

HENRY MCMASTER, CHAIR  
GOVERNOR

CURTIS M. LOFTIS, JR.  
STATE TREASURER

RICHARD ECKSTROM, CPA  
COMPTROLLER GENERAL



HUGH K. LEATHERMAN, SR.  
CHAIRMAN, SENATE FINANCE COMMITTEE

G. MURRELL SMITH, JR.  
CHAIRMAN, HOUSE WAYS AND MEANS COMMITTEE

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:** Gerber Products Company d/b/a Nestlé Infant Nutrition

**Case No.:** 2020-123

**Posting Date:** March 26, 2020

**Contracting Entity:** South Carolina Department of Health and Environmental Control

**Solicitation No.:** 5400018781

**Description:** Women, Infants, and Children (WIC) Formula Rebate

### DIGEST

A protest of the solicitation is granted in part and denied in part. The protest letter of Gerber Products Company d/b/a Nestlé Infant Nutrition 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.

---

<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	11/01/2019
Amendment One Issued	11/25/2019
Amendment Two Issued	12/04/2019
Amendment Three Issued	12/12/2019
Protest Received	12/27/2019
Amendment Four Issued	12/27/2019

This Invitation for Bids was issued by the South Carolina Department of Health and Environmental Control (DHEC) on November 1, 2019 to solicit bids from infant formula manufacturers to supply, and provide a rebate for, standard iron-fortified milk-based formula and iron-fortified soy-based formula which will become the primary contract infant formula issued to South Carolina WIC participants. Three amendments were issued making changes to the solicitation, the last of which was posted on December 12, 2019. Gerber timely protested the changes in Amendment 3 on December 27, 2019, alleging that the data upon which bidders are to rely upon in calculating their bids is outdated and inconsistent, and that DHEC provided incomplete and inaccurate answers to bidders' questions and in some cases did not address bidders' questions. Amendment 4 was issued to suspend the solicitation after receipt of the protest.

The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) is a federal-state nutrition and health-assistance program for low-income childbearing women, infants and young children. Infant formula is provided through the WIC program. The WIC Program in South Carolina is 100% federally funded through the United States Department of Agriculture. Eligible participants purchase infant formula from a merchant with no retail payment, a record of the purchase is forwarded to DHEC who reimburses the seller, and DHEC forwards information to the formula manufacturer on a monthly basis to seek rebates to cover a portion of the expense for the eligible purchases.

The contract resulting from this solicitation will be awarded to the manufacturer that provides a rebate that results in the lowest net cost to DHEC. Federal regulation 7 CFR § 246.16a.(c)(5) dictates how the contract is to be awarded:

***How are contracts awarded?*** A State agency must award the contract(s) to the responsive and responsible bidder(s) offering the lowest total monthly net price for infant formula or the highest monthly rebate (subject to paragraph (c)(4)(ii) of this section) for a standardized number of units of infant formula. The State agency must calculate the lowest net price using the lowest national wholesale cost per unit for a full truckload of the infant formula on the date of the bid opening.

**(i) *Calculating the standardized number of units of infant formula.*** The State agency must specify a standardized number of units (e.g., cans) of infant formula by physical form (e.g., concentrated liquid, powdered, and ready-to-feed) to be bid upon. The standardized number of units must contain the equivalent of the total number of ounces by physical form needed to give the maximum allowance to the average monthly number of infants using each form. The number of infants does not include infant participants who are exclusively breastfed and those who are issued exempt infant formula. The average monthly number of infants using each physical form must be based on at least 6 months of the most recent participation and issuance data. In order to calculate the standardized number of units of infant formula by form to be bid upon, the average monthly number of infants using each physical form is multiplied by the maximum monthly allowable number of ounces for each form (as allowed under § 246.10(e)(9)(Table1)), and divided by the corresponding unit size (i.e., number of ounces per unit being bid). In order to compare bids, total cost is calculated by multiplying this standardized number of units by the net price for each physical form. Alternative calculations that arrive at a mathematically equivalent result are acceptable.

**(ii) *Determining the lowest total monthly net price or highest rebate.*** To determine the lowest total monthly net price a State agency must multiply the net price per unit by the established standardized amount of infant formula to be bid upon as calculated in paragraph (c)(4)(i) of this section. If the bid evaluation is based on highest rebate offered, the State agency must multiply the rebate offered by the established amount of infant formula to be bid upon as calculated in paragraph (c)(4)(i) of this section.

Federal regulation 7 CFR § 246.16a.(c)(6) requires that certain data must be included in the solicitation:

***What data must be provided to bidders?*** The State agency must provide as part of the bid solicitation the participation and infant formula usage data and the standardized number of ounces by physical form of infant formula to be used in evaluating bids as described in paragraph (c)(4) of this section. The State agency must notify bidders that the participation and infant formula usage data does not necessarily reflect the actual issuance and redemption that will occur under the contract.

Regulation 7 CFR § 246.16a.(c)(4) requires bidders supply a rebate for three physical forms of infant formula: concentrated liquid, powdered, and ready-to-feed.

In order to receive a bid that results in the lowest net cost to the state, the solicitation incorporated two spreadsheets as Attachment B. On the first spreadsheet, Bidders are to provide the following information for each of three physical forms of formula; powdered, liquid concentrate, and Ready-to-Feed:

Manufacturer's name, product name, UPC code, unit size, reconstituted ounces per unit, lowest national wholesale price per unit for a full truckload, and rebate bid per unit.

The spreadsheet automatically calculates the net cost per unit and rebate percentage. The net cost per unit, rebate percentage and, wholesale full truck price per unit are automatically transferred to the second spreadsheet.

In addition to the data from the first spreadsheet, the second spreadsheet is divided into three sections based on the physical form in which the formula is delivered. Each physical form section is divided into three infant age categories. Each age category is prepopulated with the maximum number of ounces authorized for each age group and whether the infant is fully or partially formula fed. Each age category is also prepopulated with an average number of infants based on the six-month period from November 2018 through April 2019, and whether the infant is fully or partially formula fed. The number of infants is multiplied by the number of ounces to determine the total monthly ounces for bid purposes.

The second spreadsheet applies the data from the first spreadsheet to the prepopulated data in the second spreadsheet and automatically calculates the total net monthly cost to the State. Award is made to the manufacturer providing the lowest net monthly cost to the State.

Gerber protests that data included in the solicitation, upon which bidders will rely in preparing their bids, is outdated, inconsistent, contradictory, confusing, and consequently violates federal regulations, statutory requirements for fair and open competition, and the obligation of good

faith and fair dealing.<sup>2</sup> Gerber also protests that DHEC's failure to respond to, or adequately respond to, bidders' inquiries violates the Code and preserves the solicitation's deficiencies.

## ANALYSIS

Gerber protests that the data provided in the solicitation is inconsistent.<sup>3</sup> Page 16 of the original solicitation states that, from the period of November 2018 through April 2019<sup>4</sup>, an average of 26,259 infants were served per month. The original Bidding Schedule found at Attachment B, however, indicates a total average of 19,524 infants per month—a difference of 6,735 per month. The discrepancy was caused because the data on page 16 of the original solicitation includes infants exclusively breastfed or using exempt infant formula, while the original Attachment B *excludes* this information.

DHEC, however, explained the discrepancy in its answer to Question 51 and through an amendment to the Bidding Schedule, which now includes the following footnote:

**\*Includes infants issued contract and non contract infant formula, which excludes those infants exclusively breastfed or issued exempt infant formula.**

(Amended Attachment B) (highlighting in original) (emphasis added)

---

<sup>2</sup> As the incumbent vendor, Gerber arguably lacks standing to challenge the nature and alleged inconsistency of the data provided by DHEC. Gerber's competitive position is not affected when, due to its role as the incumbent, it has superior knowledge compared to its competitors of the most recent usage data.

<sup>3</sup> Gerber points to DHEC's answers to bidder questions 14, 15, 16, and 17 to demonstrate that the data included in the solicitation is inconsistent. The four questions relate to data provided in the Introduction and Background section on page 16 of the solicitation and data provided in the Bidding Schedule, Attachment B. Question 14 asked how many infants received exempt infant formula; Question 15 asked to confirm that "all formula fed infants receiving non-exempt infant formulas have been included in the Bid Sheet (Attachment B)"; Question 16 asked whether the State had been issuing non-contract infant formulas to participants; and Question 17 (addressed below) asked for detailed data on the number of infants. DHEC answered all questions and directed bidders to changes to the original solicitation.

<sup>4</sup> DHEC used data from November 2018 to April 2019 because it transitioned from a paper-based voucher system to an electronic debit card system in May 2019. A protest issue concerning the date of the data used is discussed below.

In addition to amending Attachment B, DHEC added Attachment D and Attachment E to the Solicitation. Attachment D is a table that aggregates infant and formula usage data for the designated 6-month period which was used to populate the bidding schedule. Attachment E presented copies of rebate invoices for the months of November 2018, December 2018, January 2019, February 2019, and March 2019. Attachment A originally included copies of rebate invoices for the months of June, July, and August of 2019, but was modified to replace the June, July, and August invoices with invoices for April, May, and June of 2019. Taken together, Attachments A and E provide rebate invoice information spanning the designated 6-month period from November 2018 through April 2019 with two extra months to capture delayed invoicing for previous months.

