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Protest Decision

Matter of: Pee Dee Wetland and Stream Mitigation, LLC

Case No.: 2020-116

Posting Date: December 20, 2019

Contracting Entity: South Carolina Department of Transportation

Solicitation No.: 5400018364

Description: Pee Dee Watershed Mitigation Credits

DIGEST

Protest that winning bid was not-responsive or responsible is granted in part. Pee Dee Wetland and Stream Mitigation's (PDW) 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

Solicitation Issued	08/23/2019
Amendment 1 Issued	09/16/2019
Intent to Award Posted	10/31/2019
Intent to Protest Received	11/06/2019
Amended Protest Received	11/14/2019
DOT's Request to Cancel Solicitation	11/26/2019

The South Carolina Department of Transportation (DOT) issued this Invitation for Bids under a delegation from the CPO to acquire a contractor to provide stream and wetland mitigation bank credits for compensatory mitigation as a result of unavoidable adverse impacts resulting from the construction of the transportation program in the Middle Pee Dee River Watershed Hydrologic Unit Code (HUC) 03040201. DOT posted an Intent to Award to American Mitigation Company, LLC (AMC) on October 31, 2019. PDW filed an Intent to Protest on November 6, 2019 and amended its protest on November 14, 2019. PDW alleges that AMC is not a responsible bidder and that AMC's bid was non-responsive.

On November 26, 2019, DOT requested in writing that the award to AMC be cancelled pursuant to Regulation 19-445.2085(C)(8). DOT stated that the two sole bidders were "at risk of failure in their ability to provide the mitigation banking credits in the time required in the solicitation, given that neither are established mitigation banks at this time." DOT also stated that its brokerage model was not viable and not permitted by certain mitigation banking guidelines; that the intent of the solicitation was not fulfilled; and that the solicitation's timeframe was insufficient to allow more competition to enter the market. DOT sought to "cancel and resolicit removing the Special Standards of Responsibility and making it clear that what SCDOT desires is for entities such as PDWSM and AMC to develop additional mitigation banking areas within the Middle Pee Dee Watershed Hydrologic Unit Code 03030201."

ANALYSIS

This solicitation was issued as an Invitation for Bids (IFB) under Section 11-35-1520 of the Consolidated Procurement Code. Award is made to the lowest responsive and responsible

bidder. A responsive bidder means a person who has submitted a bid or proposal which conforms in all material aspects to the invitation for bids or request for proposals.

Responsiveness of a sealed bid is determined at the time of opening by examining the four corners of the bid document. Unless a bidder has taken exception to a material requirement of the invitation, its signed bid is an offer to enter into a contract to provide the specified goods or services at the terms and conditions stated in the invitation at the price bid. The lowest priced bid may be accepted by the State without further action through the issuance of a statement of award or intent to award.

PDW protests that AMC's bid was not responsive to material requirements of the solicitation.

Specifically, PDW protests:

- a. Non-Conforming Bid. The AMC Bid Does Not Conform to the IFB Requirements Because It (1) Fails to Adequately Identify a Mitigation Bank as required by the IFB and (2) Provides Alternative Performances Not Allowed/Contemplated by the IFB.
- b. Improper Teaming. The AMC Bid Improperly Suggests Teaming without Naming Team Members.
- c. Insufficient Details of Performance. The AMC Bid Does Not Provide Enough Specificity of Performance.
- d. Inability to Timely Perform. AMC Cannot Deliver the Credits within SCDOT's Required Timeline.

