, CPPO, Procurement Manager sgregg@mmo.sc.gov
Keith McCook, Esquire-General Counsel, SFAA kmccook@mmo.sc.gov

Attachment 8

C. HEYWARD BELSER, SR.
(1918-1994)
CLINCH H. BELSER, JR.
H. FREEMAN BELSER
MICHAEL J. POLK
WILLIAM C. DILLARD, JR.
CHARLES H. McDONALD
ROBERT YOUNG, P.A.
OF COUNSEL
CHARLES L. DIBBLE
OF COUNSEL



POST OFFICE BOX 96
COLUMBIA, SC 29202
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FACSIMILE: 803-929-0196
OFFICE LOCATION:
1325 PARK STREET
SUITE 300
COLUMBIA, SC 29201

March 26, 2018

VIA E-MAIL AND HAND DELIVERY

Materials Management Office
Attn: Chief Procurement Officer
1201 Main Street, Suite 600
Columbia, S.C. 29201

**Re: Notice of Protest by Allsteel, Inc. of Intent to Award Statewide Term
Contract for Office Furniture**

Solicitation No.: 5400013853 (Invitation for Bid Issued 9/28/2017)

Contract No.: 44-18027

Allsteel, Inc. protests the Intent to Award with respect to all bidders for the above referenced Solicitation. A copy of the Solicitation is attached hereto as **Exhibit 1**, a copy of the Notice of Intent to Award to Allsteel is attached hereto as **Exhibit 2**, and a copy of Allsteel's bid is attached hereto as **Exhibit 3**. This Solicitation was bid using a "market basket" pricing schedule (See Attachment M-Amended Pricing Schedule) for four (4) categories of office furniture: (1) Desks & Tables; (2) Filing, Storage & Wooden Caseworks; (3) Seating; and (4) Systems. Under this Solicitation, the State reserved the right to award a contract for the same category of furniture to multiple offerors up to a maximum of fifteen (15) vendors.

Grounds for Protest

The grounds for this protest are that the Solicitation contained latent defects and issues that only became apparent after the issuance of the first Notice of Intent to Award on February 9, 2018. South Carolina Code § 11-35-4210 anticipates the possibility that defects in a solicitation may not be evident or discoverable at such an early stage and that an actual bidder may protest a notice of intent to award based on a flawed solicitation when the defects or issues were not capable of being known within fifteen days of its issuance. This code section reads in relevant part "except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract." See S.C. Code Ann. § 11-35-4210(b) (emphasis added). The plain language set forth above clearly contemplates the ability to protest latent issues with a solicitation post-bid. Such is the case here.

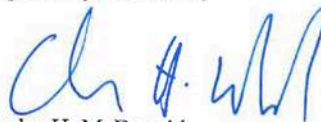
Specifically, requiring vendors to 'match' individual parts as opposed to providing a full solution, was unreasonable considering the manner in which the State evaluated the bids. The State's solicitation only required "functional equivalency" without requiring any technical data from bidders. However, based upon the responses, it appears the State is utilizing technical or some other unknown criteria to evaluate the bids none of which were part of the evaluation criteria set forth in the Solicitation. Accordingly, the State arbitrarily assigned value to vendor responses which was not tied to any real quality or price point of the product. Despite seeking clarification through the RFI process, the true intention of the State with respect to evaluating competing bids was not evident until bidders received information from the Notice of Intent to Award issued on February 9, 2018.

Moreover, it appears that the State improperly changed the bid numbers for certain bidders whose bids were considered in the first Notice of Intent to Award in violation of S.C. Code Ann. § 11-35-1520. In support of this, Allsteel offers a comparison on the Notice of Intent to Award issued on February 9, 2018 (attached as **Exhibit 4**) versus that issued on March 16, 2018 (Allsteel has not yet been provided with a comprehensive list of all intended contract awards from the March 16, 2018 Notice of Intent to Award). The State lists different vendor total scores in the second Notice of Intent to Award evidencing improper changing of bids after submission.

Relief Requested

Due to the latent defects in the Solicitation, as to which it is now clear were material and substantial, Allsteel requests that all Notices of Intent to Award be rescinded and that a new Solicitation be issued free of the issues that were present here. In the spirit of fair and open procurement, a new Solicitation is the best course of action here with respect to all interested parties.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'Ch H. McDonald', is written over the printed name.