Although the new Attachment D shows the total number of infants as 25,947 compared to the 26,259 on page 16 of the Solicitation, DHEC explained this variance in Amendment 3:

The average number of infants has a minuscule variance in the infant participant numbers listed in Attachment D, which is a breakdown of infant participants averages listed in Attachment B. The 1.6% count variance is due to how SC's (retiring) MIS reports the data that is pulled at different times based on possible adjustments that occurred after the initial report (26,259 count). The adjustments include canceled vouchers, changes in the reporting module, and/or multiple formula changes.

(Amendment 3, p. 3) (emphasis in original)

DHEC has acknowledged variations in the data on page 16 of the solicitation and the bidding schedule and attributes it to data collection from two different systems. DHEC explained how it arrived at the monthly average number of infants used in the bidding schedule by identifying exclusions, recapping the raw data in Attachment D, and providing the raw data in Attachments A and E. The solicitation provides bidders adequate information on which to base fair and competitive bids. This aspect of Gerber's protest is denied.

Gerber also points to question 17 to support its argument that the data provided in the solicitation is inconsistent. However, question 17 is a request for more granular information than is provided in Attachments A and E as follows:

QUESTION 17: Page 16 - Number of Infants - In order to ensure compliance with USDA regulations pertaining to the number of infants that must be included on the Bid Sheet, we request the State provide detailed spreadsheets on infant participation for each separate product currently provided by SC WIC. We request this data be provided by infant feeding category, age, type, form, and size, similar to the data provided on the Bid Sheet.

STATE'S RESPONSE: See changes to the original Solicitation and Section III. Chart for Total Can Redemption on page 17.

In its letter of protest, Gerber justifies this request as follows:

Q&A No. 17 asked for additional infant formula data in a form that would allow all bidders to confirm SC DHEC was complying with federal regulations concerning the infant participation numbers required to be on the Bid Sheet. Gerber renews its request that this data be provided, detailing by brand, feeding category, and age the nonexempt infant formulas issued to participants. This detailed breakdown will prevent post-bid-opening challenges based upon infant participation, as experienced in Virginia.

(emphasis in original)

The federal regulations cited do not require DHEC to provide infant participation data for each separate product currently provided by SC WIC. Gerber's request for this additional information so that it and other bidders can "confirm" DHEC's compliance implies that the bidders are responsible for regulatory compliance. It is DHEC, not the bidders, that shoulders the responsibility for compliance with applicable federal regulations. Gerber's assumption of authority for regulatory compliance that has no legal or regulatory basis. DHEC provided adequate information satisfy federal regulations and allow bidders to submit competitive offers based on the same set of data.

Gerber also protests that the data provided in the solicitation is outdated and more current data will directly affect bidder's pricing:

The Bid Sheet Does Not Match the Numbers on the Two Most Recent Invoices  
Provided with the IFB; the Participation Numbers are Out-of-Date, Resulting in a  
Bid Sheet that Vastly Overstates Concentrate Infants

Gerber argues that DHEC failed to use the most recent data available as required by federal regulations and the failure to use the most recent data will significantly impact bid pricing. The federal regulation states:

USDA regulation 7 C.F.R. § 246.16a(c)(5)(i) requires participation data to "be based on at least 6 months of *the most recent participation and issuance data.*" (emphasis added). SC DHEC reported updated infant participation to the USDA through September 2019. For this procurement, however, SC DHEC is using data from November 2018 – April 2019 - not the most recent data as required by federal law.

(emphasis added)

The changes to the original solicitation included revisions to Attachments A, B, C and the addition of Attachment E. The significance of the concerns raised here are more clearly understood by looking at Attachment B, the bidding schedule. In calculating the low bid, the average number of infants participating during the months of November 2018 through April 2019 is multiplied by the maximum allowable allocation of formula per infant per age group to determine the total potential volume of formula per month. This is then multiplied by the bidder's net cost to determine the bid cost. This attachment was modified by adding a footnote that defined but did not change the number of infants per age group or the calculations. As stated earlier, this information is capsulized in Attachment D with supporting documentation in Attachments A and E.

The original Attachment A included rebate invoice data for the months of June, July and August of 2019. Amendment 1 replaced the rebate invoice data for these months with the rebate invoice data for April, May, and June of 2019. Attachment E was added by Amendment 3 and included rebate invoice data for the months of November 2018 through March 2019. The rebate invoice data for May and June of 2019 is necessary in order to capture delayed invoicing for April purchases.



Questions 97 and 114 imply a direct link between the average number of infants participating in the program with the amount of formula invoiced for rebate. While common sense dictates that the amount of formula rebated will fluctuate with the average number of infants participating, there is no direct link because the amount of formula authorized per infant varies in part with age, whether the infant is fully or partially dependent on formula, and whether the infant actually redeems the full allotment.

While there is no direct link, there is a correlation between infants participating and amount of formula rebated. The data from Attachments A and E, original and amended, does show a significant decrease in formula usage which would suggest a significant decrease in infants participating. During the six months from which the average number of infants is derived for the bid schedule, the average number of cans of liquid concentrate formula invoiced for rebate was 12,539 with a peak of 13,249 in January 2019 and a steady monthly decline to 11,139 in April. Considering the factors that affect consumption this decline of 11% from the average and 16% decline from the peak points to a trend but cannot be relied on as an indication of declining participation. However, in May 2019 consumption dropped to 8,416 cans, 33% from average, and in June it dropped to 3,849, 69% from average. Such a significant decrease in redemption indicates a significant decrease in the number of participating infants which would directly affect bid calculations.

While the solicitation does notify bidders that the participation and infant formula usage data published in the solicitation does not necessarily reflect the actual issuance and redemption that will occur under the contract as required by federal regulation, the data in Attachments A and E is between 10 and 16 months old and reflects a significant change. Federal Regulations require that:

The average monthly number of infants using each physical form must be based on at least 6 months of the most recent participation and issuance data.

DHEC is directed to amend the solicitation, replacing the data in Attachments A and E with more current data and adjusting the average monthly infants participating and total allowable allocation to provide a more accurate reflection of the current state of the program.

Gerber next protests a contradiction between specifications 3.4.2.1 and 3.1.1:

In response to bidder questions, the State amended Specification 3.4.2.1 by deleting the words "will not" and replacing them with "intends to" issue non-contract standard 20-calorie infant formulas. However, Specification 3.1.1 still reads: "DHEC shall contract with the bidder whose standard iron-fortified milk-based formula and iron fortified soy-based formula will be designated as the **sole** authorized brands of infant formula in the South Carolina WIC Program." (emphasis added). These two provisions are contradictory and must be clarified.

In response to the protest, DHEC has agreed to reconcile these statements:

Gerber rightly identifies a needed change in the Solicitation text at Specification 3.1.1. [Protest at p. 15]. The corrected text should provide:

"DHEC shall contract with the bidder whose standard iron-fortified milk-based formula and iron-fortified soy-based formula will be designated as the intended sole authorized brands of infant formula in the SC WIC Program."

If allowed to proceed with the Solicitation, DHEC will issue a consolidated amendment reciting the version of Specification 3.1.1 as presented immediately above.

Gerber identifies additional contradictory responses to bidder' questions:

SC DHEC's answers to Questions 5 and 22 contradict and show inconsistency regarding authorizing and issuing standard infant formulas versus SC DHEC's answer to Question 98:

QUESTION 5: Page 7, paragraph I. -Are there any circumstances under which the State would accept infant formulas that provide less than 20 kilocalories per fluid ounce of formula at standard dilution?

STATE'S RESPONSE: No.

QUESTION 22: Page 19, Section 3.2.5. - Please confirm only standard formulas providing 20 kilocalories per fluid ounce will be added to the State's list of authorized WIC infant formulas. Please further confirm infant formulas that only provide 19 kilocalories do not meet the SC definition of standard formulas and will therefore not be authorized for issuance to SC WIC infants.

STATE'S RESPONSE: Only standard formulas providing 20 kilocalories per fluid ounce will be added to the State's list of authorized WIC infant formulas.

QUESTION 98: Section HI. Scope of Work/Specifications. Rebate Requirements. 3.1.1.1. - Page 17. Will the State please explain which rebated products it intends to utilize in the program?

- a. Please confirm that the State is aware that the USDA has made a correction to regulations that provides for nonexempt formulas that are less than 20 kcal fl. /oz. to be provided and rebated through the WIC program with a prescriber's authorization as alternate to the primary contracted infant formulas. Our company produces several non-exempt alternate to the primary contracted formulas that are ~ 19 kcal/fl. oz. that are widely used and rebated in states where we hold the contract.
- b. Should [redacted] be the successful Bidder on this contract, please confirm that the alternate to the primary infant formulas would be allowable and utilized ahead of non-contract non-exempt formulas produced by other manufacturers.
- c. Please confirm the State intends to not allow the issuance of non-contract non-exempt formula through the duration of the contract.

STATE'S RESPONSE:

- a. The State is aware.
- b. Confirmed.
- c. The State will consider a zero-tolerance policy with respect to issuance of non-exempt, non-contract infant formulas.

In response to the protest, DHEC has agreed to reconcile these responses:

DHEC agrees that its answers created an ambiguity. DHEC proposes to revise the answer to Question 5: "Yes, it would be an exempt formula."

DHEC also proposed to address the issue with Question 98:

Please see response to item (iv), above. DHEC desires to correct its error at 3.1.1 in a consolidated amendment to be issued.

Gerber next protests the State's response to the following question as unclear:

At least one question refers bidders back to the provisions in question and fails to provide any explanation:

QUESTION 12: Page 12, paragraph (e) Unbalanced Bidding - Please confirm this paragraph does not apply to this WIC infant formula rebate bid. If unwilling to confirm, please provide additional guidelines for bidders to ensure their bids are in compliance with this section.

