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Protest Decision

Matter of: BFG Marketing, LLC

Case No.: 2018-165

Posting Date: May 7, 2018

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400014790

Description: Backfire SC Media and Marketing Campaign

DIGEST

Protest claiming issues with electronic bidding is denied as either untimely or premature. BFG Marketing's (BFG) letter of protest is included by reference. [Attachment 1]

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.

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

BACKGROUND

Event	Date
Solicitation Issued	02/09/2018
Amendment One Issued	03/09/2018
Protest Received	04/11/2018

ANALYSIS

The State Fiscal Accountability Authority issued this Request for Proposals on behalf of the South Carolina Department of Health and Environmental Control to acquire professional development, implementation and evaluation of a comprehensive media and marketing campaign to decrease youth tobacco use, decrease initiation of use and promote quitting. BFG Marketing filed a protest claiming it was unable to submit its proposal electronically.

The South Carolina Consolidated Procurement Code authorizes the CPO to conduct an administrative review of the protest of a solicitation or an amendment to a solicitation within 15 days of the posting of the document. Section 11-35-4210(1)(a):

A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue.

The CPO is also authorized to review the protest of any actual bidder, offeror, contractor, or subcontractor in accordance with Section 11-35-4210(1)(b) as follows:

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.

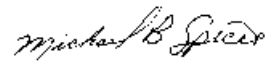
(emphasis supplied.) In this case, the solicitation was issued on February 9, 2018 and the amendment was issued on March 9, 2018. To the extent BFG protests the solicitation, its protest

is untimely because it was filed more than fifteen days after the last amendment. If BFG challenges the award, its protest is premature because no award statement has been posted. In either case, the protest is dismissed.²

DECISION

For the reasons stated above, the protest of BFG Marketing, LLC is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

² If its protest had been timely, the CPO is unconvinced that BFG has alleged any violation of the Code. The federal Government Accountability Office has held that the government’s loss of a bid because of a computer malfunction—even if through the negligence of the agency—does not entitle the bidder to relief. *American Material Handling, Inc.* B- 281556 (Comp. Gen.), 99-1 CPD ¶ 46 (1999). GAO recognizes a limited exception “where the record demonstrates that the loss was not an isolated incident, but rather, was part of a systemic failure....” *Id.* BFG has alleged little more than its bid was not accepted. That the State received other proposals electronically indicates there was no “systemic failure.” Even accepting its allegations as true, BFG’s protest letter fails to state a claim upon which the CPO may grant a protest.

Attachment 1



VIA EMAIL

Materials Management Office
ATTN: Mike Spicer, Chief Procurement Officer
mspicer@mmo.sc.gov
protest-mmo@mmo.state.sc.us

CC: Kathy Santandreu, Procurement Manager, ksantandreu@mmo.sc.gov

April 11, 2018

RE: Formal protest of contract award for South Carolina State Solicitation number 5400014790, Backfire SC Media and Marketing Campaign (the "RFP").

Dear Mike,

In furtherance of recent discussions with you and Kathy Santandreu, and pursuant to the terms and conditions of the RFP, this letter shall serve as BFG Marketing, LLC's (State Vendor No. 7000241673; "BFG") formal protest of the intended award of a contract or contracts related to the RFP. For the reasons set forth below, BFG has been aggrieved with respect to the online submission process. Specifically, BFG experienced prolonged and uncorrected technical errors within the South Carolina Procurement Portal (the "Portal") including, but not limited to, being locked out of the Portal, as well as portions of the Portal - which were necessary to upload our proposal - being entirely unavailable. Those technical errors, which occurred through no fault of BFG, ultimately led to multiple failed upload attempts.

Attached for your reference as Exhibit A is a brief timeline of events which occurred during our multiple upload attempts on the morning of March 28, 2018 ("Submission Timeline"). As you will see in the Submission Timeline, BFG initiated the submission process at 9:30AM on March 28, 2018, well in advance of the Opening Time.

