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## Protest Decision

**Matter of:** Sustainability Partners, LLC

**Case No.:** 2020-005

**Posting Date:** February 25, 2020

**Contracting Entity:** College of Charleston

**Solicitation No.:** RFQ No. H15-T001-ML

**Description:** College of Charleston Energy Conservation Project

### DIGEST

Protest of Request for Qualifications determination is denied. Sustainability Partners' (SP) 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 State Engineer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

## BACKGROUND

Request for Qualifications Issued	10/01/2019
Statements of Qualification Received	11/09/2019
Announcement of Most Qualified	12/13/2019
Protest of RFQ determination Received	12/23/2019

The College of Charleston issued this Request for Qualifications for an entity to provide guaranteed energy, water, and wastewater conservation services on October 1, 2019. Offerors submitted Statements of Qualification which were scored and ranked by a selection committee. Based on this scoring and ranking the top three Offerors were determined to be eligible to receive a subsequent Request for Proposals on December 13, 2019. Ameresco, Siemens, and Con Edison Solutions were the three highest ranked offerors. SP filed a protest with the Chief Procurement Officer on December 23, 2019 that it had been wrongfully identified as “NON-COMPLIANT.” SP requests a complete review of its submission and reinstatement as compliant, qualified, and competent.

## ANALYSIS

SP protests that it had been wrongfully identified as “NON-COMPLIANT.” This Request for Qualifications was issued under Section 11-35-1530(4) of the Code which provides:

(a) Before soliciting proposals, the procurement officer may issue a request for qualifications from prospective offerors. The request must contain at a minimum a description of the scope of the work to be solicited by the request for proposals and must state the deadline for submission of information and how prospective offerors may apply for consideration. The request must require information only on their qualifications, experience, and ability to perform the requirements of the contract.

—(b) After receipt of the responses to the request for qualifications from prospective offerors, rank of the prospective offerors must be determined in writing from most qualified to least qualified on the basis of the information provided. Proposals then must be solicited from at least the top two prospective offerors by means of a request for proposals. The determination regarding how many proposals to solicit is not subject to review pursuant to Article 17.

The process was explained to potential bidders in the SE-820 as follows:

#### **PART IV - RFO PROCESS**

This RFQ is part of a selection process leading to a Performance Contract, for energy, water, and/or wastewater efficient equipment and services, between the Agency and an ESCO. Steps in the process are described below.

1. Agency solicits SOQs from interested ESCO's via this RFQ.
2. Each interested ESCO delivers an original SOQ and the required copies of same, along with a transmittal letter to the Agency by the required deadline. Agency will distribute copies of the SOQ to the Selection Committee for review, scoring, and ranking.
3. ESCO reviews proposed contract attached to this RFQ and includes within its SOQ package delivered to the agency an acknowledgment accepting the contract terms and conditions or listing exceptions taken with the terms and conditions.
4. Based on scoring and ranking, the Selection Committee will rank ESCOs from most qualified to least qualified and select not more than the 3-top ranked ESCOs to receive the RFP.

[SE-820, Page 4]

The selection committee met on December 4, 2019 to review, score and rank the responses and determined the three most qualified offerors.<sup>2</sup> The selection committee did not determine that SP was not qualified; rather it determined that SP was not one of the three most qualified offerors. There was no determination that SP lacked qualification or was non-compliant with any aspect of the procurement. Section 11-35-2410(A) provides that the ranking of Offerors required by Section 11-35-1530(4) is final and conclusive unless it is clearly erroneous, arbitrary, capricious, or contrary to law. SP does not allege that the selection committee's ranking was clearly erroneous, arbitrary, capricious, or contrary to law.

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<sup>2</sup> The CPO is advised that selection committee "did not keep an official record of the scoring and ranking, nor does anyone have any notes" relating to the scoring and ranking of the Offerors' qualification. The results of the selection committee's actions are memorialized on a SE-712 form. Agencies are advised that selection committee meetings are considered public meetings subject to notice and record keeping requirements of the Freedom of Information Act. The issue of compliance with the FOIA requirements for public meetings was not raised as an issue of protest and, consequently, the CPO lacks jurisdiction to address the issue in this decision.

The CPO looks to decisions by the Procurement Review Panel regarding Section 11-35-2410 when considering SP's request for a complete review of its submission and reinstatement as compliant, qualified, and competent:

The Panel has held numerous times that this section dictates that the Panel will not re-evaluate proposals and will not substitute its judgment for the judgment of the evaluators. *See, e.g., Protest of Travelsigns*, Case No. 1995-8; *Protest of First Sun EAP Alliance, Inc.*, Case No. 1994-11; *Protest of NBS Imaging Systems, Inc.*, Case No. 1993-16; and *Protest of Coastal Rapid Public Transit Authority*, Case No. 1992-16.

In the *Coastal Rapid Public Transit Authority* case, the Panel established the basic framework for review of challenges to evaluators' conduct:

The determination by the State who is the most advantageous offeror is final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law .... The burden of proof is on [the protestant] to demonstrate by a preponderance of the evidence that the determination in this case has such flaws .... The Panel will not substitute its judgment for the judgment of the evaluators, who are often experts in their fields, or disturb their findings so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased.

The Panel has held that the evaluation process does not need to be perfect so long as it is fair. *NBS Imaging Systems, Inc.*, cited above. Further, because the Panel will not re-evaluate proposals or substitute its judgment for that of the evaluators, the Panel has held that a claim of superiority by a vendor in certain areas of evaluation, however valid, does not compel the finding that the vendor is the most advantageous to the State. *See, Protest of First Sun EAP Alliance, Inc.*, and *Protest of Coastal Rapid Public Transit Authority*, cited above.

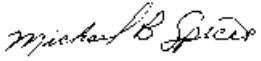
SP does not allege that the selection panel was clearly erroneous, arbitrary, capricious, or violated the law in its scoring and ranking. The CPO will not re-evaluate proposals and will not substitute his judgment for the judgment of the evaluators.

## **DECISION**

For the reasons stated above the protest of Sustainability Partners, LLC is denied.

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Case No. 2020-005  
February 25, 2020

For the Materials Management Office

A handwritten signature in black ink, appearing to read "Michael B. Spicer". The signature is written in a cursive, flowing style.

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Michael B. Spicer  
Chief Procurement Officer

## Attachment 1



Sustainability as a Service®

December 23, 2019

To: Chief Procurement Officer  
Office of State Engineer  
1201 Main Street Suite 600  
Columbia, SC 29201

**REFERENCE:** “Protest-CPO” College of Charleston RFQ for GUARANTEED ENERGY, WATER, AND WASTEWATER CONSERVATION SERVICES (H15-T001-ML)

Dear Chief Procurement Officer:

Pursuant to the Request for Qualification captioned above, Sustainability Partners hereby submits this “Protest-CPO” in conformity with the terms and conditions set forth in the subject RFQ, whose provisions we accept in their entirety, without reservation or restriction.

We are submitting our protest because we believe we have been wrongfully identified as NON-COMPLIANT. We confirm that we have designated Mr. Joe Riley (Senior Investor) from the New York office, based in South Carolina, as the designated Sustainability Partners point-of-contact, authorized to provide any clarification required by the College of Charleston regarding our RFQ protest.

We humbly request a complete review of our submission and reinstatement as complaint, qualified and competent offerors.

Sincerely,

Joe Riley III

[www.sustainability.partners](http://www.sustainability.partners)

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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.

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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.**