STATE'S RESPONSE: Unbalanced Bidding is defined with in Paragraph (e).

Gerber argues:

The response provides a circular answer, referring bidders back to the provision on which the question is based. This provision remains unclear and should be clarified or removed from the IFB.

The solicitation defines unbalanced bidding and this definition has been addressed in case law. Unbalanced bidding is also addressed in Regulation 19-445.2122. It is improper to ask an agency to pre determine compliance with a law when the agency has no knowledge of the details of a particular bid until after bid opening. It is the bidder's responsibility to comply with the law. The question was properly answered.

Gerber next protests that:

Questions 28, 29, 30, 63, 107, and 108 do not explain what SC DHEC expects bidders to provide to show how the bidder complies with the requirements:

DHEC responds as follows:

**Challenge to response to Q. 28 and Q. 108 [Protest at p. 17]**

Section V. Qualifications of the Solicitation provides the information that bidders should include. DHEC's response to Q. 28 referred bidders back to standard provisions in the Qualifications section for guidance. For questions 28 and 108, if allowed to proceed with the Solicitation, DHEC will include in its amendment the following clarification: "Recent financial statements, audited, would fulfill this requirement. Annual reports vary by entity. Depending on their content, they might satisfy this requirement. If the information submitted is deemed inadequate, the State will request additional information for review."

**Challenge to response to Q. 29 [Protest at p. 18]**

If allowed to proceed with the Solicitation, DHEC will include in its amendment the response "Confirmed." and reassure bidders that "providing the information one time is appropriate even if it applies to more than one section."

DHEC is advised to amend the solicitation and incorporate these changes.

Question 30 and the State's response are as follows:

QUESTION 30: Page 23 - Qualifications – Required Information (MAR 2015) - Paragraphs (f) of this section appears to be similar to the requirement on page 9 - Certification Regarding Debarment and Other Responsibility Matters (JAN 2004). Please confirm the certification provision on page 9 fully satisfies the requirement specified in paragraph (f) on page 23. To minimize confusion, we request the State delete paragraph (f).

STATE'S RESPONSE: "Qualifications – Required Information (MAR 2015) paragraph (f) requires that a list be submitted if applicable.

The CPO reviewed the two clauses and finds that they are duplicative. DHEC is directed to amend the solicitation by deleting the clause Qualifications – Required Information (MAR 2015) - Paragraph (f) on page 23 of the solicitation.

In response to Question 107 and 63, DHEC offers the following:

**Challenge to response to Q. 107 [Protest at p. 17]**

This is a standard state clause. If allowed to proceed with the Solicitation, DHEC will include in its amendment clarification to these items.

**Challenge to response to Q. 63 [Protest at p. 19]**

If allowed to proceed with the Solicitation, DHEC proposes to include in its amendment the following response to subpart (a): "Confirmed."

DHEC is advised to amend the solicitation and incorporate these modifications.

Gerber next protests:

There are several questions SC DHEC ignored altogether:

QUESTION 51: Section III, Introduction and Background, pages 16 and 17-We appreciate the State providing the breakdown of infants in the SC WIC Program. . . .

e. Please confirm a manufacturer is not billed for rebates for infant formula issued to children.

[51.e: No Answer]

In response to this protest, DHEC offers the following:

**Challenge to response to Q. 51 [Protest at p. 18]**

If allowed to proceed with the Solicitation, DHEC proposes to include in its amendment the following additional responses to specific subparts to question 51:

51(e): Not Confirmed.

51(i): Approximately 65.

DHEC is advised to amend the solicitation and incorporate these modifications.

Gerber next protests that the State's response to Question 60 is inadequate:

QUESTION 60: Section IV, Information for Offerors to Submit, page 22 -

a. Please confirm a manufacturer is not required to document how they meet all requirements listed in III. Scope of Work and V. Qualifications as part of their bid proposal and that a signed bid fulfills these requirements. i. If not confirmed, please describe what the State is requiring in a bid submission to meet requirements.

STATE'S RESPONSE: a. Please review each section of the Solicitation as detailed in the clause entitled "Information for Offerors to Submit- General (MAR 20 15).

In response to this protest, DHEC offers:

**Challenge to response to Q. 60 [Protest at p. 18]**

If allowed to proceed with the Solicitation, DHEC proposes to include in its amendment the following response to subpart (a): "By submitting a signed bid, offeror confirms that it is compliant with Section III. The information stated in the clauses 'Qualifications – Required Information (MAR 2015)' and 'Qualifications – Special Standards of Responsibility (MAR)' are required to be submitted with the signed bid."

DHEC is advised to amend the solicitation and incorporate these modifications.

Gerber also protests that DHEC failed to fully respond to the following question:

QUESTION 63: Section V, Qualifications – Required Information, page 23 –

a. Please confirm that if an offeror is a wholly owned subsidiary of a publicly-traded parent corporation and as such does not prepare its own financial statements or reports, that the parent company's financial reports which include information about the offeror and were filed with the SEC would be sufficient to meet the all requirements as stated in item (b).

b. If not confirmed, please list what additional information would need to be submitted to meet the State's requirements.

c. Please confirm that it would be acceptable for a bidder to submit their financial statements on a CD or USB with their hard copy to reduce the amount of paper included in the packet.

STATE'S RESPONSE:

a. See clause entitled "Qualifications of Offeror (MAR 2015)(3)."

[b. No Answer]

c. A USB drive is acceptable.

In response to this protest, DHEC offers:

**Challenge to response to Q. 63 [Protest at p. 19]**

If allowed to proceed with the Solicitation, DHEC proposes to include in its amendment the following response to subpart (a): "Confirmed."

DHEC is advised to amend the solicitation and incorporate these modifications.

Gerber next protests that DHEC's answers to questions 77 and 100 are incomplete.

QUESTION 77: Please describe the policy involving WIC issued returned infant formula.

STATE'S RESPONSE: Dispose of returned formula.

QUESTION 100: Section III. Scope of Work/Specifications. Formula Requirements. 3.2.5 - Page 19.

a. Please explain the State's policy on accepting returned formula from participants.

b. Please confirm that if the State reissues formula (in the event of a return), that the contracted manufacturer will not pay rebates exceeding the federal maximum.  
i. Example: Mom is issued 9 cans of Gerber Good Start Gentle powder and redeems all 9 cans. Mom returns 7 cans to the clinic and is issued a new benefit for 7 cans of Gerber GoodStart Soothe powder. Is the State seeking rebates on 9 cans or 16 cans today?

c. If (b) above is not confirmed, please detail by age of baby, form, and type how many units of formula are rebated above the federal maximum.

STATE'S RESPONSE: a. Dispose of returned formula.

b. See Specification 3.4.2.2.

DHEC's response to the protest is:

**Challenge to response to Q. 77 and Q. 100 [Protest at p. 19]**

Questions 77 and 100(a) are directed to "the policy" for returned formula. The questions are vague and are not directed at rebates. Returned infant formula is disposed of. As to subpart (b) of question 100, if allowed to proceed with the Solicitation, DHEC will amend its response as follows: "The State is unable to give an exact answer to the example used since the program is in transition to a new MIS."

DHEC's response to these questions is not consistent with the question asked. Question 77 and 100 part a asks DHEC to explain the State's policy on accepting returned formula from participants. DHEC's answer addresses disposition of returned formula not the policy for accepting returned formula. DHEC should amend the solicitation and address the question asked. DHEC's response to Question 100-part b refers to paragraph 3.4.2.2 which assures compliance with applicable federal regulations. DHEC's response to the

protest appears to be in response to Question 100-part c. DHEC is advised to amend the solicitation and clarify its response.

Gerber also protests DHEC's response to questions about the information to be disclosed at bid opening:

Federal law (42 U.S.C. § 1786(h)(9)(B)(iii)) requires states to open and read aloud all bids at a public proceeding on the date on which the bids are due. This means states are required to read all relevant items on the Bid Sheet aloud for all bidders, including columns D, F,G, H, I, J, and K on the first page of the Bid Sheet, and columns C, J, K, L, M, and N on the second page of the Bid Sheet. But based on the following responses to Questions 8 and 90, SC DHEC will not be in compliance with federal law:

QUESTION 8: Page 11-12 - Public Opening Information – we have the following questions related to this section: ...

b. Please provide additional details on the information to be read aloud at the public bid opening. Please confirm the State will read aloud the following information contained on page 1 of the Bid Sheet: Product Name Being Bid, the Unit Size, Reconstituted Ounce Per Unit, Lowest Wholesale Full Truckload Price Per Unit, Rebate Bid Per Unit, Net Cost, and Percent Rebate, and on page 2 the corresponding data populated in columns (C), (J), (K), (L), (M), and (N). Please further confirm the State will read aloud the Total Net Cost Per Month.

STATE'S RESPONSE: ...

b. The following columns on Page 2 of the Bidding Schedule will be read aloud: (B), (L), (M), and (N), which includes Total Net Cost Per Month.

QUESTION 90: Section 11. Instructions to Offerors - A. General Instructions - Public Opening Information - Page 11.