I also want to draw your attention to BFG's Network Latency and Loss Report for March 28, 2018, attached hereto as Exhibit B. As shown in the report, our network was functioning at an optimal level, and was more than capable of facilitating the upload. Further, we conducted extensive IT forensics on the computer used for the RFP submission, and no hardware errors were identified. In fact, that computer was configured specifically for, and had been used exclusively in conjunction with, submitting proposals to the State of South Carolina. Nevertheless, BFG is now being kept out of the bid process because DSIT will not formally acknowledge the existence of any technical issues within the Portal.

While I understand and appreciate you are strictly bound by South Carolina's Budget and Control Board Procurement Regulations, it is our firm belief that BFG complied with both the spirit and the letter of those regulations, as well as the RFP, by attempting to submit our proposal five times prior to the Opening Time. Put differently, there was no deficiency in BFG's submission efforts. Rather, the deficiency occurred as the Portal attempted to upload our submissions, and continued throughout the morning as we were locked out of our account, the Portal failed to populate necessary fields and ultimately froze again during our final four upload attempts. These facts are clearly supported by the record, and BFG should not be penalized for a problem it did not cause, simply because DSIT won't acknowledge any level of responsibility.

At BFG, we take great pride in the years of dedicated service we've provided to the State of South Carolina and its various Departments. Among our most notable accomplishments was the creation and



rollout of the BackFire brand and all related creative/media assets. To be eliminated from the RFP process due to circumstances beyond our control is both unreasonable and, most importantly, it jeopardizes the quality and integrity of the BackFire brand. As such, we hereby request that you allow BFG to submit its proposal for consideration. In the alternative, we ask that on Monday, April 23rd, 2018, you reopen the submission process in its entirety, and for all potential participants, for one (1) hour (which represents the approximate amount of time we were unable to fully access the Portal the morning of 3/28).

If you have any questions, please feel free to contact me directly. Otherwise, I look forward to your response.

Best Regards,

A handwritten signature in black ink, appearing to read 'Kevin Meany', written in a cursive style.

BFG Marketing, LLC
By: Kevin Meany, President | CEO
843.837.0211
kmeany@bfgcom.com



EXHIBIT A

SUBMISSION TIMELINE

3/28/18 Submission Effort Details

9:30 am – BFG’s initial submission; upload fails. Mr. Arlett completed the initial submission process (through step 30 on the Submission Simulation), selected the document to upload, and submitted the first document. The Portal froze and after approximately ten (10) minutes, the document had not uploaded. Mr. Arlett then contacted DSIT for technical support (see *Attachment 1* showing the first stalled upload).

9:45 am – First call for assistance logged by BFG to DSIT help desk. Mr. Arlett reached a live operator, and was informed that the team responsible for resolving the technical issue wasn’t available until 10 am. Mr. Arlett was instructed to call back at that time.

10:00 am – Second call for assistance logged by BFG to DSIT help desk. Mr. Arlett, along with BFG’s VP of Client Services, spoke with Jessica Cummings (DSIT), who attempted to identify and resolve the upload issue. Due to the Portal’s inability to upload the first submission, as well as the inability to stop the stalled upload, Ms. Cummings instructed Mr. Arlett to log out of the Portal, and log back on to restart the upload. Unfortunately, this step caused a larger issue, as the Portal still recognized the *initial* Portal session, together with the ongoing (and still stalled) upload attempt. As a result, we were locked out of the Portal. Multiple individuals at DSIT were consulted and various fixes were attempted, but without success.

10:36 – Portal still unable to upload proposal. While on hold with DSIT, Mr. Arlett contacted Kathy Santandreu via e-mail to identify the technical issue, and request an alternate submission option in the event of continued technical errors within the Portal (See *Attachment 2*).

10:37 am – Continuing to hold with DSIT. Mr. Arlett followed up with Kathy Santandreu via phone to discuss the technical issues, and to discuss options should DSIT’s attempts to resolve not work. He was unable to reach her.