PDW argues that the solicitation required bidders have a conforming mitigation bank at the time of bid submission. This requirement is not a material requirement of the solicitation, but a special standard of responsibility identified in the solicitation as such:

(a) This section establishes special standards of responsibility. **UNLESS YOU POSSESS THE FOLLOWING MANDATORY MINIMUM QUALIFICATIONS, DO NOT SUBMIT AN OFFER:**

USACE approved Mitigation Bank with a primary service area that covers the project location(s) as described in Section III. (Middle Pee Dee River Watershed)

[Solicitation, Page 15] (emphasis in original)

This requirement was affirmed in response to several questions included in Amendment 1:

17. Is an USACE approved mitigation bank with a primary service area that covers the Middle Pee Dee River Watershed as described in V.2(a) an

absolute minimum qualification? If so, why are secondary service areas discussed as acceptable in the Scope of Work/Specifications

ANSWER:

The winning bidder must have a bank with a service area consistent with the June 9, 2016 Lower Pee Dee USACE Service Map (03040201) Upper Coastal Plain.

[Amendment 1, Question 17] (emphasis in original)

A special standard of responsibility is defined in Regulation 19-445.2120(F) as follows:

When it is necessary for a particular acquisition or class of acquisitions, the procurement officer may develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards shall be set forth in the solicitation (and so identified) and shall apply to all offerors. A valid special standard of responsibility must be specific, objective and mandatory.

AMC's bid response states:

AMC proposes to establish a new USACE approved mitigation bank with a primary service area that will serve the entire 8-digit hydrological unit code 03040201 (Middle Pee Dee) within the Upper Coastal Plain ecoregion. AMC has identified several potential mitigation sites (parcels of land) in the Middle Pee Dee watershed which have wetland and stream mitigation resources capable of producing the amount of credits required by this solicitation upon USACE permit approval of a wetland and stream mitigation bank on one of those sites. If a mitigation bank is not authorized by December 1, 2020, the initial credits required by the agency will be provided from an established mitigation bank that is authorized to sell credits in the Middle Pee Dee watershed. As required by this solicitation a minimum of 50% of the wetland and stream credits provided to SCDOT under this solicitation will be restoration/enhancement credits.

(emphasis added)

AMC fails to meet the special standard of responsibility and should have been rejected.²

² AMC's counsel submitted a response to the protest, dated December 6, 2019 that suggests the IFB was amended through Answers to Questions 6 and 13. Essentially, AMC argues that the requirement that a bidder "must have a bank" was amended to read that the bidder "must have credits by December 1, 2020." However, a requirement that a bidder have an existing bank and a requirement that a bidder also have credits available on December 1, 2020 are not mutually exclusive. A bidder, for example, could have an existing bank on the date it submitted a bid, but then use credits elsewhere prior to December 1, 2020. Thus, requiring a bidder to have an existing bank *and* credits available December 1, 2020 are separate requirements that are not mutually exclusive. Further, to the extent AMC

PDW's second issue of protest alleges that AMC improperly "suggests" teaming without naming the team members as required by the solicitation. PDW relies on the following excerpt from AMC's bid:

If a mitigation bank is not authorized by December 1, 2020, the initial credits required by the agency will be provided from an established mitigation bank that is authorized to sell credits in the Middle Pee Dee watershed.

While one might infer that that initial credits would be provided by a teaming partner, however improbable, it is possible AMC could meet the requirement without teaming and AMC takes no exception to the requirement. This issue of protest is denied.

PDW's third issue of protest alleges that AMC failed to provide enough specificity of performance for the State to determine it a responsible bidder. As stated above, AMC failed to meet the special standard of responsibility and should have been rejected.

PWD's last issue of protest alleges that AMC cannot deliver the credits within the required timeframe. By submission of its bid, AMC made a contractual commitment to deliver the credits in the time required. Failure to provide the credits on time would be a post award performance issue. PDW's allegation that AMC will not meet its contractual obligations is based on conjecture and is dismissed.

DECISION

For the reasons stated above, the protest of Pee Dee Wetland and Stream Mitigation, LLC is granted. The award to American Mitigation Company LLC is cancelled. This procurement is remanded to the South Carolina Department of Transportation for processing in accordance with the South Carolina Consolidated Procurement Code.³

argues that this creates an ambiguity, AMC could have challenged any perceived ambiguities through a protest to the solicitation, which it failed to do.

