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## Protest Decision

**Matter of:** Abbott Laboratories, Inc.

**Case No.:** 2020-134

**Posting Date:** July 10, 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 alleging apparent successful bid was not responsive and improperly allowed to correct bid is denied. The protest letter of Abbott Laboratories is included by reference. (Attachment 1)

### AUTHORITY

The Chief Procurement Officer<sup>1</sup> (CPO) conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on materials in the procurement file and applicable law and precedents.

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

## BACKGROUND

Solicitation Issued	11/01/2019
Amendment One Issued	11/25/2019
Amendment Two Issued	12/04/2019
Amendment Three Issued	12/12/2019
Amendment Four Issued	12/27/2019
Amendment Five Issued	05/01/2020
Amendment Six Issued	05/14/2020
Amendment Seven Issued	05/20/2020
Bids Opened	06/04/2020
Intent to Award Posted	06/08/2020
Intent to Protest Received	06/17/2020
Protest Received	06/23/2020

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. The WIC Program in South Carolina is 100% federally funded through the United States Department of Agriculture. Infant formula is provided through the WIC program. 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.

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.

The contract resulting from this solicitation will be awarded to the manufacturer that provides a rebate that results in the lowest overall 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 determine the bid offering the lowest net cost to the state, the solicitation incorporated a bidding schedule comprised of two spreadsheets which were attached to the solicitation as Attachment B. The first spreadsheet required Bidders to provide the following information for each of the 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 fields for the required information were highlighted for easy identification. Embedded formulas calculated the net cost per unit and rebate percentage. The lowest national wholesale price per unit for a full truckload, and rebate bid per unit for each formula type were to automatically transfer to the second spreadsheet.

The second spreadsheet was divided into three sections based on the physical form in which the formula is delivered. Each physical form section was then 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 recalculated the net cost per unit and applied to the prepopulated data to automatically calculate the total net monthly cost to the State for each formula type. The total net monthly cost to the State for all three types was combined to determine the overall net monthly cost to the State. Award is made to the manufacturer providing the overall lowest net monthly cost to the State. The bid schedule was to be completed, printed, executed, notarized and submitted in paper form.

Bids were received from Mead Johnson (\$473,918.192), Abbott (-\$419,565.45) and Gerber (-\$473,989.205) on June 4, 2020. On June 8, 2020, Gerber requested the opportunity to correct its bid:

Gerber requests correction of its bid, after bid opening, pursuant to S.C. Code Ann. §11-35-1520(7). Gerber clearly documents the error below as required by S.C. Code Regs. Reg. No. 19-445 .2085A. The error does not cause a substantial loss to Gerber, however.

Gerber submitted Attachment B Bidding Schedule with an incorrect page 2. Page 1 reflects the correct bid rebate of 125.8% for Powder, 95.1 % for Concentrate and 73.9% for RTF. Total monthly cost to the state should be -\$592,047.335. This amount was Gerber's intent. Page 2 submitted in error has an incorrect amount of --\$473,989.205 monthly cost to state. Gerber requests the Procurement Officer to correct its bid to only reflect the rebate percentage on page 1 and the correct net cost bid of \$592,047.335 The correction does not impact fair competition. Gerber's offer provided the lowest net cost to the state under either calculation. The total net cost to the state of the next best offer was approximately - \$419,000.000. Thus Gerber would be awarded the contract either way.

(Attachment 2) An Intent to Award to Gerber was posted on June 8, 2020 in the amount of - \$592,047.335. Abbott notified the CPO of its intent to protest on June 17, 2020 and filed its formal protest on June 23, 2020 alleging that Gerber's original bid was non-responsive and improperly corrected after bid opening.

## **ANALYSIS**

Abbott's first issue of protest raises two issues. First, that Gerber's initial bid was materially non-compliant and should have been rejected as nonresponsive and, second, that the correction of Gerber's bid was not permissible under the Code. Abbott first argues:

The Bid Schedule required Gerber to provide the pricing and rebate information on Page 1 of the Schedule. The embedded formulas in the spreadsheets were designed to transfer this data to Page 2 of the Bid Schedule. There can be no dispute that Gerber did not complete the Bid Schedule as required by the IFB. The Gerber Powdered product entries on Page 1 for Rebate Bid Per Unit, Net Cost and Percent Rebate do not equate to those entries contained on Page 2.... Had Gerber properly completed the Bid Schedule it would have been impossible for those entries to be different on Page 1 and 2. The indisputable effect is that Gerber submitted a non-responsive bid.