Please confirm the following will be read aloud at the Public Opening:

- a. Manufacturer
- b. Product Being Bid
- c. UPC Code
- d. Unit Size
- e. Reconstituted Ounce Per Unit
- f. Lowest Wholesale Full Truckload Price Per Unit
- g. Rebate Bid Per Unit
- h. Net Cost
- i. Rebate Percent
- j. Total Net Cost Per Month



STATE'S RESPONSE: The following columns on Page 2 of the Bidding Schedule will be read aloud: (B), (L), (M), and (N).

SC DHEC has provided no reason why the state is not fully complying with federal law.

The federal regulation requires the state to:

(iii) open and read aloud all bids at a public proceeding on the day on which the bids are due; and

This regulation does not require the reading of every detail of every bid at bid opening.

This solicitation was issued under Section 11-35-1520 of the SC Consolidated Procurement Code and paragraph 5 requires:

**Bid Opening.** Bids must be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids and in the manner prescribed by regulation of the board. The amount of each bid, and other relevant information as may be specified by regulation, together with the name of each bidder, must be tabulated. The tabulation must be open to public inspection at that time.

State Budget and Control Board Regulation 19-445-2050(A) requires the procurement officer or his designee to:

... publicly open all bids received prior to that time, and read aloud so much thereof as is practicable, including prices, to those persons present and have the bids recorded. The amount of each bid and such other relevant information, together with the name of each bidder, shall be tabulated and certified in writing as true and accurate by both the person opening the bids and the witness. The tabulation shall be open to public inspection.

DHEC's response complies with the federal regulation and South Carolina Code and Regulations. The bid tabulation, as required by Regulation, will be open to public inspection. This issue of protest is denied.

## **DECISION**

For the reasons stated above, the protest of Gerber Products Company d/b/a Nestlé Infant Nutrition is granted in part and denied in part. DHEC is directed restart the solicitation process

Protest Decision, page 18

Case No. 2020-123

March 26, 2020

by issuing an amendment incorporating the changes identified herein and any other alterations it deems necessary and prudent.

For the Materials Management Office



---

Michael B. Spicer  
Chief Procurement Officer



Jeremy C. Hodges  
(Admitted in SC & WV)  
T 803.255.9766 F 803.255.9164  
jeremy.hodges@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP  
ATTORNEYS AND COUNSELORS AT LAW

1320 Main Street | 17th Floor  
Columbia, SC 29201  
T 803.799.2000 F 803.256.7500  
nelsonmullins.com

December 27, 2019

**VIA EMAIL AND HAND DELIVERY**

Chief Procurement Officer  
Materials Management Office  
1201 Main Street, Suite 600  
Columbia, SC 29201  
Email: protest-mmo@mmo.state.sc.us

**IMMEDIATE SUSPENSION**  
**OF BID DATE REQUESTED**

Laura M. Cravens, Procurement Officer  
SC Dept. of Health & Environmental Control  
Attn: Procurement Services Division  
301 Gervais Street, 4th Floor  
Columbia, SC 29201-3073  
Email: cravenlm@dhec.sc.gov

**RE: Pre-award Protest of Gerber Products Company d/b/a Nestlé Infant Nutrition**

**Invitation for Bid/Solicitation No. 5400018781  
South Carolina Department of Health & Environmental Control,  
Procurement Services Division**

**Women, Infants, and Children (WIC) Formula Rebate**

Dear Chief Procurement Officer and Ms. Cravens:

Gerber Products Company d/b/a Nestlé Infant Nutrition, 1812 N. Moore Street, Arlington, VA 22209 ("Gerber") protests the terms of Invitation for Bid/Solicitation No. 5400018781 (the "IFB"), as amended December 12, 2019, issued for the State of South Carolina by the South Carolina Department of Health & Environmental Control, Procurement Services Division ("SC DHEC"). Specifically, the amended IFB does not meet required competition standards and is otherwise arbitrary and unreasonable.

### **INTRODUCTION**

The IFB is for soliciting bids from infant formula manufacturers to supply and provide a rebate for standard infant formulas in the Women, Infants and Children ("WIC") program. Gerber is a competitor for the procurement and eligible for award. Gerber has twenty-six years of WIC contract experience in more than forty states. Gerber draws upon this extensive experience in urging South Carolina to fashion a procurement process on a solid foundation consistent with public procurement requirements.

The IFB unreasonably and improperly fails to provide adequate data that allows bidders to determine whether the solicitation fully complies with federal regulations governing the WIC Program. The U.S. Department of Agriculture ("USDA"), Food and Nutrition Service ("FNS") has specified particular requirements for structuring these bids. Although the USDA regulations require that WIC infant formula rebate procurements be conducted independently by the states, the regulations also require that certain data be provided to prospective bidders with the solicitation. As written, the IFB provides conflicting data and creates uncertainties that precludes a fair competition.<sup>1</sup>

The SC DHEC's latest answers to questions on December 12, 2019 do not resolve Gerber's concerns. Among other things, the IFB does not provide complete and consistent data.

*SC DHEC should briefly stay the procurement or extend the bid due date to provide bidders with the correct data and otherwise clarify requirements to avoid arbitrary action arising from inconsistent or ambiguous data requirements.*

Gerber also protests that SC DHEC has failed to provide complete answers to relevant questions or to provide clear and unambiguous answers to relevant questions such that there is no level playing field. The uncertainties and ambiguities raised by the answers provided to bidders do not permit offerors the opportunity to submit bids and compete on a fair, impartial and equitable basis. *To remedy the substantial ambiguities and uncertainties, SC DHEC should suspend the proposal due date, amend the IFB to address the defects identified above, reopen the question and answer ("Q&A") period to allow for further clarification, and then permit offerors a minimum of 10 business days to submit bids on that basis.*

---

<sup>1</sup> Gerber is pursuing this complaint pursuant to the South Carolina public procurement protest procedures. Gerber is continuing to review the disparate treatment of infant participation numbers by various states and USDA's role. The filing is not a waiver of Gerber's rights under federal law or an election of remedies. Gerber reserves the right to pursue judicial remedies under the federal Administrative Procedure Act in an appropriate United States District Court.

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 3

Gerber requests that the SC DHEC extend the proposal due date, respond to the outstanding bidder questions, and amend the IFB, or otherwise issue clarifications as discussed below, and in accordance with the applicable South Carolina Procurement Code and Regulations. Gerber raises serious concerns that the IFB and responses to questions include material ambiguities and uncertainties that preclude fair and full competition.

#### **REQUEST FOR STAY OF BID DUE DATE**

Bids are due on January 7, 2020 at 2:30 p.m., EST. Pursuant to S.C. Code § 11-35-4210(7), the State cannot proceed further with the solicitation once a timely protest has been filed. This protest is timely filed within fifteen (15) calendar days from the issuance of Amendment 3 that provides the basis for this protest.

Moreover, a suspension of the bid due date is in the best interests of South Carolina, the WIC program, the competing offerors and the public because it will permit South Carolina to take appropriate action in order to correct the defects addressed in this protest. In addition, submission of bids on January 7, 2020 would result in a waste of resources if, as a result of this protest, South Carolina then amends the solicitation and requests new bids or is directed to do so by judicial authority. Accordingly, Gerber respectfully requests that South Carolina suspend the due date to allow it enough time to address Gerber's protest and to take appropriate corrective action.

#### **GERBER'S WILLINGNESS TO PARTICIPATE IN ALTERNATIVE DISPUTE RESOLUTION OR OTHER INFORMAL PROCEDURES WHILE THE PROTEST IS PENDING**

Gerber is committed to resolving the issues in a non-adversarial fashion on an expedited basis. It is important that the IFB incorporate the principles of fundamental fairness, competitive bidding, and integrity. A solicitation that fails to comply with federal and state law and includes ambiguous and indefinite terms is not in the best interest of South Carolina, the public and competition. Most importantly, it is not in the best interest of the WIC program and its participants.

Pursuant to S.C. Code § 11-35-4210(3), Gerber is willing to participate in an alternative dispute resolution or other informal procedures while the protest is pending in an effort to resolve these important issues.

#### **PROCUREMENT BACKGROUND**

The Child Nutrition Act of 1966, 42 U.S.C. §§ 1771-1793, was passed to expand efforts to safeguard the health and well-being of the Nation's children and to encourage consumption of agricultural and other foods, by assisting the States, through grants-in-

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 4

aid and other means to more effectively meet the nutritional needs of the Nation's children. Applicable here is Section 17 (42 U.S.C. § 1786) for the special supplemental nutrition program for women, infants and children.

Section 17 was enacted to help combat the special risk Congress found for substantial numbers of pregnant, postpartum, and breastfeeding women, infants and young children from families with inadequate income. Congress found these groups at risk with respect to their physical and mental health by reason of inadequate nutrition or health care, or both. Congress determined to authorize supplemental foods and nutritional education, including breastfeeding promotion and support, through any eligible local agency that applies for participation in the program.

WIC is a federal-state nutrition and health assistance program for low-income childbearing women, infants and young children. WIC is the country's third-largest food and nutrition assistance program (behind SNAP and School Lunch). The program provides participants with food benefits delivered through a food instrument system identifying specific amounts and types of foods that participants can generally buy at local grocery stores. WIC is administered at the Federal level by the USDA FNS. The program provides grants for supplemental foods, nutrition services, and administration to ninety WIC State agencies, including all fifty States, the District of Columbia, thirty-four Indian Tribal Organizations, and five territories (Guam, the U.S. Virgin Islands, American Samoa, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands).