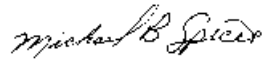
³ As stated above, the Procurement Officer requested in writing on November 26, 2019 to cancel the award and re-solicit. The award has now been cancelled and the solicitation has returned to its pre-award status. If the Procurement Officer still wishes to cancel the IFB and issue a new solicitation based upon the reasons stated in his November 29, 2019 letter, he has that discretion under Regulation 19-445.2065.

Protest Decision, page 6

Case No. 2020-116

December 20, 2019

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.

Michael B. Spicer

Chief Procurement Officer

Attachment 1

BURR FORMAN MCNAIR

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November 14, 2019

Via Email and Hand Delivery

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**Re: Final Protest of Notice of Award posted October 31, 2019 for Solicitation No.
5400018364, Pee Dee Watershed Mitigation Credits**

Dear Mr. White:

We represent Pee Dee Wetland and Stream Mitigation, LLC ("Pee Dee") (a subsidiary of NextEra Energy Marketing, LLC), which hereby gives notice to the Procurement Office of its Final Protest of the award of Solicitation No. 5400018364, Pee Dee Watershed Mitigation Credits (the "Solicitation"), to American Mitigation Company LLC ("AMC"), posted October 31, 2019. Pursuant to S.C. Code Ann. § 11-35-4210(2) (Supp. 2019), on November 6, 2019, Pee Dee filed its initial protest of the award of the Solicitation to AMC. Pee Dee submits this final protest pursuant to the requirements of S.C. Ann. § 11-35-4210 (Supp. 2019).

The South Carolina Department of Transportation ("SCDOT") issued the Solicitation, with an Invitation to Bid dated August 23, 2019 ("IFB"). AMC and Pee Dee were the only two bidders to respond to the IFB. For the reasons set forth below, SCDOT should have determined that AMC's bid (the "AMC Bid") was non-responsive and awarded the contract to Pee Dee.

AL • DE • FL • GA • MS • NC • SC • TN

SUMMARY OF PROTEST

Pee Dee protests the Solicitation award to AMC on the following grounds:

1. The AMC Bid is non-responsive for several reasons and should have been rejected for any of the following reasons (as further set forth in the Protest section below):
 - a. **Non-Conforming Bid.** The AMC Bid Does Not Conform to the IFB Requirements Because It (1) Fails to Adequately Identify a Mitigation Bank as required by the IFB and (2) Provides Alternative Performances Not Allowed/Contemplated by the IFB.
 - b. **Improper Teaming.** The AMC Bid Improperly Suggests Teaming without Naming Team Members.
 - c. **Insufficient Details of Performance.** The AMC Bid Does Not Provide Enough Specificity of Performance.
 - d. **Inability to Timely Perform.** AMC Cannot Deliver the Credits within SCDOT's Required Timeline.

PROTEST

AMC's Bid Language. The following language is quoted from Page 3 of the AMC Bid and provides the basis for this Protest. Note that the following language is the only aspect of AMC's Bid that provides any semblance of details and support regarding AMC's efforts to have a mitigation bank that satisfies the requirements of the IFB.

"Description of the Mitigation Bank

AMC proposes to establish a new USACE approved mitigation bank with a primary service area that will serve the entire 8-digit hydrological unit code 03040201 (Middle Pee Dee) within the Upper Coastal Plain ecoregion. AMC has identified several potential mitigation sites (parcels of land) [emphasis added] in the Middle Pee Dee watershed which have wetland and stream mitigation resources capable of producing the amount of credits required by this solicitation upon USACE permit approval of a wetland and stream mitigation bank on one of those sites. If a mitigation bank is not authorized by December 1, 2020 [emphasis added], the initial credits required by the agency will be provided from an established

mitigation bank that is authorized to sell credits in the Middle Pee Dee watershed. As required by this solicitation a minimum of 50% of the wetland and stream credits provided to SCDOT under this solicitation will be restoration/enhancement credits.”

