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Protest Decision

Matter of: Rapp Productions, Inc. dba FurnitureLab
Krueger International, Inc.

Case No.: 2019-101
2019-102

Posting Date: August 9, 2018

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400013739

Description: Educational Furniture Statewide Contract

DIGEST

Protest of improper disqualification is denied. Rapp Productions' (RP) and Krueger International's (KI) letters of protest are 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	09/08/2017
Amendment 1 Issued	10/05/2017
Amendment 2 Issued	10/24/2017
Amendment 3 Issued	11/01/2017
Amendment 4 Issued	01/10/2018
Amendment 5 Issued	01/22/2018
Amendment 6 Issued	02/05/2018
Amendment 7 Issued	04/04/2018
Amendment 8 Issued	04/10/2018
Intent to Award Issued	06/22/2018
Protest Received	06/26/2018

The State Fiscal Accountability Authority (SFAA) issued this Fixed Price Bid (FPB) to establish state term contracts for educational furniture in the following categories:

- Cafeteria Furniture
- Classroom Furniture
- Computer Lab Furniture
- Dormitory/Housing Furniture
- Healthcare Furniture
- Library/Media Center Furniture
- Locker Room Furniture
- Music Room Furniture
- Playground Seating/Outdoor Furniture
- Fixed Seating
- High Density Storage & Shelving Units

Amendment 8 reproduced the entire solicitation including any changes or alterations and answers to vendor questions. The solicitation addressed a restocking fee on page 20:

The State will allow Contractor, at their option, to charge a State user a restocking fee for orders that are cancelled in excess of five (5) days after receipt of the purchase order.

The restocking fee is also addressed in response to vendor question 35:

As a general rule, our company does not offer a restocking fee as each piece is made to order; however, we would be willing to negotiate a return and the fee would be subject to negotiations. Would this preclude our company from holding a contract?

[Amendment 8, Attachment G, Page 8] The State responded that “[t]he conditions specified in the contract regarding returns shall apply to all contractors.” *Id.*

Bidders were to submit their restocking fee in response to mandatory questions on page 48 of Amendment 8 as a percentage and allowed bidders to provide a comment.

ANALYSIS

RP and KI protest a determination that their bids were non-responsive based on their responses to the restocking fee requirement. This is a fixed price solicitation wherein the State set the minimum discount for each category of product. Award is made to the responsive and responsible bidder who bid at or above the minimum discount. The discounts submitted by the bidder become a binding requirement of the resulting contract. In lieu of setting a minimum restocking fee, the solicitation required each bidder to state its restocking fee as a percentage, and allowed for a comment. Again, the bidder’s response becomes a binding requirement of the resulting contract.

RP left blank the space where it was required to put a restocking fee percentage and commented that “This is determined on a case by case basis.” This response did not meet the mandatory requirement of the solicitation to state a percentage. Had the contract been awarded, the restocking fee term would have been open-ended. RP’s bid was properly determined to be non-responsive.

KI responded to the requirement to state its restocking fee percentage with “TBD” and a comment that:

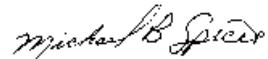
Product conforming to the specifications contained in KI's acknowledgement to the Customer may not be returned to KI without prior KI written consent, which consent may be conditioned upon Customer's agreement to pay re-handling and/or restocking charges and/or to prepay all freight charges on the return freight.

Like RP, KI did not provide the required percentage with its bid. In addition, the solicitation limited the imposition of a restocking fee to orders that are cancelled in excess of five (5) days after receipt of the purchase order. KI's comment modifies the solicitation requirement by eliminating the five-day grace period, requiring KI's consent and imposing additional fees on any return. KI's response to the restocking fee requirement was properly determined to be non-responsive.

DECISION

For the reasons stated above, the protests of Rapp Productions, Inc. d/b/a FurnitureLab and Krueger International, Inc. are denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1



Ms. Stacy Gregg
SC State Fiscal Accountability Authority
1201 Main St, Ste 600
Columbia, SC 29201

RE: Solicitation 5400013739 for Educational Furniture

Dear Ms. Gregg,

I am writing in to formally protest the result of the award for the above solicitation.

FurnitureLab has a wide range of products that fall into the educational category. Since 2009 we have sold close to \$2,000,000 in cafeteria furniture on the previous SC state contract.