Bidders were required to complete Attachment B and mail it in with their bid, [Solicitation, Page 37] Attachment B instructed bidders:

Instructions: Enter manufacturer's name, product name, UPC code, unit size, reconstituted ounce per unit, lowest national wholesale price per unit for a full truckload, and rebate bid per unit in the chart below.

Data entry fields are yellow sections.

Calculations will be performed automatically within the spreadsheet in Page 2.

Sign and Notarize this page.

Gerber entered all the required information including the “Lowest Wholesale Full Truckload Price Per Unit” and the “Rebate Per Unit” for each formula type on page 1 which calculated a “Net Cost Per Unit” and a Percentage Rebate. Page 2 was designed to retrieve the “Lowest Wholesale Full Truckload Price Per Unit” and the “Rebate Per Unit” for each formula type from page 1 and recalculate the “Net Cost Per Unit” and multiply it by the anticipated usage to determine the cost to the State for that formula type. The cost for all three formula types were automatically added together to determine the bid total. On page 1 Gerber submitted a “Rebate Per Unit” of 21.470 for powdered formula. However, this number was not automatically transferred to page 2 which showed a “Rebate Per Unit” of 20.600. The spreadsheet calculated a “Net Cost Per Unit” that was lower than the page one calculation and resulted in a cost of -\$480,374.460 for powdered formula and an overall monthly price to the State of -\$473,989.205. This was the lowest overall monthly cost to the State of the three bidders.

The solicitation did not require the bidder to submit any information on page 2 of the spreadsheets. Since the only purpose for including page 2 in the solicitation was to show how the overall cost to the State would be calculated, it could have, and probably should have, been password protected to prevent bidder manipulation. Regardless, the solicitation only required unit prices, and those prices were required to be entered on page 1 of the spreadsheet. Gerber provided all the information required on page 1 of the spreadsheets, which was all that was required of the solicitation, and was, therefore, responsive to the requirements of the solicitation. This issue of protest is denied.

Abbott next alleges that Gerber was improperly allowed to "correct" its bid pursuant to Section 11-35-1520(7) and S.C. Reg. 19-445.2085A and Gerber's request did not comport with the requirements for such a correction and the Department's award was in violation of the law.

Abbott argues:

Under the Code, the State must unconditionally accept bids without alteration or correction, unless as authorized in the Code. S.C. Code Ann. § 11-35-1520(6). While Gerber sought to "correct" its bid pursuant to Section 11-35-1520(7) and S.C. Reg. 19-445.2085A, as discussed more fully below, such a "correction" is not authorized by the Code or the regulations.

The Panel has considered the bid correction provisions in the past and have held that an inadvertent mistake in a bid must be evident from the bid documents themselves and correctable from the information contained therein without consulting the bidder.

This is not a case where a bidder failed to extend a unit price or submitted a bid with an obvious scrivener's error. Simply put, Gerber submitted two entirely different bids for Powder on its Bid Schedule. To allow Gerber to simply declare which bid it intended to submit post-opening is not permitted under any provisions of the Code and would be prejudicial to the protections of the Code and undermine fair competition. Gerber's argument that allowing them to declare which bid was intended would be beneficial to the State is without merit as well. To do so, would give a bidder the potential to manipulate the procurement process at its whim. In other words, the bidder would maintain the discretion to quote any price it desired on one Page 1 of the Bid Schedule without regard for what it "intended" to quote on Page 2 and declare its intended bid appeared on Page 1. Another example of a potential impact on competition would be if a bidder submitted two bids contained within a Bid Schedule, one of which was unbalanced. Once the bidder was aware that it would be the low bid, it could simply declare that its unbalanced bid schedule was submitted in error....