Grounds for Protest. The AMC Bid should have been rejected as non-responsive based on any of the following reasons:

1. **The AMC Bid is a Non-Conforming Bid.** S.C. Code Ann. § 11-35-20(2)(a) provides that the purposes of the Code include providing for increased economy in state procurement activities, fostering effective broad-based competition and to provide increased economy in state procurement activities and maximizing to the fullest extent practicable the State’s purchasing power while ensuring the most advantageous procurements to the State. A non-responsive bid fosters none of these goals. Pursuant to S.C. Code Ann. § 11-35-1410(9), to be deemed a “Responsive bidder or offeror”, the relevant bidder or offeror must submit a bid or proposal which conforms in all material aspects of the IFB.
 - a. **SCDOT Solicitation Questions from Offerors, Answer No. 12¹states in the State’s Response:** “The winning bidder must have a bank with a service area consistent with the June 9, 2016 Lower Pee Dee USACE Service Map (03040201) Upper Coastal Plain.” (Emphasis added.) The same Answer in more or less the same language responds to Question Nos. 17, 20, and 32. Additionally, SCDOT Solicitation Questions from Offerors, Answer No. 1, states in pertinent part: “...the first wetland mitigation bank credit must be delivered on or before December 1, 2020...” (Emphasis added.) As such, the IFB clearly required that an offeror (*at the time of the Bid*) have a mitigation bank that could be reasonably expected to be completed (and able to deliver mitigation credits) by December 1, 2020. The AMC Bid fails to do so.
 - i. Land/site securement is an essential and necessary element of the permitting and development of any mitigation bank. The AMC Bid does not indicate that AMC actually has a site secured. Rather, as noted above, the AMC Bid merely provides in pertinent part that: “AMC *has identified several potential mitigation sites* (parcels of land) in the Middle Pee Dee watershed...” (Emphasis added.) AMC does not identify a mitigation bank site that it actually has obtained. Moreover, AMC provides no evidence or support that it even

¹ The State’s responses to the Q&A amended the Solicitation and are considered to be part of the Solicitation. See Pre-bid Conference Notice issued 9/16/19 and S.C. Code Ann. Reg. 19-445.2042(B).

has any reasonable possibility of securing suitable land for a mitigation bank. The AMC Bid is thus not responsive.

AMC's failure to agree to (or to provide reasonable supporting evidence that it could satisfy) the material IFB requirement that a mitigation bank will be completed (and able to deliver mitigation credits) by December 1, 2020 gave it an unfair and unequitable advantage over other offerors in contravention of S.C. Code § 11-35-20(2)(f) (Supp. 2019). AMC is not a responsive offeror because the AMC Bid does not comply with all of the essential and material requirements of the IFB. The proposal should be rejected pursuant to S.C. Code Ann. Reg. 19-445-2070(A) (Supp. 2019) ("Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.")

Other offerors could have responded to the Solicitation if the Solicitation allowed offerors to bid with hypothetical mitigation banks; but it did not. Instead, the IFB generally required each offeror to provide a detailed statement with adequate information demonstrating that the offeror will have a mitigation bank completed (and able to deliver mitigation credits) by December 1, 2020. S.C. Code Ann. Reg. 19-445.2070(D)(1) (Supp. 2019) provides, in pertinent part: "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." The AMC Bid is essentially a speculative bid (unsupported by any objective evidence that AMC is on track – or even capable – of timely satisfying the IFB requirements) and thus prejudicial to bidders who submit bids supported by information and evidence that reasonably demonstrate timely satisfaction of the requirements of the IFB, like Pee Dee's bid.