We are on several other Cafeteria contracts including:

- TIPS – Commercial Cafeteria Equipment
- State of Alabama – Furniture: Office, Tables, Education
- Arkansas – Cafeteria
- Massachusetts – Office, School and Library Furnishings, Accessories and Service
- Mississippi – Furniture
- Pennsylvania – Commercial Furniture
- University of Wisconsin – Miscellaneous Education Related Furniture

We request a second evaluation of our proposal. Thank you for the opportunity to participate in this contract and please feel free to contact me if you have any questions.

Best Regards,

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

Nathan Bearman
Sales Director
nathan@furniturelab.com

From: [Mark Thompson](#)
To: [Protest-MMO](#)
Cc: [Mark Thompson](#)
Subject: RE: SC Educational Furniture Statewide Term Contract/ Solicitation 5400013739/ Protest
Date: Monday, July 02, 2018 4:45:21 PM

Mike Spicer
Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

RE: Regarding SC Educational Furniture Statewide Term Contract

I am the South Carolinas Account Manager for Krueger International, and I am writing this letter to protest the decision of the State to disqualify Krueger International (KI), from the Statewide Educational Furniture Term Contract.

I understand our response to the mandatory question regarding restocking fees as "TBD" was viewed as a Condition. This interpretation effectively removes KI from supporting the State with Educational Furniture in the following categories:

- 1.Cafeteria Furniture
- 2.Classroom Furniture
- 3.Computer Lab Furniture
- 4.Dormitory/Housing Furniture
- 6.Healthcare Furniture
- 7.Library/Media Center Furniture
- 9.Playground Seating/Outdoor Furniture
- 11.Fixed Seating

KI is in fact responsive and conforms to the material requirements of the solicitation as our fees can be clearly determined by the Quote and PO terms of this solicitation.

KI submitted our response completely and within time constraints to include our website, pricing and proof of our ability to provide product per specific category. We have supported the State for many years in each of these categories.

On 6/25 we were told our response in the Mandatory Questions for Restocking Fees on page 48 of Amendment 8 of the Solicitation added conditions and our terms conflict with the Solicitation. We explained that our Comments conform with Section III,G. Order Cancellation on Page 19... *"Contractors may refuse cancellation or charge a penalty fee for furniture, which is built to order or customized according to the Using Governmental Unit's specification regarding shape, size, color, materials, fabric, finishes, designs, etc. Cancellation or penalty terms must be placed on the Contractor's quote and presented to Using Governmental Unit prior to issuance of purchase order."* The issuance of a KI quote and End User PO are used as the written agreement and permission to charge a restocking fee where applicable.

After the Procurement Officer agreed with the Comments we were told that our response of "TBD" could not be accepted. KI's entire product offering is custom whether it's one chair or a truckload of teacher workstations. We explained that the fee associated would not be the same and a set percentage could range from 0% to 50%. While we do restock anything, we didn't have a set % to apply and therefore used TBD as the response. We were relying on the Terms of the States Solicitation requiring the Quote and PO to clearly define the Restocking Fee. It allows us to do what's right for the End User and charge the least possible amount for restocking. Otherwise we'd be forced to put in 50% or even higher. The Procurement Officer stated a response on our submission could have been submitted as " 0%-100%" and we would not have been disqualified. We feel there is no difference in TBD and (0%-100%) as neither are a fixed amount

and are in English and/or dollars per the Solicitation terms on page 6 [02-2A025-1].

Restocking Fees were discussed during the Q&A portion of the Solicitation process and formally responded to on Question 35 which clearly defaults to the original terms of the Solicitation. It requires all Contractors to allow Restocking and charge a fee defined by Quote and PO. No further direction was provided stating a FIXED restocking fee was required.

Question 35

As a general rule, our company does not offer a restocking fee as each piece is made to order; however, we would be willing to negotiate a return and the fee would be subject to negotiations. Would this prelude our company from a holding a contract?

The conditions specified in the contract regarding returns shall apply to all contractors.

There are no additional terms as the Section referenced in the Solicitation is Section III H, page 19 which states "H. Minimum Order, Ship Quantity or Dollar Value

Contractor shall not impose, throughout the life of the contract, any minimum orders, ship quantities, or minimum dollar values to receive the minimum required discounts from list price." Returns are covered in Section III, G.