In addition, the procurement officer's consideration and acceptance of Gerber's request to correct deviated from the requirements of the Code and R. 19-445.2085. The regulation requires that the bidder provide clear evidence that an error occurred. Gerber submitted no documentation or any evidence that a mistake occurred. The sole basis for the allowed "correction" was a representation made in a letter from Gerber's counsel that Page 1 of the Bid Schedule was Gerber's intended bid. This is not sufficient to satisfy the requirements for bid correction. The regulation also requires that a correction can occur only upon a showing that the error would cause the bidder a substantial loss. This condition clearly does not exist in this case and was acknowledged by Gerber in its request. Gerber's request for correction fails to satisfy the requirements of R. 19-445.2085. The procurement officer does not have the authority or discretion to deviate from the requirements when contemplating allowing a bid correction.

Gerber submitted the request to correct its bid pursuant to S.C. Code Ann. §11-35-1520(7) and S.C. Code Regs. Reg. No. 19-445.2085A on June 5, 2020. Regulation 19-445.2085(A) requires:

A bidder or offeror must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request must document the fact that the bidder's or offeror's mistake is clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency, or the designee of either.

(emphasis added)

There is nothing in the record to indicate that the head of the agency or his designee made a written determination of appropriateness concerning Gerber's request. There is nothing in the record to indicate a DHEC response either accepting or rejecting Gerber's request. Rather, DHEC responds that it considered the error on page 2 of Gerber's bid a minor informality or irregularity:

Confronted with the circumstances of this solicitation, DHEC's procurement officer determined that the nonconforming unit information on page two of the Gerber Bid was the type of minor irregularity the State is allowed to waive when doing so is to the advantage of the State.

*A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect ...on the total bid price, quality, quantity, or...performance of the contract, and the correction or waiver of which would not be prejudicial to bidders.*

SC Code § 11-35-1520(13).

Upon request, the CPO received a copy of a Memorandum to File that purports to be the determination to waive the error on page 2 of Gerber's bid as a minor informality or irregularity, as required by Section 11-35-1520(13), on July 6, 2020.<sup>2</sup> (Attachment 3) The CPO notes that the Intent to Award was posted June 8, 2020, Abbott's Intent to Protest was filed on June 17, 2020, and the Memorandum to File is dated June 18, 2020. Abbott filed its protest on June 23, 2020. Abbott has provided the CPO with evidence in the form of emails dated June 9, 2020 and June 12, 2020 requesting any and all documents related to Gerber's request to correct its bid. Abbott

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<sup>2</sup> The Memorandum fails to identify the specific entry being waived, fails to identify the error as a minor informality or irregularity or reference the legal basis for the waiver.



advises the CPO that it first received a copy of the Memorandum at the same time it was provided to the CPO on July 6, 2020. As the time limits for filing a protest are statutory, Abbott was obliged to file its protest without the benefit of this Memorandum explaining the reasoning leading to the award. DHEC explains that:

The written documentation of the determination had not yet been created at the time of the FOIA request. All of our buyers, including Mrs. Cravens, the buyer on this solicitation, have had exceptional workloads these past several months during the pandemic, and there was a delay in documenting this action.

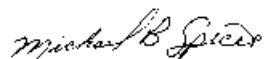
The failure to deliver the document to all concerned parties upon its creation is not explained.<sup>3</sup> While the CPO finds this situation distasteful, and is troubled by the lack of a contemporaneous written determination to justify the waiver of the page 2 discrepancy as a minor informality, this situation is not fatal to Gerber's intended award. *See, e.g. Appeal of Triad Mechanical*, Panel Case No. 2006-7 (rejecting argument that determination of non-responsibility was erroneous because agency failed to prepare a written determination where CPO's determination qualified as a written determination of nonresponsibility).

Since Gerber's request to correct its bid was not acted upon and played no role in determining the award, Abbott's issues of protest related to Gerber's request are dismissed as moot.

## DECISION

For the reasons stated above, the protest of Abbott Laboratories, Inc. is denied.

For the Materials Management Office



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Michael B. Spicer  
Chief Procurement Officer

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<sup>3</sup> While there is no legal duty under FOIA to supplement documents created subsequent to the FOIA request and production, given that DHEC knew the June 18 memorandum was relevant to the protest, the better practice would have been to produce it immediately. In any event, the CPO takes this opportunity to remind procurement officers that the General Assembly amended the Procurement Code through Act 41 of 2019. As part of that amendment, Section 11-35-410(F) requires procurement officers to respond within five days to written document requests made before final award.