On or about November 1, 2019, SC DHEC issued the above referenced IFB for infant formula manufacturers to supply and provide a rebate for standard infant formula to become the primary contract infant formula issued to South Carolina WIC participants. IFB, Section 1. The primary contract infant formula will be the formula of first choice for issuance to infants with all other infant formula issued as an alternative to the primary contract infant formula. Id.

The South Carolina WIC Program is seeking to contract with the bidder whose standard iron-fortified milk-based formula and iron-fortified soy-based formula will be designated as the sole authorized brands of infant formula in the South Carolina WIC Program. IFB, Section 3.1. The IFB indicated the WIC Program is seeking to obtain a rebate for each of the types of physical forms of the following infant formulas:

Types of Infant Formula	Physical Forms of Infant Formula	Infant Formula Requirements
<i>A single milk-based Infant formula (primary contract infant formula)</i>	<i>Concentrated Liquid, Powdered, Ready-to-Feed</i>	<i>Meets requirements under 246.10(e)(1)(iii) and 246.10(e)(2)(iii) and suitable for routine issuance to the</i>

		<i>majority of generally healthy, full-term infants</i>
--	--	---

IFB Amendment 1 (Section I, Scope of Solicitation); see also id. Section III ("Scope of Solicitation"); id. at Sections 3.1.1, 3.1.2.

The IFB states that during the period November 2018 through April 2019, an average of 26,259 infants were served per month, broken down as follows:

Fully Formula Fed – 20,823  
Fully Breastfeeding – 1,965  
Partially Breastfeeding – 3,471

The SC DHEC procurement permitted the submission of pre-bid questions by November 18, 2019 from prospective bidders with the understanding that the state would provide accurate and complete responses before the bid due date so that prospective bidders could formulate competitive bids on a level playing field and in time to meet the state's bid deadline. Gerber timely submitted questions.

On November 25, 2019, SC DHEC issued Amendment 1 that provided responses to bidder questions and made some revisions to the IFB. In many instances, however, the state's responses were incomplete or failed to address concerns raised by prospective bidders. The state's answers are not accurate and complete as required.

On November 27, 2019, Gerber submitted questions to SC DHEC requesting clarification of the answers to bidder questions as addressed in Amendment 1. Gerber's additional questions to SC DHEC requested clarification regarding the inconsistent and incomplete data included in the IFB and SC DHEC's November 25, 2019 answers to questions.

On December 4, 2019, SC DHEC issued Amendment 2 to change the bid due date from December 12, 2019 to January 2, 2020. IFB Amendment 2 did not address Gerber's November 27 questions.

On December 12, 2019, SC DHEC issued Amendment 3. IFB Amendment 3 included answers to bidder questions and made modifications to the Scope of Work, Introduction and Background Section to now include the following language:

The average number of infants has a minuscule variance in the infant participation numbers listed in Attachment D, which is a breakdown of infant participants averages listed in Attachment B. The 1.6% count variance is due to how SC's (retiring) MIS reports the data that is pulled at different times

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 6

based on possible adjustments that occurred after the initial report (26,259 count). The adjustments include canceled vouchers, changes in the reporting module, and/or multiple formula changes.

IFB Amendment 3 at page 3. IFB Amendment 3 did not resolve Gerber's questions.

IFB Amendment 3 also extended the bid due date from January 2, 2020 to January 7, 2020.

### **PROTEST GROUNDS**

#### **I. Legal Standards Applicable to this Procurement**

It is a fundamental procurement principle that agencies must provide a solicitation that permits fair competition and that precludes award based on illusory cost savings. Courts will review protests that challenge the rationality of the procurement process and procurement officials' compliance with legal requirements.

The WIC program is subject to fundamental public procurement requirements. The covenant of good faith and fair dealing is an implied duty each party of the contract owes the contracting partner. See Restatement (2nd) of Contracts § 205. "Although implied covenants are not favored in the law . . . there exists in every contract an implied covenant of good faith and fair dealing." Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 366-67, 147 S.E.2d 481, 484 (1966). In the absence of an express provision in the contract, "the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made." Id. (quoting 17A C.J.S. Contracts § 328, pp. 282-284). Government agencies are not excused from this covenant and implied duty. Indeed, the South Carolina Consolidated Procurement Code specifically provides that "[e]very contract or duty within this code imposes an obligation of good faith and fair dealing in its negotiation, performance or enforcement. 'Good faith' means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing." S.C. Code Ann. § 11-35-30. If the government conducts a procurement in an arbitrary, capricious or irrational manner, then it has breached the implied contract to consider all bids fairly and honestly. Central Ark. Maint., Inc. v. United States, 68 F.3d 1338, 1341 (Fed. Cir. 1995).

Similarly, the South Carolina Consolidated Procurement Code emphasizes the importance of "broad based competition" and the "fair and equitable treatment of all persons who deal with the procurement system." S.C. Code Ann. §11-35-20(b) and (f).



Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 7

Where mandatory competitive bidding is required, it is essential that every prospective bidder have identical information upon which to base its bid, including any changes made to the plans and specifications. Boger Contracting Corp. v. Bd. of Comm'rs of Stark Cnty., 60 Ohio App. 2d 195 (5th Dist. Stark County 1978). See also Healthsource Maine, Inc. v. State Emp. Health Comm'n, No. CV-92-582, 1993 Me. Super. LEXIS 14, at \*41-42 (March 5, 1993) ("Competitive bidding laws and request for proposal requirements are intended to give all those who may be interested in bidding on public contracts fair notice of the goods and/or services being sought by the public agency and the conditions which that agency will attach to provision of the goods and services."); Taylor v. Arlington Cnty. Bd., 189 Va. 472, 480 (1949) ("implicit in its invitation [for competitive bids]" was the duty "to weigh the bids and make the award fairly and in good faith.").

**II. The SC DHEC's IFB Does Not Meet the Required Competition Standards Given Substantial Uncertainty and the Inconsistent Data Provided; the Infant Participation Numbers Listed in the IFB, Provided During Qs & As, and on the Bid Sheet Do Not Match, Thus Improperly Precluding Competition and a Level Playing Field**

As described more fully below, the SC DHEC IFB is defective. The SC DHEC IFB does not appear to have updated, complete and consistent data. This means (a) vendors are unable to verify whether all the required data has been provided; (b) the Bid Sheet appears to vastly overstate concentrate infants based upon the two more recent invoices provided when the solicitation was issued; and (c) the out-of-date participation numbers provided, greatly affect the number of concentrate infants.

By providing inconsistent and incomplete data, bidders are not submitting responses to the IFB against common requirements and there can be no level playing field. In other words, the data as currently provided gives rise to a substantial inconsistency and reflects arbitrary and disparate treatment.

By way of background for this section, sufficient detail in the context of a WIC infant formula rebate bid is especially important. The difference of two or three infants in one of the infant participation category totals can change the outcome of the bid. SC DHEC's failure to provide up-to-date, accurate, complete, and detailed data supporting the infant participation information violates USDA regulations governing these bids. As noted below, in at least one other state, the USDA forced a rebid after bids were submitted and publicly opened because that state similarly failed to include all the infants on its Bid Sheet.

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 8

**A. As Solicited, Bidders Are Unable to Verify the Data Provided,  
Contrary to the USDA Requirements**

The uncertainty and arbitrary treatment regarding solicitation infant participation numbers is particularly concerning because the USDA and other states have treated these numbers in an unreasonable and disparate fashion. The failure of various states to use the required, accurate data has resulted in numerous state bid protests, cancellation of a WIC procurement in Virginia, an action in the United States District Court for the District of Columbia under the federal Administrative Procedures Act and delay and disruptions to WIC bidders and state agencies. Future protests, delays and disruptions can be avoided in South Carolina if the IFB is reasonably and properly amended.

"A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." Transactive Corp. v. United States, 91 F.3d 232, 237 (D.C. Cir. 1996). That is the case here. See also Afghan Am. Army Servs. Corp. v. United States, 106 Fed. Cl. 714, 729 (2012) ("an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently") (citing Transactive); Natural Resources Defense Council v. EPA, 571 F.3d 1245, 1267 (D.C. Cir. 2009) (noting same and citing Transactive); SKF USA, Inc. v. United States, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (noting same and citing Transactive); Redland Genstar, Inc. v. United States, 39 Fed. Cl. 220, 234 (1997) (noting same and citing Transactive).

South Carolina has not provided sufficient data as compared to what was provided in the Virginia procurement noted above that resulted in cancellation. The South Carolina IFB does not appear to include complete and current data, again inconsistent with the Virginia procurement. It would be inconsistent treatment for USDA to direct cancellation of the Virginia procurement based on "missing data" but not others like the South Carolina procurement. A failure to reasonably amend the IFB will result in disparate treatment among state WIC awarding agencies and render this procurement arbitrary and un-awardable.

SC DHEC's answers to bidder questions 14, 15, 16, and 17 regarding scope of work and infant participation, demonstrate the inconsistent and incomplete data:

QUESTION 14: Page 16 - Number of infants - How many infants received exempt infant formulas for the period November 2018 through April 2019?

STATE'S RESPONSE: A monthly average of 5,518 infants.

QUESTION 15: Page 16 - Number of infants - The number of infants included on Attachment B - Bid Sheet, totals to

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 9

19,004 infants. This number is substantially less than the total of the fully formula fed, and partially breastfeeding infants specified in this section. Please confirm all formula-fed infants receiving non-exempt infant formulas have been included on the Bid Sheet (Attachment B).

STATE'S RESPONSE: See changes to the original Solicitation.

