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INFORMATION TECHNOLOGY MANAGEMENT OFFICER
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Protest Decision

Matter of: EFK Diagnostics

Case No.: 2020-119

Posting Date: December 20, 2019

Contracting Entity: South Carolina Department of Health and Environmental Control

Solicitation No.: Intent to Sole Source

Description: HemoCue hemoglobin analyzers and miscellaneous supplies

DIGEST

Protest of sole source is granted. EKF Diagnostics' (EKF) 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

Intent to Sole Source Advertised
Protest Received

11/07/2019
11/14/2019

The South Carolina Department Health and Environmental Control (DHEC) published its intent to award a sole source contract to Hemocue America for hemoglobin analyzers that measure hemoglobin levels in whole blood, and supplies including dedicated microcuvettes that are compatible with existing Hemocue America analyzers used in DHEC Health Department laboratories statewide. EKF protested that there are other sources for hemoglobin analyzers.

ANALYSIS

DHEC explains:

These hemoglobin analyzers are used in DHEC clinics statewide to screen hemoglobin for all WIC clients (pre-natal and post-partum women, infants 9 – 12 months, and children ages 1 – 5). This is in compliance with a Federal requirement of the WIC program that requires all clients to be screened when they are accepted into the program. The screening is used to determine nutritional deficiencies that may be present, leading to targeted nutritional education or, if necessary, medical referral. There are three principle components in the system: (1) the analyzer is the device that is used to read the blood sample, (2) the microcuvettes are the consumables used to collect the blood sample, and (3) R&D controls are used to validate and calibrate the analyzers (a process that must be performed daily for each device).

Regulation 19-445.2105(B)(1) provides that a sole source may be necessary “where the compatibility of equipment, accessories, or replacement parts is the paramount consideration.” Statewide, DHEC has over 100 Hemocue analyzers and over 100 staff members that are trained to use these systems. We believe that compatibility with existing systems, and the staff trained to use the existing equipment, is a paramount consideration and therefore warrants the continued use of the Hemocue analyzers and supplies.

Switching to a different system would present an unreasonable hardship to the agency, and would very likely result in gaps in service to clients during the transition that would be required. Initial training for each person --- over 100 staff members distributed across dozens of DHEC locations statewide --- must be done by a CLIA general supervisor. Then, each staff member being trained must stick 20 patients each twice and the readings must be within 0.5 of each other before the employee is considered to be certified to use the device. This translates to

more than 4,000 patient sticks that would be necessary to transition current staff to a new system.

(Attachment 2)

Based on past experience DHEC believed that HemoCue America was the exclusive authorized dealer in the United States for the HemoCue hemoglobin analyzers and their respective dedicated cuvettes for distribution to state and county public health customers.

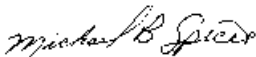
In verifying its understanding of the marketplace, DHEC learned that while formerly HemoCue's agreements with their resellers prohibited those resellers from offering to Public Health entities, this is no longer the case. (Attachment 3) "In cases of reasonable doubt, competition must be solicited." *Appeal by Beckman Instruments*, Panel Case No. 1995-6.

DHEC has determined that in this case a sole source contract is not appropriate and will solicit for a new contract.

DECISION

The intended award to Hemocue America is cancelled and this procurement is remanded to the Department of Health and Environmental Control for processing in accordance with the Consolidated Procurement Code.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1

From: [Pat Breheny](#)
To: [Protest-IMO](#)
Subject: [External] Protest Intent To Sole Source
Date: Thursday, November 14, 2019 10:47:03 AM

We wish to Protest the following:

The South Carolina Department of Health & Environmental Control (DHEC) is seeking qualified vendors to provide portable hemoglobin analyzers that measure hemoglobin levels in whole blood, and supplies including dedicated microcuvettes that are compatible with existing Hemocue America analyzers used in DHEC Health Department laboratories statewide. The total estimated dollar amount of the purchase is \$350,000, over a period of 2 years.