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June 23, 2020

**VIA EMAIL AND HAND DELIVERY**

Mr. Michael B. Spicer- [protest-mmo@state.sc.us](mailto:protest-mmo@state.sc.us)  
Chief Procurement Officer, Materials Management Office  
1201 Main Street, Suite 600  
Columbia, SC 29201

**RE: Protest of Award of Contract for Solicitation No. 5400018781**  
**Agency: South Carolina Department of Health and Environmental Control**  
**Women, Infants and Children (WIC) Formula Rebate Contract**  
**Bruner Powell File No.: 7-3188.100**

Dear Mr. Spicer:

This firm has been retained to represent Abbott Laboratories, Inc. ("Abbott") in connection with the above-referenced solicitation. On behalf of Abbott, we hereby submit this Protest of the Intent to Award the Contract for DHEC's Solicitation No. 5400018781 for the Women, Infants and Children (WIC) Formula Rebate to Gerber Products Company ("Gerber") and request a hearing and/or administrative review. Abbott was a bidder in the above-referenced procurement and, pursuant to S.C. Code Ann. § 11-35-4210(1), Abbott has standing to protest and is pursuing this protest through this filing direct to you as the Chief Procurement Officer in this solicitation. The protest is based upon the following factual and legal basis:

**PROCUREMENT BACKGROUND and REQUIREMENTS OF THE IFB**

On November 1, 2019, the Invitation for Bids was issued by the South Carolina Department of Health and Environmental Control ("DHEC") for Solicitation No. 5400018781. The solicitation sought 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. The South Carolina Special Supplemental Nutrition Program for Women, Infants and Children ("WIC") administered by DHEC, utilizes a single, uniform food delivery system statewide. Infant formula is provided to participants 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 through the program with no retail payment. A record of the purchase is forwarded to DHEC who reimburses the seller and DHEC forwards the information to the formula manufacturer on a monthly basis to seek rebates to cover expenses for the eligible purchases.

Michael B. Spicer  
Chief Procurement Officer, Materials Management Office  
June 23, 2020  
Page 2

In this solicitation, three (3) amendments were issued to the IFB before one of the prospective bidders, Gerber, protested the changes in Amendment 3 on December 27, 2019. Gerber, among other complaints, challenged the solicitation as being non-compliant with the federal regulations governing the WIC program, including 7 CFR § 246.16a(c)(5), which dictates how the contract is to be awarded by the states. Amendment 4 was issued suspending the solicitation pending the CPO review of the Gerber protest. On March 26, 2020, the CPO issued a decision granting in part and denying in part the Gerber protest. As a result of certain directives in the CPO Decision, DHEC issued Amendment 5 which reissued the solicitation, as amended, in its entirety. Two additional amendments were issued and the revised bid opening date was scheduled for June 4, 2020.

The solicitation is designed to award the contract to the responsive and responsible bidder that provides rebates that result in the lowest net cost to DHEC. The solicitation included a detailed Bid Schedule/Price Proposal that was designed such that the procurement complied with the 7 CFR § 246.16a(c) requirements concerning the award of the subject contract. Specifically, in order to ensure that DHEC received a bid that resulted in the lowest net cost to the state, the solicitation incorporated two spreadsheets as the Bid Schedule set forth as Attachment B<sup>1</sup>. On the first spreadsheet on Page 1 of the Bid Schedule, bidders were required to provide the following information for each of the 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 formula set forth on the Page 1 Excel spreadsheet automatically calculated the net cost per unit and the rebate percentage. The net cost per unit, and the rebate percentage and wholesale full truck price per unit were automatically transferred to the Page 2 spreadsheet. In addition to the data transferred from the Page 1 spreadsheet, the Page 2 spreadsheet was divided into three sections based on the physical form in which the formula is delivered. Each physical form section was divided into three infant age categories. Each age category was 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 October 2019 through March 2020 and whether the infant is fully or partially formula fed. The number of infants was multiplied by the number of ounces to determine the total monthly ounces for bid purposes. The Page 2 spreadsheet applied the data from the Page 1 spreadsheet to the prepopulated data in the Page 2 spreadsheet and automatically calculated the total net monthly cost to the State. **See Attachment B, as revised, attached hereto as Exhibit A.**

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<sup>1</sup> A Revised Attachment B was issued with Amendment 5 which contain updated data.