QUESTION 16: Page 16 - Number of Infants - Has the State been issuing any non-contract infant formulas such as Enfamil AR to its participants? If yes, are these infants included on the Bid Sheet?

STATE'S RESPONSE: Yes. See changes to the original Solicitation.

QUESTION 17: Page 16 - Number of Infants - In order to ensure compliance with USDA regulations pertaining to the number of infants that must be included on the Bid Sheet, we request the State provide detailed spreadsheets on infant participation for each separate product currently provided by SC WIC. We request this data be provided by infant feeding category, age, type, form, and size, similar to the data provided on the Bid Sheet.

STATE'S RESPONSE: See changes to the original Solicitation and Section III. Chart for Total Can Redemption on page 17.

USDA regulation 7 C.F.R. § 246.16a(c)(5)(i) requires the infant participation numbers to include all infants receiving both milk and soy non-exempt infant formulas. Gerber requested clarification of the discrepancies in the infant participation numbers provided in the IFB, the Bid Sheet, and by SC DHEC through Q&As. Specifically, Gerber questioned whether infants receiving non-contract, non-exempt infant formulas were included on the Bid Sheet as required by USDA regulations. It is essential for all bidders to be provided with data that allows bidders to verify compliance with the federal regulations. Without such assurance, the solicitation is vulnerable to a post-bid-opening challenge, as was the case in Virginia. Such a challenge is not in the best interest of the South Carolina, its WIC participants and program officials, or the bidders. In order to prevent such a challenge, SC DHEC easily could have clarified the participation numbers it provided. Based on the information provided in the IFB, through Q&As, and on the Bid Sheet, Gerber cannot be assured the correct participation numbers have been included on the Bid Sheet.

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 10

For example, the initial participation numbers provided in the solicitation did not break out infants receiving exempt infant formulas. Federal regulations prohibit including these infants on the Bid Sheet. In response to Q&A No. 14, SC DHEC informed bidders there were 5,518 infants receiving exempt infant formulas in the specified period. IFB Amendment 3 provided a new Attachment D with new and more detailed infant participation numbers. After subtracting two categories of infants provided in Attachment D, it appears SC DHEC is now informing bidders there were 4,460 infants receiving exempt infant formulas in the specified period. SC DHEC did not provide any explanation for why this number changed so substantially.

Q&A No. 16 asked specifically whether infants receiving a non-contract, non-exempt infant formula (Enfamil AR), were included on the Bid Sheet. SC DHEC responded affirmatively, stating they were included, but the response also referred bidders to a revised solicitation. The applicable revision being referenced by SC DHEC, however, is the first amended Bid Sheet, which included nearly 500 more infants than the initial Bid Sheet.

Q&A No. 17 asked for additional infant formula data in a form that would allow all bidders to confirm SC DHEC was complying with federal regulations concerning the infant participation numbers required to be on the Bid Sheet. Gerber renews its request that this data be provided, detailing by brand, feeding category, and age the non-exempt infant formulas issued to participants. This detailed breakdown will prevent post-bid-opening challenges based upon infant participation, as experienced in Virginia.

In sum, the SC DHEC's December 12, 2019 answers did not provide bidders with complete data on which to submit their bids and creates a situation where bidders are not competing on a level playing field because bids will be submitted based on incomplete data. Based on SC DHEC's responses to these questions, bidders cannot verify that the solicitation is fully compliant with the USDA regulations.

**B. The Bid Sheet Does Not Match the Numbers on the Two Most Recent Invoices Provided with the IFB; the Participation Numbers are Out-of-Date, Resulting in a Bid Sheet that Vastly Overstates Concentrate Infants**

USDA regulation 7 C.F.R. § 246.16a(c)(5)(i) requires participation data to "be based on at least 6 months of *the most recent participation and issuance data.*" (emphasis added). SC DHEC reported updated infant participation to the USDA through September 2019. For this procurement, however, SC DHEC is using data from November 2018 – April 2019 - not the most recent data as required by federal law.

During Qs &As, bidders sought clarification of the infant participation data provided in the IFB and questioned unit redemptions of the various types of infant

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 11

formula provided in the program. Other than referencing amendments to the Bid Sheet (Attachment B), the State did not adequately address the questions submitted. For example, the State neglected to provide a response that addressed subparts d through f in question 97. The original answer for question 97 stated the following:

QUESTION 97: Section III. Scope of Work/Specifications.  
Introduction and Background - Page 17.

a. Does the table include all contracted infant formula (primary and alternate to the primary)

b. Will the State please provide data from November 2018 - April 2019 on issuance and redemption by brand, size, and unit for all contract, exempt, and non-contract non-exempt infant formulas by age of baby.

c. Please also provide invoice s that match the data provided - November 2018 - April 2019

d. There is a > 600% discrepancy between the monthly average unit redemptions of CL from the invoices compared to the units derived from the bid sheet. Please explain why the bid sheet is higher than the invoices by this magnitude.

e. There is a > 16% discrepancy between the monthly average unit redemptions of powder from the invoices compared to the units derived from the bid sheet. Please explain why the bid sheet is higher than the invoices by this magnitude.

f. There is a > 27% discrepancy between the monthly average unit redemptions of RTF from the invoices compared to the units derived from the bid sheet. Please explain why the bid sheet is higher than the invoices by this magnitude.

STATE'S RESPONSE: a. Yes. See changes to the original Solicitation.

b. See changes to the original Solicitation.

c. The State is providing the required information and data recommended by the USDA.

d. See changes to the original Solicitation.

e. See changes to the original Solicitation.

f. See changes to the original Solicitation.

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 12

Amendment 3 revised the State's answer to this question by simply deleting all of its previous responses, and replacing them with a single answer to all of the question parts: "a-f. See changes to the original Solicitation for Section IX." The changes referenced in this answer refer to a revised Bid Sheet (Attachment B), a new chart with new infant participation numbers (Attachment D), and additional invoices (Attachment E). However, none of these additional documents address questions d-f in question 97.

Parts d-f of question 97 highlighted a large discrepancy between the unit totals used in the bid evaluation process and the unit totals contained in the actual invoices provided to bidders.

Further clarification on this issue was sought with the following two questions:

QUESTION 96: Section III. Scope of Work/Specifications.  
Introduction and Background - Page 16. "Approximately 237,094 infant vouchers were printed for the contract infant formula and 66,834 vouchers were printed for exempt infant formulas."

a. Please provide the information by baby, age group and units/form of infant formula for the same time period or the most recent 6 months (to match the time period for invoices provided). As vouchers may not always offer the same number of units, it does not provide a true reflection of the amount of infant formula the state is indicating it issued.

STATE'S RESPONSE: See changes to the original Solicitation and Section III. Chart for Total Can Redemption on page I 7.

For Question 96, SC DHEC asserts the chart for Total Can Redemption was changed, but did not provide that change to bidders.

QUESTION 114: Attachment A – Invoices

a. Please explain the sharp decline in CL units invoiced in July of 2019 (compared to June). Is the state no longer using/seeking rebates on Gerber CL following Gerber's transition to the 8.1 oz CL package (from 12.1)? If this is the case, then the bid sheet should be adjusted to decrease the number of infants utilizing CL. If the state is continuing to issue Gerber CL in the 8.1 oz package, please explain why this item does not appear on the invoices or provide all interested bidders adjustments to invoices that have

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 13

occurred since May of 2019.

STATE'S RESPONSE: See changes to the original Solicitation.

These questions sought information regarding what the state was requesting in response to specific provisions, and raised concerns regarding the content of the IFB and terms that were ambiguous, unclear or unfair to the prospective contractor. *These questions required clarification so that bidders would be able to compete on a level playing field and would have sufficient information to submit competitive bids. SC DHEC's refusal to provide any substantive response means that bidders do not know the basis for the State's actions. This is fundamentally unfair and precludes any fair, competitive bidding.*

Moreover, as previously explained, a difference of two or three infants in one of the infant participation category totals (e.g., infants receiving liquid concentrate formulas) can change the outcome of the bid. A significant change in these participation numbers will affect bidding strategies, making it critical that these category numbers provide a fair representation of the most recent participation and issuance data as required by the federal regulations. It appears there has been a sharp decline in the number of infants receiving liquid concentrate formulas. The final, second amended Bid Sheet calculates that a monthly average of 15,367 units of liquid concentrate were issued from November 2018 – April 2019. However, the July and August 2019 invoices provided to offerors with the initial solicitation show issuance of 1,468 units and 686 units, respectively. It appears issuance of liquid concentrate may now be less than 5 percent of the issuance from the November 2018 – April 2019 period. Therefore, it is essential for this to be reflected on the Bid Sheet. SC DHEC's failure to provide up-to-date, accurate, complete, and detailed data supporting the infant participation information violates USDA regulations governing these bids.

The deficiencies and ambiguities left after the Qs & As illustrates the arbitrary nature of the IFB; SC DHEC will not receive the best possible bids if bidders are forced to make arbitrary assumptions. Prospective bidders will have to price unknown contingencies to address the uncertainties. Moreover, bidders will not be competing on an "apples-to-apples" basis since they may make different assumptions about the ambiguous and indefinite terms. SC DHEC should amend the IFB to answer all vendor questions to ensure a clear and unambiguous solicitation.