Charles H. McDonald

Counsel for Allsteel, Inc.

Attachment 8A

C. HEYWARD BELSER, SR.
(1918-1994)
CLINCH H. BELSER, JR.
H. FREEMAN BELSER
MICHAEL J. POLK
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April 2, 2018

VIA E-MAIL AND HAND DELIVERY

Materials Management Office
Attn: Chief Procurement Officer
1201 Main Street, Suite 600
Columbia, S.C. 29201

**Re: Amendment to Protest by Allsteel, Inc. of Intent to Award Statewide Term
Contract for Office Furniture**

Solicitation No.: 5400013853 (Invitation for Bid Issued 9/28/2017)

Contract No.: 4400018033

Pursuant to S.C. Code Ann. § 11-35-4210(2)(b), Allsteel, Inc. hereby supplements and amends its Protest as set forth below. Allsteel reaffirms the grounds for protest and the relief requested set forth in its original Protest and submits the following by way of supplement to, and not in lieu of, the original Protest.

The Solicitation did not give bidders notice that MMO intended to apply the “Functionally Equivalent” standard set forth in Attachment M in a restrictive manner and as a basis to declare a bidder non-responsive.

The Solicitation, through Attachment M, gave bidders the reasonable expectation that by providing a bid on each listed market basket item (as the Solicitation required—see Attachment M, Instructions), the criteria of “Functionally Equivalent” as to each item bid would not be applied by MMO in a restrictive manner or used as a basis upon which to make a finding that a bidder was non-responsive. It was not until after publication of the Notice of Intent to Award that bidders were on notice of MMO’s strict application of this standard and that MMO intended to use it as a basis to determine the responsiveness of a bid on a particular category.

Moreover, MMO erred in making a finding that Allsteel’s bid was non-responsive in the category of “Seating” simply because one or two items in the market basket were, in MMO’s

Chief Procurement Officer
April 2, 2018
Page Two

opinion, not the functional equivalent of the listed market basket item.¹ The Solicitation specifically sets forth other options available when the item bid does not suit the purchaser's needs. Nowhere in the Solicitation is a bidder advised that it will be found non-responsive if MMO deems that one of the many products that it provides in the market basket bid is not the "functional equivalent" of the listed market basket item.

Accordingly, the Solicitation should be re-issued because the evaluation method used by MMO differs from reasonable construction of the requirements set forth in the Solicitation. This reflects a latent deficiency in the Solicitation that only became evident at the Notice of Intent to Award stage.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "H. McDonald", is written over a horizontal line.

on behalf of
Charles H. McDonald

Counsel for Allsteel, Inc.

¹ Allsteel has not been provided with any determination of non-responsiveness yet by MMO. A records requests has been submitted. However, Allsteel believes that MMO likely found one or more of its bid items to not be the functional equivalent of the listed market basket item.

Attachment 9

C. HEYWARD BELSER, SR.
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March 26, 2018

VIA E-MAIL AND HAND DELIVERY

Materials Management Office
Attn: Chief Procurement Officer
1201 Main Street, Suite 600
Columbia, S.C. 29201

**Re: Protest by The HON Company, LLC of Intent to Award Statewide Term
Contract for Office Furniture**

Solicitation No.: 5400013853 (Invitation for Bid Issued 9/28/2017)

Contract No.: 4400018033

The HON Company, LLC ("HON") protests the Intent to Award with respect to the above referenced Contract as well as the Intent to Award to all bidders with respect to the above Solicitation. A copy of the Solicitation is attached hereto as **Exhibit 1**, a copy of the Notice of Intent to Award to HON is attached hereto as **Exhibit 2**, and a copy of HON's bid is attached hereto as **Exhibit 3**. This Solicitation was bid using a "market basket" pricing schedule (See Attachment M-Amended Pricing Schedule) for four (4) categories of office furniture: (1) Desks & Tables; (2) Filing, Storage & Wooden Casegoods; (3) Seating; and (4) Systems. Under this Solicitation, the State reserved the right to award a contract for the same category of furniture to multiple offerors up to a maximum of fifteen (15) vendors.