Michael B. Spicer  
Chief Procurement Officer, Materials Management Office  
June 23, 2020  
Page 3

As such, in order to comply with the requirements of the solicitation and as dictated by the applicable federal regulations, bidders were required to submit a compliant, fully responsive Bid Schedule/Price Proposal so as to allow for the formulas in the Bid Schedule to transfer the required pricing information in order for the State to be assured that the net cost to the State would be as presented. The IFB provided that if fixed pricing was required, as in Pages 1 and 2 of the Bid Schedule, a bid would be rejected if the total possible cost to the State cannot be determined. Moreover, the IFB is clear that a bidder will not be provided an opportunity to correct any material nonconformity. See Amendment 5, p 12.

At the bid opening on June 4, 2020, bids were submitted from Abbott, Gerber and Mead Johnson. As provided in the solicitation, Columns B, L, M & N from Page 2 of the Bid Schedule from each of the bidders were read aloud. Based solely on what was read aloud at the bid opening, it appeared that Gerber had submitted the apparent low bid. What was not discernable from the bid opening was that Gerber had submitted a non-conforming bid in that Page 1 and Page 2 of the Bid Schedule did not tie together such that the pricing information from Page 1 carried over to Page 2 as the Schedule was designed to do, automatically. The submission of a fully completed Bid Schedule was a material requirement of the IFB.

On June 5, 2020, counsel for Gerber submitted a letter to the DHEC procurement officer acknowledging that Gerber has submitted a non-compliant Bid Schedule.

*Gerber submitted Attachment B Bidding Schedule with an incorrect page 2. Page 1 reflects the correct bid rebate of 125.8% for Powder, 95.1% for Concentrate and 73.9% for RTF. Total monthly cost to the state should be -\$592,047.335. This amount was Gerber's intent. Page 2 submitted in error has an incorrect amount of --\$473,989.205 monthly cost to the state.*

**See letter from Marcus A. Manos, dated June 5, 2020 attached hereto as Exhibit B.** Counsel for Gerber then requested that it be allowed to correct its Bid. There was no supporting information provided to support the representations set forth in counsel's letter. On June 8, 2020, DHEC issued a Notice of Intent to Award the Contract to Gerber at the "corrected" Total Net Cost Per Month of -\$592,047.335.

Subsequent to the issuance of the Notice of Intent, Abbott requested copies of the Gerber bid along with all documents relating to DHEC's responsiveness determination and the determination to allow Gerber to "correct" a materially non-conforming bid. Based on the documents provided, Abbott has confirmed material non-conformities with Gerber's bid which violated the requirements of the IFB, the Code and the applicable federal regulations, which should have resulted in Gerber's bid being rejected. Furthermore, DHEC's post-bid opening consideration of Gerber's attempt to correct the material non-conformities was in violation of the IFB, the Code and reflects arbitrary and capricious actions and an intent to award in violation of law.

## GROUNDS OF PROTEST

1. **The Gerber Bid Schedule reflects a rejection of the essential requirements of the IFB with regards to Pricing such that it rendered the Bid non-responsive. Gerber's non-responsive bid was evident from the Bid itself. Therefore, Gerber's Bid should have been rejected.**

The Bid Schedule required Gerber to provide the pricing and rebate information on Page 1 of the Schedule. The embedded formulas in the spreadsheets were designed to transfer this data to Page 2 of the Bid Schedule. There can be no dispute that Gerber did not complete the Bid Schedule as required by the IFB. The Gerber Powdered product entries on Page 1 for Rebate Bid Per Unit, Net Cost and Percent Rebate do not equate to those entries contained on Page 2. **A copy of the Gerber Bid Schedule is attached hereto as Exhibit C.** Had Gerber properly completed the Bid Schedule it would have been impossible for those entries to be different on Page 1 and 2. The indisputable effect is that Gerber submitted a non-responsive bid. Under the Code, the State must unconditionally accept bids without alteration or correction, unless as authorized in the Code. S.C. Code Ann. § 11-35-1520(6). While Gerber sought to "correct" its bid pursuant to Section 11-35-1520(7) and S.C. Reg. 19-445.2085A, as discussed more fully below, such a "correction" is not authorized by the Code or the regulations.