We would like to offer the State another option.
Thank you,

Pat Breheny
Public Health Sales Specialist

Cell: 210-601-5252

Email: patbreheny@ekfdiagnostics.com



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Tel: 830.249.0772 • Fax: 830.249.0851 • www.stanbio.com

Attachment 2

From: [Clark, Tripp](#)
To: [Spicer, Michael](#)
Cc: [Grier, Manton](#); [Skinner, Gail](#); [Robertson, Dixon](#); NICHOLRJ@DHEC.SC.GOV; MADDOX@DHEC.SC.GOV
Subject: Re: [External] Protest Intent To Sole Source
Date: Tuesday, December 3, 2019 5:20:41 PM

Mr. Spicer,

On November 7, 2019, SC DHEC posted public notice of an "Intent to sole source," in accordance with §11-35-1560(A), for portable hemoglobin analyzers that measure hemoglobin levels in whole blood, and supplies including dedicated microcuvettes that are compatible with existing Hemocue America analyzers used in DHEC Health Department laboratories statewide. On November 14, EKF Diagnostics submitted a Protest of this Intent to Sole Source, stating that they "would like to offer the State another option."

These hemoglobin analyzers are used in DHEC clinics statewide to screen hemoglobin for all WIC clients (pre-natal and post-partum women, infants 9 – 12 months, and children ages 1 – 5). This is in compliance with a Federal requirement of the WIC program that requires all clients to be screened when they are accepted into the program. The screening is used to determine nutritional deficiencies that may be present, leading to targeted nutritional education or, if necessary, medical referral. There are three principle components in the system: (1) the analyzer is the device that is used to read the blood sample, (2) the microcuvettes are the consumables used to collect the blood sample, and (3) R&D controls are used to validate and calibrate the analyzers (a process that must be performed daily for each device).

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Be aware also that all three of the Hemocue items that are a part of this system are available on the NASPO contract with Fisher Scientific. However, this is a non-mandatory state contract and we have chosen to instead go directly to the manufacturer, Hemocue, because the items are available direct at significantly lower prices than from Fisher.

Tripp Clark
Procurement Director
Bureau of Business Management
S.C. Dept. of Health & Environmental Control
Office: (803) 898-3485
Mobile: (803) 465-3636
Fax: (803) 898-3505
Connect: www.scdhec.gov [Facebook](#) [Twitter](#)



Attachment 3

From: [Clark, Tripp](#)
To: [Spicer, Michael](#)
Cc: NICHOLRJ@DHEC.SC.GOV
Subject: [External] Fw: HemoCue Hb201 distributors
Date: Tuesday, December 10, 2019 10:55:11 AM

Mike,

Please see below. In a phone call yesterday with Hemocue representatives Danalu Smith and Mark Bellwood, we learned that while formerly their agreements with their resellers prohibited those resellers from offering to Public Health entities, this is no longer the case. Since the market has changed and resellers are available, we no longer have a "sole source" situation. We will be soliciting for a new contract instead. Since our current contract expires December 31, it will be necessary for us to do a short term extension on the current contract to provide continuity until a new contract can be solicited and awarded.

I am uncertain what additional information you may need from me in regards to the Protest from EKF Diagnostics (Stanbio). Please call or reply to let me know.

Tripp Clark
Procurement Director
Bureau of Business Management
S.C. Dept. of Health & Environmental Control
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From: Smith, Danalu N <Danalu.N.Smith@hemocue.com>
Sent: Monday, December 9, 2019 9:28 PM
To: Nichols, Rebecca J. <nicholrj@dhec.sc.gov>; Clark, Tripp <clarkhc@dhec.sc.gov>
Cc: Bellwood, Mark C <Mark.C.Bellwood@hemocue.com>
Subject: HemoCue Hb201 distributors

***** Caution. This is an EXTERNAL email. DO NOT open attachments or click links from unknown senders or unexpected email. *****

Hi Becky and Tripp,

In the past, our distribution agreements restricted distributor access to certain market segments. In the last few years, HemoCue no longer restricts access to the Hb201+ by our distributors. Instead, distributors are generally unable to access the Public Health segment since their access cost is significantly more than our standard Public Health price of \$168.00 per box.

Some examples of distributors who sell the Hb201+ are: Cardinal Healthcare, Fisher Scientific, Medline Industries, and Owens and Minor. Please let me know if you have any other questions.
Thank you,

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.