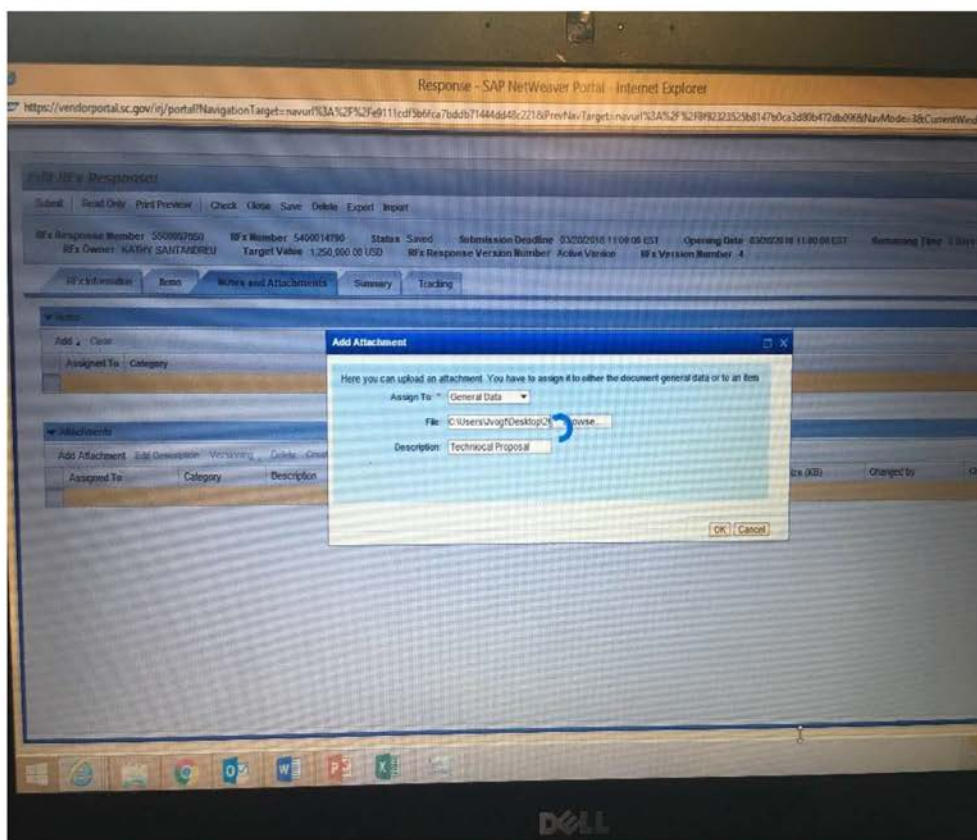
10:39 am – BFG still speaking with DSIT and working to resolve the lock out. Ms. Cummings indicated she had not seen a freeze like this in the Portal, but was eventually able to resolve the Portal lock out. However, portions of the Portal necessary to initialize the file upload were not populating, and Mr. Arlett was not able to submit BFG’s proposal.

10:55 am – All fields within the Portal are now populated. We are now able to log back into the Portal, and all necessary upload fields are populated, enabling us to submit our documents. Prior to submitting our files for the second time, we confirmed that each of the files was under 10MB in size (all were under 4MB) and the title for each file was under 30 characters. Mr. Arlett submitted the first document and experienced the exact issue he encountered at 9:30am, in the upload failed following his submission (see *Attachment 3* which provides proof of four (4) separate upload attempts via the Portal’s Javascript applet between 10:55AM and 10:59AM).

11:00 am – Bid process for the RFP closes. Despite five (5) submission attempts, no documents were successfully uploaded to the Portal, and Ms. Cummings informs Mr. Arlett she’s no longer able to assist.



Attachment 1





Attachment 2

From: Santandreu, Kathy [<mailto:ksantandreu@mmo.sc.gov>]
Sent: Wednesday, March 28, 2018 11:53 AM
To: neil arlett <narlett@bfgcom.com>
Subject: RE: 5400014790

Neil, hi, good morning.

I saw where you called, but I've been away from my desk checking on this RFP.

Unfortunately, your bid was not submitted and there is nothing that can be done. RFP closed at 11AM.

SCEIS checked and there were no issues to report on their end.

I hate this happened, but there is nothing that I can do to remedy this situation.