The Panel has considered the bid correction provisions in the past and have held that an inadvertent mistake in a bid must be evident from the bid documents themselves and correctable from the information contained therein without consulting the bidder. *See In re: Appeal by Cannon Construction Company*, Panel Case 2011-9 (January 17, 2012); *In re: Protest of Miller's of Columbia*, Panel Case No. 1989-3 (April 24, 1989) (where bidder failed to indicate four required unit prices on its bid even though an overall lot price was given, a mistake which was clearly evident on the face of the bid, the procurement officer could not correct the bid by filling in the unit prices without contacting the bidder, a practice not allowed by the Procurement Code).

This is not a case where a bidder failed to extend a unit price or submitted a bid with an obvious scrivener's error. Simply put, Gerber submitted two entirely different bids for Powder on its Bid Schedule. To allow Gerber to simply declare which bid it intended to submit post-opening is not permitted under any provisions of the Code and would be prejudicial to the protections of the Code and undermine fair competition. Gerber's argument that allowing them to declare which bid was intended would be beneficial to the State is without merit as well. To do so, would give a bidder the potential to manipulate the procurement process at its whim. In other words, the bidder would maintain the discretion to quote any price it desired on one Page 1 of the Bid Schedule without regard for what it "intended" to quote on Page 2 and declare its intended bid appeared on Page 1. Another example of a potential impact on competition would be if a bidder submitted two

bids contained within a Bid Schedule, one of which was unbalanced. Once the bidder was aware that it would be the low bid, it could simply declare that its unbalanced bid schedule was submitted in error.

In *In re: Protest of Miller's of Columbia*, Miller's argued that allowing it to correct its bid would be beneficial to the State. The Panel rejected this argument:

*While Miller's argument has appeal in the private sector, this case arises in the public forum. Of equal, if not more, concern to getting the lowest price is promoting public confidence in the procurement process, ensuring fair and equitable treatment of all bidders, fostering effective broad-based competition and providing safeguards for maintaining a procurement system of quality and integrity with clearly defined rules of ethical behavior for all parties to the procurement process. S.C. Code Ann. [§ 11-35-20(2)(b),(d),(f) & (g)]. The stated goals of the Procurement Code are served by consistently enforcing the rules. Neither cost differential nor sympathy for a vendor in one case can shape the rules that must apply to all cases.*

In *Miller's*, the Panel further found the bid on its face was non-responsive. Although it was evident on the face of the bid that a mistake had been made, that mistake could not be corrected from the information available. As such, Miller's had the potential to manipulate the system, which warranted rejection of the bid.

In this case, it is impossible to discern Gerber's intended bid from the face of its Bid Schedule. The federal requirements governing this solicitation set forth in 7 CFR § 246.16a(c) are specific and were incorporated in the DHEC Bid Schedule. These regulations along with the clearly articulated Panel precedent dictates that the Gerber bid should have been declared non-responsive and rejected without regard to any effort by Gerber to declare a mistake. DHEC's failure to reject the Gerber Bid was arbitrary, capricious and reflected error of law.

**2. Even if Gerber's Bid was susceptible to correction under the applicable provisions of the Code and Regulations, Gerber's request did not comport with the requirements for such a correction and the Department's award was in violation of the law.**

The correction of an "inadvertently erroneous" bid is addressed by S.C. Code § 11-35-1520(7), which provides in pertinent part:

After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted. After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations promulgated pursuant to it. Except as otherwise provided by regulation, all decisions to permit the correction ... of bids ... after award but before performance, must

Michael B. Spicer  
Chief Procurement Officer, Materials Management Office  
June 23, 2020  
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be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency.

The correction of bids is also governed by S.C. Reg. 19-445.2085, which establishes the following procedure:

A bidder... must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request must document the fact that the bidder's mistake is clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief procurement officer or head of purchasing agency, or the designee of either.