The continuation of the South Carolina procurement while the inconsistencies remain and a failure to reasonably amend the IFB and the Bid Sheet will extend the arbitrary and improper state action, will taint the South Carolina procurement, and will render this procurement arbitrary and un-awardable. As currently written, the Bid Sheet vastly overstates the number of infants receiving concentrated liquid infant formulas. As we saw in the Virginia procurement, the mix between the number of infants receiving

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 14

the three forms of infant formula can make the difference in which bidder offers the lowest net price, and therefore which bidder submits the winning bid. Until the data is clarified, the continuation of the South Carolina procurement reflects arbitrary action and is inconsistent with competition and administrative procedural requirements.

**III. SC DHEC Has Failed to Provide Answers to Relevant Questions or to Provide Clear and Unambiguous Answers to Relevant Questions Such that There is No Level Playing Field; SC DHEC Should Permit Another Round of Q&A to Resolve Ambiguities and Uncertainties and to Ensure a Reasonable Amount of Time for Bid Submission After any Final Amendment to the IFB or Response to Bidder Questions**

As written, the solicitation prevents bidders from submitting the best price or competing on equal footing. Metzger-Gleisinger Mechanical, Inc. v. Mansfield City School District, No. 2004-CA-86, 2005 WL 1303206, at \*2 (Ohio Ct. App. 5th Dist. 2005) (noting the public authority "was required to give all parties all the specifications and inform them of the criteria it would use in making its choice"); see also Hunt Bldg. Co. v. United States, 61 Fed. Cl. 243, 274 (2004) ("[I]t is a fundamental rule of competitive procurement that all offerors compete on an equal basis by proposing to the same terms, conditions and specifications"); In re: Appeal by Qmatic, Inc., SCPD 2012-3 (S.C. Procure. Rev. Panel), 2012 WL 2498906 (finding answers given in an Amendment created ambiguities regarding actual and stated requirements); In re: Today's Business Systems, SCPD 1994-2 (S.C. Procure. Rev. Panel), 1994 WL 16006489 ("If a fairness or competitive problem exists with a specific procurement process or solicitation . . . the correct remedy is to resolicit[] the procurement with the appropriate changes."); In re: Appeal by B&R Painting Contractors, Inc., SCPD 2018-6 (S.C. Procure. Rev. Panel), 2018 WL 3917701 (finding perceived ambiguities were patently obvious from the language of the bid document such that it was incumbent upon potential bidder to either ask a question during the Q&A or file a protest of the solicitation within fifteen days).

Canberra Indus., Inc., B-271016, Jun. 5, 1996, 96-1 CPD ¶ 269 (all offerors must be provided a common basis for submission of proposals); S.W. Monroe Constr. Co., B-256382, Jun. 10, 1994, 94-1 CPD ¶ 362 (agency properly cancelled its bid when bidders could not estimate the number of needed contract items, which made it impossible to correctly price, and as a result the agency could not be certain which bid would result in the lowest cost to the government).<sup>2</sup>

---

<sup>2</sup> Courts frequently look to bid protest decisions of the GAO for guidance. The GAO or Comptroller General has operated as an arm of the United States Congress resolving bid protests through a quasi-judicial administrative process since 1926. GAO hears and decides thousands of protests each year. The United States Court of Appeals for the Federal Circuit and the United States Court of Federal Claims have frequently observed that, while not binding authority on the Courts, the decisions of the Comptroller General are instructive in the area of bid protests. See Planning Research Corp. v. United States, 971 F.2d 736, 740 (Fed. Cir.



As a general rule, a procuring agency must give sufficient detail in a solicitation to enable bidders to compete intelligently and on a relatively equal basis. Technosource Info. Sys., LLC; TrueTandem, LLC, B-405296, Oct. 17, 2011, 2011 CPD ¶ 220 at 11; AirTrak Travel et al., B-292101 et al., Jun. 30, 2003, 2003 CPD ¶ 117 at 13; Service Technicians, Inc., B-249329.2, Nov. 12, 1992, 92-2 CPD ¶ 342 at 2. This means the solicitation must be free from ambiguity and describe the minimum needs of the procuring activity accurately.

The competition requirement is not met where the agency includes specifications that exceed the agency's minimum needs or that are insufficiently definite and free from ambiguity to permit competition on a common basis. See, e.g., Biddle Instruments; Tektronix, Inc. – Recon., B-225769 et al., Sept. 15, 1987, 87-2 CPD ¶ 251. "[A] contracting agency may impose restriction on the competition only if it can be shown that after consideration of all relevant factors, the restriction is deemed necessary to meet the agency's actual minimum needs, since the benefit of competition, both to the Government and to the public in terms of price and other factors, is directly proportional to the extent of the competition." Tennant Co., B-205914.1 et al., Dec. 20, 1982, 82-2 CPD ¶ 546 at 3.

**A. The IFB Cannot Fairly Proceed Until the State Provides Complete Answers to Bidder Questions; SC DHEC Did Not Adequately Answer all Questions and Consequently, Some of the IFB Terms and Conditions Remain Ambiguous**

SC DHEC permitted bidders to submit pre-bid questions but then failed to provide responses to the questions with sufficient details for bidders to submit complete and competitive bids. This is contrary to the procurement law requirements. The bidder questions were aimed at seeking clarification to ensure that there were no unfair competitive advantages and that the state provides a level playing field. But the state's answers have only further created substantial ambiguities and uncertainties. For example:

In response to bidder questions, the State amended Specification 3.4.2.1 by deleting the words "will not" and replacing them with "intends to" issue non-contract standard 20-calorie infant formulas. However, Specification 3.1.1 still reads: "DHEC shall contract with the bidder whose standard iron-fortified milk-based formula and iron-fortified soy-based formula will be designated as the **sole** authorized brands of infant formula in the South Carolina WIC Program." (emphasis added). These two provisions are contradictory and must be clarified.

---

1992); see also Impresa Costruzioni Geom. Domenico Garuffi v. United States, 61 Fed. Cl. 175, 182 n.9 (2004) (citations omitted); Filtration Dev. Co. v. United States, 59 Fed. Cl. 658, 664 n.11 (2004).

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 16

SC DHEC's answers to Questions 5 and 22 contradict and show inconsistency regarding authorizing and issuing standard infant formulas versus SC DHEC's answer to Question 98:

QUESTION 5: Page 7, paragraph I. -Are there any circumstances under which the State would accept infant formulas that provide less than 20 kilocalories per fluid ounce of formula at standard dilution?

STATE'S RESPONSE: No.

QUESTION 22: Page 19, Section 3.2.5. - Please confirm only standard formulas providing 20 kilocalories per fluid ounce will be added to the State's list of authorized WIC infant formulas. Please further confirm infant formulas that only provide 19 kilocalories do not meet the SC definition of standard formulas and will therefore not be authorized for issuance to SC WIC infants.

STATE'S RESPONSE: Only standard formulas providing 20 kilocalories per fluid ounce will be added to the State's list of authorized WIC infant formulas.

QUESTION 98: Section HI. Scope of Work/Specifications. Rebate Requirements. 3.1.1.1. - Page 17. Will the State please explain which rebated products it intends to utilize in the program?

a. Please confirm that the State is aware that the USDA has made a correction to regulations that provides for non-exempt formulas that are less than 20 kcal fl. /oz. to be provided and rebated through the WIC program with a prescriber's authorization as alternate to the primary contracted infant formulas. Our company produces several non-exempt alternate to the primary contracted formulas that are ~ 19 kcal/fl. oz. that are widely used and rebated in states where we hold the contract.

b. Should [redacted] be the successful Bidder on this contract, please confirm that the alternate to the primary infant formulas would be allowable and utilized ahead of non-contract non-exempt formulas produced by other manufacturers.

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 17

c. Please confirm the State intends to not allow the issuance of non-contract non-exempt formula through the duration of the contract.

STATE'S RESPONSE:

- a. The State is aware.
- b. Confirmed.
- c. The State will consider a zero-tolerance policy with respect to issuance of non-exempt, non-contract infant formulas.

At least one question refers bidders back to the provisions in question and fails to provide any explanation:

QUESTION 12: Page 12, paragraph (e) Unbalanced Bidding - Please confirm this paragraph does not apply to this W1C infant formula rebate bid. If unwilling to confirm, please provide additional guidelines for bidders to ensure their bids are in compliance with this section.

STATE'S RESPONSE: Unbalanced Bidding is defined with in Paragraph (e).

The response provides a circular answer, referring bidders back to the provision on which the question is based. This provision remains unclear and should be clarified or removed from the IFB.

Questions 28, 29, 30, 63, 107, and 108 do not explain what SC DHEC expects bidders to provide to show how the bidder complies with the requirements:

QUESTION 28: Page 23 - Qualifications - Required Information (MAR 2015)- Please confirm the annual report of the offeror 's parent corporation will be sufficient to comply with paragraph (b) of this section. Please further confirm this information may be submitted on a CD Rom or USB drive. We note all of the potential offerors are large multinational corporations with longstanding demonstrated financial stability.

STATE'S RESPONSE: See clause entitled "Qualifications of Offeror (MAR 2015)(3). " Only a USB drive is acceptable.

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 18

QUESTION 29: Page 23 - Qualifications - Required Information (MAR 2015) - Paragraphs (a), (d) and (e) in this section appear to be similar or identical to the requirements in section 5.1.2. References. Please confirm a response addressing section 5.1.2. also satisfies the requirements in section (a), (d) and (e) of this section.

STATE'S RESPONSE: The information stated in the clauses entitled "Qualifications- Required Information (MAR 2015) and "Qualifications - Special Standards of Responsibility (MAR 2015) are required.