- ii. Further, the AMC Bid is not responsive because it proposes to provide for the delivery of credits from a mitigation bank other than one that AMC may develop (if at all). AMC unilaterally qualified its Bid by attempting to impose a condition on the State that AMC be allowed to purchase mitigation credits from a source external to AMC if AMC could not satisfy the specific requirements of the IFB (i.e., develop its own mitigation bank, capable of delivering mitigation credits by December 1, 2020): "If a mitigation bank is not authorized by December 1, 2020, the initial credits required by the agency *will be provided from an established mitigation bank* that is authorized to sell

credits in the Middle Pee Dee watershed.” (Emphasis added.) This modification to the IFB imposed unilaterally by AMC in effect means that SCDOT has no way to know if AMC will comply with any, some or all of the mandatory requirements of the IFB, most specifically that AMC would have its own mitigation bank completed (and able to deliver mitigation credits) by December 1, 2020. Through AMC’s unilateral modification to the IFB, AMC could simply never attempt to create its own mitigation bank and deliver credits from such bank (as required by the IFB); instead, AMC has unilaterally created an option for itself to deliver a substitute product to SCDOT that was never contemplated by the IFB. This is an impermissible alternative performance not prescribed by the Solicitation, rendering the AMC Bid nonresponsive. S.C. Code Ann. Reg. 19-445.2070(B) and (C).

Thus, if SCDOT were to award the contract to AMC, then (in effect) SCDOT would not have a binding contract with AMC for the timely delivery of mitigation credits from a mitigation bank developed by AMC (and that otherwise meets the requirements of the IFB) because the AMC Bid does not include an unconditional contractual promise by AMC that it will complete its own mitigation bank by December 1, 2020 (from which AMC could deliver mitigation credits). In fact, the AMC Bid expressly includes contingency plans that were not contemplated by the IFB in the event that AMC is unable (or simply elects not to attempt) to fulfil this fundamental promise.

Nowhere does the Solicitation allow an offeror to hedge its commitment to develop a mitigation bank that is capable of delivering mitigation credits by December 1, 2020; moreover, the Solicitation does not provide any back-up option for an offeror to satisfy the IFB requirements by acquiring credits from a bank that was not timely developed by such offeror. AMC’s unilateral modification to the IFB is patently unfair to other bidders (See S.C. Code Ann. § 11-35-20(2)(f)), as the clear implication of AMC’s Bid is that even though it does not have a mitigation bank (and it has not provided reasonable evidence that it will have its own mitigation bank capable of delivering mitigation credits by December 1, 2020), AMC will just buy the credits from a third party if AMC is unable to timely satisfy the core requirements of the IFB. S.C. Code Ann. Reg. 19-445.2070(D)(1)(Supp. 2019) provides, in pertinent part: “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.” (Emphasis added.) Even assuming that the IFB had allowed for any such back-up option (which it did not), the AMC bid failed to provide any reasonable details regarding AMC’s ability (if any) to acquire replacement credits from a qualifying source if AMC failed to develop its own mitigation bank that is capable of delivering mitigation credits by December 1, 2020.

The additional back-up option unilaterally imposed by AMC prejudices other bidders as it provides a “fallback” position for bidders that would have been uncertain that they could have been able to timely create a mitigation bank as specifically required by the IFB (no small feat, as noted below.) S.C. Code Ann. § 11-35-20(2)(f) provides that one of the purposes of the Procurement Code is “to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement.” Allowing AMC to unilaterally qualify its bid in such a material way is not fair to the other potential bidders and undermines the transparency of the procurement system. If SCDOT intended for such a contingent bid to be permissible and/or that the requirement that the offerors have a mitigation bank completed (and able to deliver mitigation credits) by December 1, 2020 was desired but not required by SCDOT, it should have stated so specifically in the Solicitation so that all bidders could have considered it and have an opportunity to bid accordingly.

- iii. Additionally, the Solicitation’s Section III, Scope of Work/Specifications at Page 13 states in part that: “SCDOT has reviewed the United States Army Corps of Engineers (USACE) Regulatory In-Lieu Fee and Bank Information Tracking System (RIBITS) for multiple private commercial mitigation banks that service the area and determined that none currently have credits available for purchase.” (Emphasis added.)