While there are certain conditions upon which the Code authorizes the state to consider a bidder's request correct a mistake, as discussed above, those conditions do not exist in this case. Because the "mistake" was not evident from the bid itself such that the correction could be made from the information available to the procurement officer, to allow a correction would be prejudicial and undermine fair competition. In this case, the "correction" sought was Gerber being allowed to declare that Page 1 of the intertwined Bid Schedule was its intended bid and that the State should just ignore Page 2 of the Bid Schedule. These conditions simply do not resemble in any way those contemplated by the Code as warranting permissible bid correction.

In addition, the procurement officer's consideration and acceptance of Gerber's request to correct deviated from the requirements of the Code and R. 19-445.2085. The regulation requires that the bidder provide clear evidence that an error occurred. Gerber submitted no documentation or any evidence that a mistake occurred. The sole basis for the allowed "correction" was a representation made in a letter from Gerber's counsel that Page 1 of the Bid Schedule was Gerber's intended bid. This is not sufficient to satisfy the requirements for bid correction. The regulation also requires that a correction can occur only upon a showing that the error would cause the bidder a substantial loss. This condition clearly does not exist in this case and was acknowledged by Gerber in its request. Gerber's request for correction fails to satisfy the requirements of R. 19-445.2085. The procurement officer does not have the authority or discretion to deviate from the requirements when contemplating allowing a bid correction.

Furthermore, there is no documentation in the DHEC procurement file that reflects staff adequately considered, or considered at all, whether the facts give rise to a bid correction permitted by the Code. Both the Code and regulation requires that any decision to permit correction of a bid shall be supported by a written determination of appropriateness from the CPO or DHEC Commissioner or their designee. There is no evidence that any written determination of appropriateness was issued by the State in this case. As the Panel noted in *Miller's of Columbia*, the stated goals of the Procurement Code are served by consistently enforcing the rules. "Neither the cost differential nor sympathy for a vendor in one case can shape the rules that apply to all

Michael B. Spicer  
Chief Procurement Officer, Materials Management Office  
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cases.” The procurement officer does not have the discretion to take action outside of the parameters of the Code, regardless of whether he or she believes it to be in the best interests of the State. The Gerber bid was non-responsive and should have been rejected outright without consideration of a requested correction. However, if it is determined that it was appropriate to consider a request for bid correction, the procurement officer’s allowance of the correction in this case to cure a material non-conformance was arbitrary, capricious and not in accordance with the requirements of the Code and the applicable regulation.

For the foregoing reasons, the Intent to Award to Gerber should be cancelled. Abbott contends that Gerber’s bid should have been rejected as non-responsive. Abbott will rely on these arguments and such additional information as may become available through the course of our Freedom of Information Act requests and further investigation. We are requesting an administrative review and hearing of this protest and look forward to addressing the issues with you in person and presenting our proof. If the CPO intends to render a decision without a hearing, Abbott requests a copy of whatever materials are reviewed as part of the required administrative review and provide Abbott with an opportunity to submit briefs supporting the protest.

If there are any questions relating to the content of this matter, don’t hesitate to let me know.

Very truly yours,



E. Wade Mullins, III

EWM/les

cc: Manton M. Grier, Esq. (via electronic mail)  
Tripp Clark (via electronic mail)  
Laura M. Cravens (via electronic mail)  
Kevin McGill, Esq. (via electronic mail)  
Marcus A. Manos, Esq. (via electronic mail)



NEXSEN|PRUET

**Marcus A. Manos**  
Member  
Admitted in SC, NC, DC

June 5, 2020

**VIA EELCTRONIC MAIL**

Henry C. "Tripp" Clark (ClarkHC@DHEC.sc.gov)  
Laura M. Craven  
(CravenLM@DHEC.sc.gov)  
South Carolina Department of Health & Environmental Control  
Attn: Procurement Services  
2600 Bull Street  
Columbia, South Carolina 29201

Re: Request to Correct Bid of Gerber Products Co. d/b/a Nestlé Infant Nutrition  
Solicitation No. 5400018781 WIC Formula Rebate

Charleston  
Charlotte

Dear Mr. Clark and Ms. Craven:

**Columbia**  
Greensboro  
Greenville  
Hilton Head  
Myrtle Beach  
Raleigh

I write to inform you that Gerber Products Co. d/b/a Nestlé Infant Nutrition ("Gerber") made an error in its bid submitted in response to Solicitation No. 5400018781 WIC Fomula Rebate and requests correction of the error. The correction does not prejudice the state nor does it impact fair competition. With or without the error, Gerber submitted the best discount to the State.