QUESTION 30: Page 23 - Qualifications - Required Information (MAR 2015) - Paragraphs (f) of this section appears to be similar to the requirement on page 9 - Certification Regarding Debarment and Other Responsibility Matters (JAN 2004). Please confirm the certification provision on page 9 fully satisfies the requirement specified in paragraph (f) on page 23. To minimize confusion, we request the State delete paragraph (f).

STATE'S RESPONSE: "Qualifications -- Required Information (MAR 2015) paragraph (f) requires that a list be submitted if applicable.

The SC DHEC responses to these questions do not provide any clarification regarding what is expected of bidders to be compliant. For instance, does the same information need to be provided twice to be compliant with the separate provisions?

There are several questions SC DHEC ignored altogether:

QUESTION 51: Section III, Introduction and Background, pages 16 and 17-We appreciate the State providing the breakdown of infants in the SC WIC Program. . . .  
e. Please confirm a manufacturer is not billed for rebates for infant formula issued to children.

[51.e: No Answer]

QUESTION 60: Section IV, Information for Offerors to Submit, page 22 -

a. Please confirm a manufacturer is not required to document how they meet all requirements listed in III. Scope

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 19

of Work and V. Qualifications as part of their bid proposal and that a signed bid fulfills these requirements.

i. If not confirmed, please describe what the State is requiring in a bid submission to meet requirements.

STATE'S RESPONSE: a. Please review each section of the Solicitation as detailed in the clause entitled "Information for Offerors to Submit- General (MAR 20 15).

QUESTION 63: Section V, Qualifications - Required Information, page 23 –

a. Please confirm that if an offeror is a wholly owned subsidiary of a publicly-traded parent corporation and as such does not prepare its own financial statements or reports, that the parent company's financial reports which include information about the offeror and were filed with the SEC would be sufficient to meet the all requirements as stated in item (b).

b. If not confirmed, please list what additional information would need to be submitted to meet the State's requirements.

c. Please confirm that it would be acceptable for a bidder to submit their financial statements on a CD or USB with their hard copy to reduce the amount of paper included in the packet.

STATE'S RESPONSE:

a. See clause entitled "Qualifications of Offeror (MAR 2015)(3)."

[b. No Answer]

c. A USB drive is acceptable.

The SC DHEC responses for questions 77 and 100 are incomplete:

QUESTION 77: Please describe the policy involving WIC issued returned infant formula.

STATE'S RESPONSE: Dispose of returned formula.

QUESTION 100: Section III. Scope of Work/Specifications. Formula Requirements. 3.2.5 - Page 19.

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 20

a. Please explain the State's policy on accepting returned formula from participants.

b. Please confirm that if the State reissues formula (in the event of a return), that the contracted manufacturer will not pay rebates exceeding the federal maximum.

i. Example: Mom is issued 9 cans of Gerber Good Start Gentle powder and redeems all 9 cans. Mom returns 7 cans to the clinic and is issued a new benefit for 7 cans of Gerber GoodStart Soothe powder. Is the State seeking rebates on 9 cans or 16 cans today?

c. If (b) above is not confirmed, please detail by age of baby, form, and type how many units of formula are rebated above the federal maximum.

STATE'S RESPONSE: a. Dispose of returned formula.

b. See Specification 3.4.2.2.

The SC DHEC answers to questions 77 and 100 are incomplete. It is unclear if participants are issued new formula and if that formula is rebated. Further, it is unclear whether the provider pays rebates twice to these participants.

**B. Based on SC DHEC's Answers to Questions, It Appears SC DHEC Will Not Comply with Federal Law that Requires Specific Items to be Read Aloud at Bid Opening**

Federal law (42 U.S.C. § 1786(h)(9)(B)(iii)) requires states to open and read aloud all bids at a public proceeding on the date on which the bids are due. This means states are required to read all relevant items on the Bid Sheet aloud for all bidders, including columns D, F, G, H, I, J, and K on the first page of the Bid Sheet, and columns C, J, K, L, M, and N on the second page of the Bid Sheet. But based on the following responses to Questions 8 and 90, SC DHEC will not be in compliance with federal law:

QUESTION 8: Page 11-12 - Public Opening Information - we have the following questions related to this section:

a. Approximately what time on December 12, 2019 will the bids be publicly opened?

b. Please provide additional details on the information to be read aloud at the public bid opening. Please confirm the State will read aloud the following information contained on page 1 of the Bid Sheet: Product Name Being Bid, the Unit

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 21

Size, Reconstituted Ounce Per Unit, Lowest Wholesale Full Truckload Price Per Unit, Rebate Bid Per Unit, Net Cost, and Percent Rebate, and on page 2 the corresponding data populated in columns (C), (J), (K), (L), (M), and (N). Please further confirm the State will read aloud the Total Net Cost Per Month.

c. Would the State be willing to provide a call-in number for those bidders unable to attend the bid opening in person?

STATE'S RESPONSE:

a. The bids will be publicly opened December 12, 2019 at 2:30 PM ET.

b. The following columns on Page 2 of the Bidding Schedule will be read aloud: (B), (L), (M), and (N), which includes Total Net Cost Per Month.

c. No.

QUESTION 90: Section 11. Instructions to Offerors - A.  
General Instructions - Public Opening Information - Page 11.  
Please confirm the following will be read aloud at the Public Opening:

- a. Manufacturer
- b. Product Being Bid
- c. UPC Code
- d. Unit Size
- e. Reconstituted Ounce Per Unit
- f. Lowest Wholesale Full Truckload Price Per Unit
- g. Rebate Bid Per Unit
- h. Net Cost
- i. Rebate Percent
- j. Total Net Cost Per Month

STATE'S RESPONSE: The following columns on Page 2 of the Bidding Schedule will be read aloud: (B), (L), (M), and (N).

SC DHEC has provided no reason why the state is not fully complying with federal law.

Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 22

**C. SC DHEC Must Extend the Bid Date Give the Uncertainties and Unanswered Questions**

When soliciting cost containment bids for authorized WIC foods, section 17(h)(9)(B)(iv) of the Child Nutrition Act (42 U.S.C. § 1786) requires state agencies to "provide a minimum of 30 days between the publication of the solicitation and the date on which the bids are due." See also 7 C.F.R. § 246.16a(g)(3). The purpose of this provision is to ensure a level playing field and fair competition by providing prospective bidders sufficient time to respond.

While the federal regulations do not specifically address how much time must be provided after any amendment to an IFB or response to bidder questions, it is arguable that the thirty-day period applies to any material IFB change. The thirty-day period is in the spirit of the law that seeks to ensure a level playing field and fair competition. In any event, the regulations require that bidders have sufficient time to prepare a meaningful and competitive bid.

Whether an agency's response time is reasonable and sufficient depends on the facts and circumstances surrounding each acquisition. See Info. Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 at 4 ("[w]hat constitutes a reasonable opportunity to respond will depend on 'the circumstances of the particular acquisition, such as complexity, commerciality, availability, and urgency'"). Here, SC DHEC has failed to properly address material questions, the answers to which are necessary for offerors to make an informed and accurate bid.

We respectfully request that SC DHEC (1) permit another round of bidder questions and answers and (2) then provide a reasonable amount of time from when bidder questions are answered and any IFB amendment to the time bids are due.

**GERBER IS AN INTERESTED PARTY TO PROTEST**

Gerber is an actual or prospective offeror whose direct economic interest is adversely affected by the IFB terms. Gerber has contractual rights in the bidding process. The IFB create an implied contract to treat offerors on a fair and consistent basis and to conduct procurements in accordance with governing laws, regulations, and policies. The issues addressed above violate the applicable rules and the State of South Carolina's contractual duties. Accordingly, Gerber is an interested party to protest the IFB terms.

**GERBER'S PROTEST IS TIMELY**

This protest is timely filed within fifteen (15) calendar days of Amendment 3 that provides the basis for this protest. See S.C. Code § 11-35-4210(1)(a). This protest is also filed before the scheduled date and time of submission of bids on January 7, 2020.



Chief Procurement Officer, Materials Management Office  
Laura M. Cravens, Procurement Officer, SC DHEC  
December 27, 2019  
Page 23

**CONCLUSION AND REQUEST FOR RELIEF**

The SC DHEC IFB includes data that is inconsistent, outdated, or insufficient and will not allow potential bidders to submit bids on a level playing field. SC DHEC's December 12, 2019 additional responses to questions do not provide clarification in many critical areas, most importantly, in the area of infant data. It is axiomatic that agency action is arbitrary and unfair when an agency treats similar situations differently without a reasonable explanation. Yet that is the case here.

Moreover, the IFB is unduly restrictive, anti-competitive, and contrary to requirements of applicable statutes, regulations and fundamental public contract principles. The solicitation contains material flaws that preclude fair competition.

For the reasons stated above, Gerber requests that SC DHEC suspend the proposal due date, amend the IFB to address the defects identified above, reopen the Q&A period to allow for further clarification, and permit offerors the opportunity to submit bids and compete on a fair, impartial and equitable basis within a reasonable amount of time after any IFB amendment or the SC DHEC's responses to bidder questions.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP



Jeremy C. Hodges  
*Attorneys for Gerber Products Company  
d/b/a Nestlé Infant Nutrition*

cc: Kevin Goldberg, Esq. (via email only – Kevin.Goldberg@US.nestle.com)  
Vice President and General Counsel, Gerber Products Company

Jonathan D. Shaffer, Esq. (via email only – jshaffer@smithpachter.com)  
Counsel for Gerber Products Company

## 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.**