Thus, even AMC’s attempt to unilaterally modify the IFB is flawed as it misrepresents to SCDOT the availability of credits that AMC could acquire from third party banks if AMC failed to develop a mitigation bank that is capable of delivering mitigation credits by December 1, 2020. This misrepresentation violates AMC’s duty of good faith to SCDOT required by S.C. Code § 11-35-30. The failure of AMC to act in good faith means that AMC does not qualify as a “Responsive bidder or offeror” pursuant to S.C. Code § 11-35-1410(8). The AMC Bid should be declared non-responsive on this basis as well.

The AMC Bid contains patently inaccurate information in an attempt to gloss over AMC's material shortcomings, namely that AMC does not have any reasonably identifiable plans to be on track to have its own mitigation bank completed (and able to deliver mitigation credits) by December 1, 2020. To the extent SCDOT relied on the AMC claim that AMC had the ability to purchase qualifying credits from third parties, SCDOT was misled. Accordingly, the AMC Bid should be determined to be non-responsive.

2. The AMC Bid is non-responsive because the teaming aspect was not disclosed as required.

- a. ***SCDOT Solicitation Questions from Offerors, Answer No. 15 states:*** "Teaming is allowed under this venture in order to allow the maximum responses and ensure the credits can be delivered in full for the watershed during the contract timeline. NOTE: If the response is submitted under teaming assumptions, please identify it via a statement uploaded as a separate attachment during electronic submission, *clearly identifying teaming members and the roles of each.*" (Emphasis added.)
- i. As noted, AMC suggests in the AMC Bid that if AMC does not have its own mitigation bank ready by December 1, 2020, it will source mitigation credits from a third party mitigation bank. Putting aside the fact that (as noted above) such backup option was not contemplated in or permitted by the IFB, AMC failed to provide any relevant details regarding AMC's ability to secure any such backup mitigation credit supply (e.g., the identity of a third party mitigation bank, and whether AMC had any contractual right to purchase the backup mitigation credit supply from such third party mitigation bank).
 - ii. This is a particularly critical disclosure since SCDOT has stated that there are no other qualifying mitigation banks in the subject area.² The failure to disclose the "fallback" mitigation bank is a gross and material failure to comply with the Solicitation.

² Pee Dee has the only bank currently in development in the required region at a stage that is advanced enough to have credits available on or before December 1, 2020. There is no agreement in place between Pee Dee and AMC pursuant to which Pee Dee is required to deliver mitigation credits to (or on behalf of) AMC, nor does Pee Dee intend to agree in the future to deliver credits from Pee Dee's bank to satisfy AMC's obligations to SCDOT.

3. AMC is a non-responsible bidder as AMC did not provide sufficient detail for SCDOT to properly evaluate AMC's minimum qualifications.

- a. The Solicitation at Section V, "Qualifications," under Subheading "Special Standards of Responsibility," requires that an offeror:

"(a) This section establishes special standards of responsibility. UNLESS YOU POSSESS THE FOLLOWING MANDATORY MINIMUM QUALIFICATIONS, DO NOT SUBMIT AN OFFER: USACE approved Mitigation Bank with a primary service area that covers the project location(s) as described in Section III. (Middle Pee Dee River Watershed)

(b) Provide a detailed, narrative statement with adequate information to establish that you meet all the requirements stated in subparagraph (a) above. Include all appropriate documentation. " (Emphasis added.)

- b. Special Standards of Responsibility are not included in every solicitation; as such, the inclusion of the Special Standards of Responsibility in the present Solicitation is noteworthy. S.C. Code Ann. Reg. 19-445.2215(F)(Supp. 2019) provides, in pertinent part: "When it is necessary for a particular acquisition or class of acquisitions, the procurement officer may develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards shall be set forth in the solicitation (and so identified) and shall apply to all offerors. A valid special standard of responsibility must be specific, objective and mandatory." (Emphasis added.)