HON's protest is two-fold. First, HON protests all Notices of Intent to Award to each proposed bidder. The grounds for this protest is that the Solicitation contained latent defects and issues that only became apparent after the issuance of the first Notice of Intent to Award on February 9, 2018. Second, and as an alternative basis for the protest, HON submits that the State erred in failing to award HON contracts for certain categories of office furniture. These grounds are more fully discussed below.

The Notice of Intent to Award Contracts to All Bidders is based upon a defective and flawed solicitation which could not have reasonably been discovered within the time frame for filing a protest of the solicitation.

While South Carolina Code § 11-35-4210 anticipates the possibility that defects with a solicitation may not be evident or discoverable at such an early stage and that an actual bidder may protest a notice of intent to award based on a flawed solicitation when the defects or issues were not capable of being known within fifteen days of its issuance. This code section reads in relevant part “except that *a matter that could have been raised* pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.” See S.C. Code Ann. § 11-35-4210(b) (emphasis added). The plain language set forth above clearly contemplates the ability to protest latent issues with a solicitation post-bid. Such is the case here as shown by the following:

-The Solicitation’s market basket bid form listed actual branded products from a particular manufacturer for a market basket item as opposed to listing technical and/or performance criteria for each market basket item. The State informed bidders that substitutions would be allowed for such products based on a standard of “functionally equivalent.” Reasonable expectations led bidders to believe that this standard would be reasonably applied and not unduly restrictive in light of the nature of the State’s approach to identifying market basket items. Upon reviewing the Notice of Intent to Award to all proposed contract recipients, and the selected substitutions to the products listed in the market basket, it is now clear that random decisions were made by the State with respect to such substitutions and with respect to any “functionally equivalent” analysis of the various market basket items.

The State erred in failing to award HON contracts for the categories of “Filing, Storage & Wooden Casegoods” and “Seating.”

HON meets all requirements for responsibility with respect to this Solicitation and was awarded a contract for the “Systems” category under the Solicitation. However, HON was not awarded a contract for any of the remaining three (3) categories. With respect to the categories of “Filing, Storage & Wooden Casegoods” and “Seating,” HON submits that its bid was responsive and its pricing for each category met the criteria for inclusion as one of the parties receiving a contract for each such category. Examining HON’s pricing in comparison to other offerors who are to be awarded contracts reveals the following:

Filing, Storage &

Wooden Casegoods: 12 Contracts Awarded; Only four Contractor’s with Total prices lower than HON’s price; HON discount in line with others receiving contract for this category

Seating: 15 Contracts Awarded; Only six Contractor’s with Total prices lower than HON’s price; HON discount in line with others receiving contract for this category

Accordingly, as grounds for this protest, HON submits that the State erred by not including the categories of “Filing, Storage & Wooden Casegoods” and “Seating” as part of the contract awarded to HON. Specifically, the State erred in finding that certain market basket items contained in

HON's bid were note the "functional equivalent" of the listed historically purchased vendor item. This is addressed in more detail below:

Filing, Storage & Wooden Casegoods: HON submits that the State erred in determining that two of its product offerings were not the functional equivalent of the listed historically purchased vendor item. See attached spreadsheet from the State making these determinations which is attached as **Exhibit 4**. See also a comparison of HON's listed product offering to the listed historically purchased vendor item which is attached as **Exhibit 5**.

-HON's proposed bookcase is functionally equivalent to the Universal bookcase. The specified item indicated 53.5" height, HON's options are either 41" or 59". HON chose the shorter height option because size height requirements normally indicated a maximum height, as installations may prevent a taller cabinet to be usable. HON offers additional adjustable shelves as an option should a third adjustable shelf be required by the user.

-HON's proposed storage unit is functionally equivalent to the Universal storage unit. The specified item indicated 4 adjustable shelves. HON chose the shorter height option to allow more installation flexibility for the user and allow the top of the cabinet to be used as the forth shelf.

The criteria are that the offered product be the "functional equivalent" of the listed item, not necessarily the "dimensional equivalent." Because the items bid by HON are functionally equivalent to the listed item, the State erred in finding these items non-responsive.