Had the Solicitation stated that a # must be entered, or it was terms for disqualification we would have provided a hard number. The actual percentage holds no significance in being awarded. Submitting 100% doesn't disqualify one from being awarded and each quote supplied must still include the notification which is what we committed to per the terms of the contract.

MANDATORY QUESTIONS

What is the Offeror's restocking fee? (Section III.H, Page 19)

Percentage _____ **%**

Comment:

Does the manufacturer's standard warranty meet the State's Requirement? (Yes / No)
(See Section VII, Page 43)

Comment:

The Restocking Fees aren't a measurable/evaluated category or capped as you could charge 0% to 500% with no limits stated on the Solicitation. The responses are informational per the Procurement Officer who confirmed 0%-100% was acceptable. Current awards have been made to Contractors like Marshall Furniture and they responded with a 100% Restocking Fee. An End User would be charged full price for the furniture and actually never receive it. It's the equivalent of no restocking fees being accepted. If you place an order you must pay for it and it cannot be canceled.

Management Office, and submitted in writing
(a) by email to protest-mmo@mmo.sc.gov,
(b) by post or delivery to 1201 Main Street, Suite 600, Columbia, SC 29201.

Awarded Contract(s)

Contract Number: 4400018943
Awarded To: **Marshall Furniture 7000239535**
999 Anita Avenue
Antioch, IL 60002

847-201-2000 lbachr@leederfurniture.com

Maximum Contract Period: August 1, 2018 - July 31, 2023

Item	Description	Discount	Restocking
00003	Computer Lab Furniture	50%	100%

Estimated Quantity Unknown: The total quantity of purchases of any individual item on the contract is not known. The State does not guarantee that the State will buy any specified item or total amount. [07-7B095-1]

Other vendors like Datum Filing have been awarded and have zero in the response on the award shown under Computer Lab Furniture.

Awarded Contract(s)

Contract Number: 4400018931
Awarded To: **Datum Filing Systems 7000114650**
89 Church Road
Emigsville, PA 17318
Michele Strickhouser
717-764-6350 michele.strickhouser@datumstorage.com

Maximum Contract Period: August 1, 2018 - July 31, 2023

Item	Description	Discount	Restocking
00003	Computer Lab Furniture		
00004	Dormitory/Housing Furniture	52%	20%
00010	High Density Storage & Filing	52%	20%

Estimated Quantity Unknown: The total quantity of purchases of any individual item on the contract is not known. The State does not guarantee that the State will buy any specified item or total amount. [07-7B095-1]

Ultimately we asked the Procurement Officer to formally Reject in Part our response to the restocking fee under the Mandatory Question per:

REJECTION/CANCELLATION (JAN 2004)

The State may cancel this solicitation in whole or in part. The State may reject any or all proposals in whole or in part. [FSC Code Section 11-35-1710 & R.19-445.2065] [02-2A100-1] (Page 11)

We believe the State misconstrues our response as a non-determinable amount to properly identify the Restocking Fee. We feel the Solicitation clearly states that Contractors must disclose restocking fees on their quotes to the State Agencies and the End User's PO acknowledges the acceptance of the fee. It is also the most effective way to keep costs like these down for the State and the End User.

We again respectfully ask the State to cure or wave KI's response as TBD to either reject it and move KI forward with a 0\$ restocking fee until such time as it can be adjusted per the Solicitation Terms or allow the default Terms of Quote/PO to stand. We understand the State has the ability to "Reject, Cure or Waive" the misconstrued informality. KI would be subject to Terms defined by the State.


(c)...If a fixed price is required, an Offer will be rejected if the total possible cost to the State cannot be determined. Offerors will not be given an opportunity to correct any material nonconformity. Any deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer. [R.19-445.2070 and Section 11-35-1520(13)] Page 12

We request to be added to the State Contract Awards for Educational Furniture for each category KI submitted.


Kindly reconsider your decision concerning approvable verbiage. We feel the terms are synonymous and our response is in the best interest of the State and it's End Users protecting them from over payment. If you would like to discuss this further I can be reached at 803-603-6282.

Thank you for the opportunity to support the State and it's End Users.

Sincerely,
Mark Thompson

 **ANGEL BURGESS** | District Leader Carolinas
P: 704.879.2727 | M: 704.524.9360 | F: 704.524.9360 | E: angel.burgess@ki.com | ki.com

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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.