- c. The AMC Bid failed to adequately respond to the information and documentation request necessary to demonstrate AMC's objective satisfaction of the Special Standards of Responsibility. The AMC Bid only included a single paragraph section in the AMC Bid indicating how AMC would satisfy the Special Standards of Responsibility (see Page 3 of the AMC Bid, under the heading *Description of the Mitigation Bank*), which paragraph merely indicated that AMC had "identified several potential mitigation sites". The AMC Bid included no other relevant details or supporting evidence regarding (i) these purported potential mitigation sites and their location; (ii) AMC's ability (if any) to actually secure land rights with respect to any such mitigation sites or the status of any contract negotiation with the relevant land owners; (iii) the permitting timeline for AMC's mitigation bank (if any) and the issuance of mitigation credits therefrom that coincided with the target date of

December 1, 2020; or (iv) generally how AMC satisfied or could satisfy the Special Standards of Responsibility. Not only was AMC's Bid deficient in describing how AMC would satisfy the Special Standards of Responsibility, AMC's sole paragraph on the subject included a back-up plan that specifically contemplated that AMC may fail to meet the Special Standards of Responsibility required by the IFB. The lack of details and information in AMC's Bid with respect to AMC's ability to satisfy the Special Standards of Responsibility should have rendered AMC non-responsive since the IFB specifically required the offeror to provide a "detailed, narrative statement with adequate information to establish that [AMC] [met] all of the requirements"; moreover, by providing a back-up plan, AMC itself admitted that it may not be able to satisfy the Special Standards of Responsibility that were required by the IFB. For these reasons, the AMC Bid was thus unresponsive and AMC should have been deemed non-responsive.

4. AMC's bid should be dismissed as it did not meet the minimum mandatory qualifications – AMC Will Not be able to deliver the bank credits on the timeline required.

- a. *SCDOT Solicitation Questions from Offerors, Answer No. 1 states:* "The winning bidder must be able to deliver all requested mitigation bank credits on or before December 1, 2024. The first stream mitigation bank credit and the first wetland mitigation bank credit must be delivered on or before December 1, 2020 by a bank with a service area consistent with the June 9, 2016 Lower Pee Dee USACE Service Map (03040201) Upper Coastal Plain." (Emphasis added.)
 - i. AMC acknowledges in the AMC Bid that it cannot commit to meeting the IFB's timeline and gives an alternate (non-qualifying) mechanism for satisfying the IFB contract requirements.
 - ii. Publicly available information supports AMC's inability to complete a mitigation bank (and deliver mitigation credits therefrom) by December 1, 2020.
 1. See timeline data and analysis submitted by Pee Dee attached as Exhibit A.
 2. The AMC Bid is not made in good faith and is non-responsive as AMC knows (or should know) that it cannot complete a self-developed mitigation bank (and deliver mitigation credits therefrom) on or before December 1, 2020. See S.C. Code §§ 11-35-30 and 11-35-1410(8). As

stated above, Pee Dee has the only bank currently in development in the required region at a stage that is advanced enough to have credits available on or before December 1, 2020. There is no agreement in place between Pee Dee and AMC pursuant to which Pee Dee is required to either (i) sell its in-development mitigation bank to AMC or (ii) deliver mitigation credits to (or on behalf of) AMC; nor does Pee Dee intend to agree in the future to any of the transactions described in the preceding sub-clauses (i) and (ii).

RELIEF REQUESTED

For the foregoing reasons (each of which is sufficient on its own), Pee Dee requests that AMC be found to be non-responsive to the Solicitation and that the Solicitation be awarded to the only responsive and responsible bid—that of Pee Dee.

Thank you for your attention to this matter, and best wishes for a happy and safe holiday season.

Very truly yours,



M. Elizabeth Crum

cc: *w/enclosures via email only:*

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STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2019)

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>

FILING FEE: Pursuant to Proviso 111.1 of the 2019 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.