Seating: HON submits that the State erred in determining that one of its product offerings was not the functional equivalent of the listed historically purchased vendor item. See attached spreadsheet from the State making this determination which is attached as **Exhibit 6**. See also a comparison of HON's listed product offering ("The Cambia") to the listed historically purchased vendor item which is attached as **Exhibit 5** as well as HON's product cut-sheet for The Cambia attached as **Exhibit 7**.

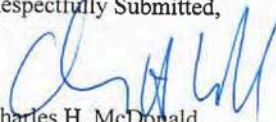
-HON's proposed chair, The Cambia, is functionally equivalent to the Krueger International Sway chair. The State's determination was that The Cambia is not a "lounge chair." However, as HON's marketing cut-sheet for Cambia states "Whether greeting visitors in a public area or hosting guests in a private office, image and comfort are everything. Cambia delivers the quality, comfort and contemporary styling suitable for any space." Moreover, as set forth in **Exhibit 7**, The Cambria is appropriate for use in "lounge areas."

Relief Requested

Due to the latent defects in the Solicitation, as to which it is now clear were material and substantial, HON requests that all Notices of Intent to Award be rescinded and that a new Solicitation be issued free of the issues that were present here. In the spirit of fair and open procurement, a new Solicitation is the best course of action here with respect to all interested parties. Should the CPO decline to issue such relief, HON requests, in the alternative, that its

contract be amended to include the categories of "Filing, Storage & Wooden Casegoods" and "Seating" in addition to the "Systems" category.

Respectfully Submitted,



Charles H. McDonald
Counsel for The HON Company, LLC

Attachment 9A

C. HEYWARD BELSER, SR.
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CLINCH H. BELSER, JR.
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**Re: Amendment to Protest by The HON Company, LLC of Intent to Award
Statewide Term Contract for Office Furniture**

Solicitation No.: 5400013853 (Invitation for Bid Issued 9/28/2017)

Contract No.: 4400018033

Pursuant to S.C. Code Ann. § 11-35-4210(2)(b), The HON Company, LLC ("HON") hereby supplements and amends its Protest as set forth below. HON reaffirms the grounds for protest and the relief requested set forth in its original Protest and submits the following by way of supplement to, and not in lieu of, the original Protest.

The Solicitation did not give bidders notice that MMO intended to apply the "Functionally Equivalent" standard set forth in Attachment M in a restrictive manner and as a basis to declare a bidder non-responsive.

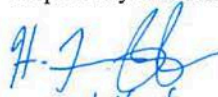
The Solicitation, through Attachment M, gave bidders the reasonable expectation that by providing a bid on each listed market basket item (as the Solicitation required—see Attachment M, Instructions), the criteria of "Functionally Equivalent" as to each item bid would not be applied by MMO in a restrictive manner or used as a basis upon which to make a finding that a bidder was non-responsive. It was not until after publication of the Notice of Intent to Award that bidders were on notice of MMO's strict application of this standard and that MMO intended to use it as a basis to determine the responsiveness of a bid on a particular category.

Moreover, MMO erred in making a finding that HON's bid was non-responsive in the categories of "Filing, Storage & Wooden Casegoods" and "Seating" simply because one or two items in the market basket were, in MMO's opinion, not the functional equivalent of the listed market basket item. The Solicitation specifically sets forth other options available when the item bid does not suit the purchaser's needs. Nowhere in the Solicitation is a bidder advised that it will be found non-responsive if MMO deems that one of the many products that it provides in the market basket bid is not the "functional equivalent" of the listed market basket item.

Chief Procurement Officer
April 2, 2018
Page Two

Accordingly, the Solicitation should be re-issued because the evaluation method used by MMO differs from reasonable construction of the requirements set forth in the Solicitation. This reflects a latent deficiency in the Solicitation that only became evident at the Notice of Intent to Award stage. Should the CPO decline to order MMO to re-issue the Solicitation free from such defects, HON incorporates the alternative request for relief set forth in its Protest—that the CPO find that HON should be awarded a contract for the categories of “Filing, Storage & Wooden Casegoods” and “Seating”.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "H. J. McDonald", is written over the typed name.

Charles H. McDonald

Counsel for The HON Company, LLC

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2018)

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 2018 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
1205 Pendleton Street, Suite 367, 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.