Gerber requests correction of its bid, after bid opening, pursuant to S.C. Code Ann. § 11-35-1520(7). Gerber clearly documents the error below as required by S.C. Code Regs. Reg. No. 19-445.2085A. The error does not cause a substantial loss to Gerber, however.

Gerber submitted Attachment B Bidding Schedule with an incorrect page 2. Page 1 reflects the correct bid rebate of 125.8% for Powder, 95.1% for Concentrate and 73.9% for RTF. Total monthly cost to the state should be -\$592,047.335. This amount was Gerber's intent. Page 2 submitted in error has an incorrect amount of --\$473,989.205 monthly cost to state. Gerber requests the Procurement Officer to correct its bid to only reflect the rebate percentage on page 1 and the correct net cost bid of -\$592,047.335. The correction does not impact fair competition. Gerber's offer

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Suite 700 (29201)  
PO BOX 2426  
Columbia, SC 29202  
www.nexsenpruet.com

T 803.253.8275  
F 803.727.1467  
E MManos@nexsenpruet.com  
Nexsen Pruet, LLC  
**Attorneys and Counselors at Law**

Henry C. "Tripp" Clark (ClarkHC@DHEC.sc.gov)  
June 5, 2020  
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provided the lowest net cost to the state under either calculation. The total net cost to the state of the next best offer was approximately -\$419,000.000. Thus Gerber would be awarded the contract either way.

The correction does not prejudice the state. Gerber intended to offer the better total net cost of -\$592,047.

Thank you for your consideration of this request.

Respectfully submitted,

Marcus A. Manos  
Counsel for Gerber Products Co. d/b/a Nestlé Infant Nutrition

cc: E. Wade Mullins III, Esquire (via email: [wmullins@brunerpowell.com](mailto:wmullins@brunerpowell.com))  
Melissa J. Copland, Esquire (via email: [Missy@SchmidtCopeland.com](mailto:Missy@SchmidtCopeland.com))  
Manton M. Grier, Jr. (via email: [mgrier@ogc.sc.gov](mailto:mgrier@ogc.sc.gov))

Attachment 3

S. C. DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL  
BUREAU OF BUSINESS MANAGEMENT  
MEMORANDUM TO FILE

**SOLICITATION NO.:** 5400018781 WIC Infant Formula Rebate

**BUYER:** Laura M. Cravens

**P.O. NUMBER:**

**VENDOR:** Nestle / Gerber

**NOTE:** Each comment recorded below should indicate the date and the name of the corresponding party.

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June 18, 2020

On June 4<sup>th</sup>, 2020 after the bid opening at 2:30 PM, the procurement officer took the bids back to her office and entered each bid manually into the Attachment "B" bidding schedule to ensure accuracy of the information. Upon reviewing Gerber's bid, Page 2 of the bid did not appear to be accurately relayed based on the data submitted on Page 1. After a phone call discussion with the program area expert, it was determined that the price information that Gerber entered on Page 1 conveyed the intended bid prices per unit, and that Page 2 must have been an accidental submission, as Page 2 only performs the calculations of the data input on Page 1.

The draft of the Notice of Intent to Award was written on Friday, June 5<sup>th</sup> with an intent to notify Gerber on Monday, June 8<sup>th</sup> that the award would be made using the data on Page 1. On Monday morning, Gerber notified DHEC in writing that the Page 1 data was the intended bid data. This occurred as Business Management received confirmation from Kathy Santandreu of State Procurement to proceed with our intent to award action. Therefore, waiving the Page 2 error as the bid price had been established via Page 1, the procurement officer posted the Intent to Award to Gerber, as it was in the best interest of the State to proceed.

Due to the procurement officer travelling and coronavirus emergency procedures in place, and in order to avoid further delay in awarding a very time-sensitive contract, this determination was conducted verbally by Business Management and as of today has been conveyed to writing as is the required action.



Laura Cravens

## 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.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

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.**