Kathy



Kathy C. Santandreu, CPPB, CPPO | Procurement Manager
Division of Procurement Services | SC State Fiscal Accountability Authority
1201 Main Street, Suite 600 | Columbia, SC 29201 | Office: (803) 896-5304 | ksantandreu@mmo.sc.gov

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From: neil arlett [<mailto:narlett@bfgcom.com>]
Sent: Wednesday, March 28, 2018 10:36 AM
To: Santandreu, Kathy
Subject: 5400014790

Kathy,

We've been online with Technical Support now for about 30 minutes. We are having considerable technical issues submitting. Is it possible to send our PDF forms to you and upload to the system as soon as technical support is able to help us clear our technical issues.

We got all the way to upload documents and when we started uploading, we waited 20 minutes for it to upload and then it timed out.

They are currently trying to back us out of it now, but don't want to miss the deadline.

Thanks.



Attachment 3

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URL : https://srwwebgui.sc.gov/sap/bc/webdynpro/sapsrm/wda_e_fpm_oif;sap-ext-
sid=Wu*BV80RK2jfiqm2r*ob6w--BGNSBFrqRN9AkBDVsr*4Gw--
Title :
Visit Time : 3/28/2018 10:55:24 AM
Visit Count : 2
Visited From :
Visit Type :
Web Browser : Internet Explorer 10/11 / Edge
User Profile : Jvogt
Browser Profile :
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Typed Count :
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Title :
Visit Time : 3/28/2018 10:56:34 AM
Visit Count : 1
Visited From :
Visit Type :
Web Browser : Internet Explorer 10/11 / Edge
User Profile : Jvogt
Browser Profile :
URL Length : 499
Typed Count :
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URL : file:///C:/Users/Jvogt/Desktop/2018%20DHEC/Technical%20Proposal.pdf
Title :
Visit Time : 3/28/2018 10:57:16 AM
Visit Count : 1
Visited From :
Visit Type :
Web Browser : Internet Explorer 10/11 / Edge
User Profile : Jvogt



Browser Profile :
URL Length : 67
Typed Count :

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URL : <https://srwebgui.sc.gov/favicon.ico>
Title :
Visit Time : 3/28/2018 10:57:27 AM
Visit Count : 1
Visited From :
Visit Type :
Web Browser : Internet Explorer 10/11 / Edge
User Profile : Jvogt
Browser Profile :
URL Length : 36
Typed Count :

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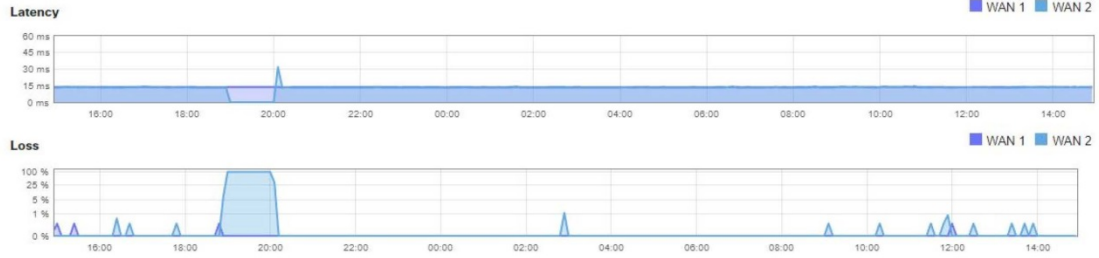


EXHIBIT B

NETWORK LATENCY AND LOSS FOR MARCH 28, 2018

Historical data for the last day ▾

Connectivity to 8.8.8.8 ▾ ⓘ





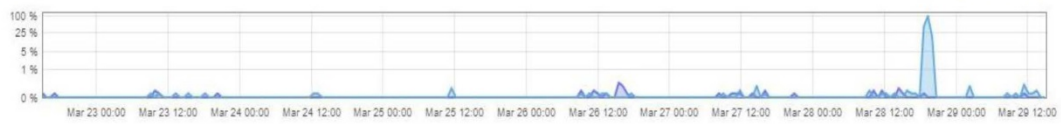
Historical data for the last week ▾

Connectivity to 8.8.8.8 ▾ ⓘ

Latency ■ WAN 1 ■ WAN 2



Loss ■ WAN 1 ■ WAN 2



STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2017)

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 2016 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.