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GRANT GILLESPIE  
EXECUTIVE DIRECTOR

THE DIVISION OF PROCUREMENT SERVICES

DELBERT H. SINGLETON, JR.  
DIVISION DIRECTOR  
(803) 734-8018

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

## Protest Decision

**Matter of:** STR Mechanical, LLC

**Case No.:** 2019-148

**Posting Date:** June 27, 2019

**Contracting Entity:** South Carolina Law Enforcement Division

**Solicitation No.:** 5400017951

**Description:** HVAC and Boilers

### DIGEST

Protest of non-responsive determination is denied. STR Mechanical's (STR) letter of protest is included by reference. (Attachment 1)

### AUTHORITY

The Chief Procurement Officer<sup>1</sup> (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.

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

## **BACKGROUND**

|                           |            |
|---------------------------|------------|
| Solicitation Issued       | 05/20/2019 |
| Amendment 1 Issued        | 06/02/2019 |
| Amendment 2 Issued        | 06/2/2019  |
| Statement of Award Posted | 06/10/2019 |
| Protest Received          | 06/10/2019 |

The SC Law Enforcement Division (SLED) issued this Invitation for Bids to acquire HVAC preventive maintenance services to include the performance of scheduled routine preventive maintenance on SLED's HVAC equipment located at its Headquarters complex at 4400 Broad River Road, Columbia SC and its Annex facility located at 1731 Bush River Road, Columbia SC. SLED posted a Statement of Award in the amount of \$53,531.00 to Hoffman Mechanical Solutions, Inc. on June 10, 2019. STR protests a determination that its bid was not responsive on June 10, 2019.

## **ANALYSIS**

STR protests that its bid was deemed non-responsive because it included a simple cover page that contained its company standard terms and conditions. STR contends that it was/and is its intention to sign the state contract with the State's standard terms and conditions as is.

Contracts are comprised of an offer and an acceptance. The SLED's Invitation for Bids is an invitation for bidders to submit an offer to provide the required goods and services under the terms and conditions stipulated in the Invitation. When a bidder responds to the Invitation for Bids it is submitting an offer. When the State makes an award, it is accepting that bidder's offer.

The Code does not allow for modifications to a bid and very limited negotiations in the Bid process. If the State were to accept STR's offer it would be agreeing to the terms and conditions of that offer which in this case includes STR's standard terms and conditions. Those terms and conditions include terms that are contrary to the Code and limit STR's liability to the State.

For example, STR's terms include the following:

**7. PAYMENT** - Payment terms are net thirty days from date of invoice. There will be a service charge of 1½ % per month for any outstanding balance. Failure to pay invoices pursuant to this paragraph shall be considered a breach of this Agreement. In addition and not in lieu of any remedies which STR Mechanical shall have at law, STR Mechanical shall be entitled to recover in addition to the sums owed, any collection costs incurred, including reasonable attorneys' fees.

Section 11-35-45(A) of the Code stipulates:

All vouchers for payment of purchases of services, supplies, or information technology must be delivered to the Comptroller General's office within thirty work days from acceptance of the goods or services and proper invoice. After the thirtieth work day, following acceptance or the postmark on the invoice, the Comptroller General shall levy an amount not to exceed fifteen percent each year from the funds available to the agency, this amount to be applied to the unpaid balance to be remitted to the vendor unless the vendor waives imposition of the interest penalty.

Regulation 19-445.2070(A) requires:

Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.

Regulation 19-445.2070(D)(1) stipulates:

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


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

To accept STR's standard terms and conditions would give STR an unfair competitive advantage. STR's bid was properly disqualified.

## **DECISION**

For the reasons stated above, the protest of STR Mechanical, LLC is denied.

For the Materials Management Office



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Michael B. Spicer  
Chief Procurement Officer



June 10, 2019

Chief Procurement Officer

Material Management Office

1201 Main Street Suite 600 Columbia, SC 29201

Good afternoon,

This letter is to confirm my formal protest to the award of solicitation 5400017951 HVAC and Boilers for the SC Law Enforcement Division (SLED). My grievance is due to the fact that my bid was deemed as "non-responsive" due to a simple cover page that was submitted that contained our company standard terms and conditions. Specifically, the grounds of my protest are as follows.

1. All state bid documentation and addendums were submitted properly, on time, and signed.
2. Our bid was \$16,800 per year which is lower than the awarded bid amount of \$19,024 per year.
3. The terms and conditions in section VII of the solicitation clearly state that "the terms and conditions shall apply notwithstanding any additional or different terms and conditions in any other document including (ii) any invoice or other document submitted by contractor".

CONTRACT DOCUMENTS and ORDER OF PRECEDENCE (FEB 2015)

- (a) Any contract resulting from this solicitation shall consist of the following documents: (1) a Record of Negotiations, if any, executed by you and the Procurement Officer, (2) the solicitation, as amended, (3) documentation of clarifications [11-35-1520(8)] or discussions [11-35-1530(6)] of an offer, if applicable, (4) your offer, (5) any statement reflecting the State's final acceptance (a/k/a "award"), and (6) purchase orders. These documents shall be read to be consistent and complimentary. Any conflict among these documents shall be resolved by giving priority to these documents in the order listed above. (b) The terms and conditions of documents (1) through (5) above shall apply notwithstanding any additional or different terms and conditions in any other document, including without limitation, (i) a purchase order or other instrument submitted by the State, (ii) any invoice or other document submitted by Contractor, or (iii) any privacy policy, terms of use, or end user agreement. Except as otherwise allowed herein, the terms and conditions of all such documents shall be void and of no effect. (c) No contract, license, or other agreement containing contractual terms and conditions will be signed by any Using Governmental Unit. Any document signed or otherwise agreed to by persons other than the Procurement Officer shall be void and of no effect. [07-7A015-2

# STRMECHANICAL

SUCCESS THROUGH REPUTATION

In summary, our intention was/and is to sign the state contract with it's standard terms and conditions as is. We followed the appropriate bidding procedures and provided the lowest price to the state of South Carolina. And the bid documents clearly state that the terms and conditions shall apply notwithstanding to any additional terms or conditions in any other document submitted by contractor. We feel that our proposal should be considered valid and not "non-responsive" and officially protest the award.

Please contact me directly with any questions you may have.

Thank you.

Sincerely,

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

Dan Makarewicz  
Business Development  
STR Mechanical  
6017 Brookshire Blvd  
Charlotte, NC 28216  
[danmakarewicz@strmechanical.com](mailto:danmakarewicz@strmechanical.com)  
(704) 674-7677 cell

## 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.

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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**

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\_\_\_\_\_  
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: \_\_\_\_\_

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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.**