

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: Cromer Food Services, Inc.

Case No.: 2021-103

Posting Date: August 6, 2020

Contracting Entity: Clemson University

Solicitation No.: 132930820

Description: Snack Vending for Clemson University

DIGEST

Protest alleging flawed evaluation is granted. The Protest letter of Cromer Food Services (CFS) is included by reference. (Attachment 1)

AUTHORITY

The Chief Procurement Officer¹ (CPO) conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on materials in the procurement file and applicable law and precedents.

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

BACKGROUND

Solicitation Issued:	06/22/2020
Amendment 1 Issued	07/08/2020
Amendment 2 Issued	07/10/2020
Intent to Award Posted	07/27/2020
Intent to Protest Received	07/29/2020
Protest Received	08/03/2020

Clemson University issued this Request for Proposals on June 22, 2020 to acquire snack-based services, and other vending services and equipment, for non-food items such as Personal Protective Equipment, non-food supplies, electronics, etc. An Intent to Award was posted to Canteen (Compass Group) on July 27, 2020. CFS filed an Intent to Protest with the Chief Procurement Officer on July 29, 2020, followed by a letter of protest on August 3, 2020.

ANALYSIS

The solicitation included the following evaluation criteria:

Award Criteria:

1. Percentage of Commission to Clemson
 - a. Fixed Guaranteed Commission Percentage to Clemson University
 - b. Value Added Incentives – if claiming incentives, offeror must provide a detailed breakdown of incentives with accurate, corresponding dollar value for each incentive. Financial incentives may include but are not limited to value added, special considerations, proposals, rebates and other incentives – scholarships, sponsorships. If there are conflicts in the incentives you propose or Clemson cannot clearly determine a clear value for your incentives, your offer may be deemed non-responsive.
 - c. Customer Service
 - o Customer service methods of contact for vending customers
 - o Response time for Clemson University service and repairs
 - d. Product Offerings
 - o Must minimally provide products that fall into each of the following categories: mints, gum, crackers, chips, pastry, candy, other foods
2. Company Overview
 - a. Supplier's Number of Year of Direct Experience in Vending Services
 - b. Number of counties currently serviced throughout South Carolina

CFS protests that Canteen's Fixed Guaranteed Commission Percentage to Clemson University was based on a proposed retail price increase that was not available to other bidders:

In every bid opportunity we have ever participated in, the criteria to follow has been set for each potential bidder. RFB criteria has always listed equipment, expectations for service, and pricing for the products. After considering each of these requirements, the vendor then provides a percentage of commission to be paid on the sales back to the institution. In the original scope of work, Clemson failed to provide the pricing to be charged in the machines. This resulted in confusion for potential bidders as preparations in determining the commission percentage are made based off what pricing is charged at the machines.

After the questions were issued by the potential bidders, the procurement officer requested a price list and stated that Clemson holds the right to discuss pricing further with the successful bidder. This answer caused many more questions but since the deadline for additional questions had already passed, there was no opportunity for additional clarity. The procurement officer then issued an updated scope of work that listed the current pricing that was being charged at Clemson. By doing this, it left further confusion regarding the bid.

Although Clemson stated that they would discuss pricing with the successful bidder, it did not clarify if a price increase would be allowed by Clemson or when pricing would be discussed. With this information, we were led to believe that the current prices being charged would be the expectation at the time of install and that discussions for pricing changes were possible in the future (during the life of the 5-year agreement) but not guaranteed. Because of this, we offered a commission rate based on the current pricing level.

Clemson announced their intent to award to Canteen on 7 /27 based on a 25% commission rate and \$35,000 in scholarships offered (actual offer from Canteen was \$30,000 in scholarships offered). We immediately requested a copy of the winning offer from Canteen and found that they had offered these incentives based on price increases and not based on the current pricing presented in the RFB. If we had been made aware in the RFB that Clemson would allow price increases, our percentage offered would have been much higher. The price increases proposed by Canteen represented between an 11% to 38% (depending on item) increase in retail prices for the students and faculty of Clemson University.

By changing the rules in the RFB after the fact, this presented an unfair playing field for all potential bidders. Had Cromer Food Services proposed a 30% commission rate with higher pricing than Canteen offered, who would have been awarded the business? Certainly, this would have resulted in a similar protest from Canteen. We are requesting that this Solicitation be reissued with the retail prices to be charged by all potential bidders. We are confident that this will result in a fair bidding process and a higher overall commission for Clemson University.

Protest Decision, page 4

Case No. 2021-103

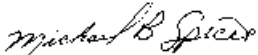
August 6, 2020

Clemson does not contest the points of protest (Attachment 2) and requests cancellation of the award, after award but prior to performance, so that it may revise the solicitation to provide a more clearly stated approach to the cost evaluation and issue a new solicitation. (Attachment 3)

DECISION

For the reasons stated above, the protest of Cromer Food Services is granted. The award to Canteen (Compass Group) is cancelled. The solicitation is cancelled, and Clemson University can satisfy its requirements with a new revised solicitation.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer



CROMER FOOD SERVICES, INC.

P.O. Box 1447 • Anderson, South Carolina 29622
1-800-922-3174 • www.cfsvending.com

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

August 3, 2020

Protest of Recent Intent to Award of Solicitation #132930820

Cromer Food Services wishes to protest the results of Solicitation #132930820, Snack Vending for Clemson University. Since 1981, Cromer Food Services has offered vending and food services to a variety of customers in the state of South Carolina. During that time, we have participated in over 25 RFB Solicitations for educational, correctional, and public health vending opportunities offered by the state.

In every bid opportunity we have ever participated in, the criteria to follow has been set for each potential bidder. RFB criteria has always listed equipment, expectations for service, and pricing for the products. After considering each of these requirements, the vendor then provides a percentage of commission to be paid on the sales back to the institution. In the original scope of work, Clemson failed to provide the pricing to be charged in the machines. This resulted in confusion for potential bidders as preparations in determining the commission percentage are made based off what pricing is charged at the machines.

After the questions were issued by the potential bidders, the procurement officer requested a price list and stated that Clemson holds the right to discuss pricing further with the successful bidder. This answer caused many more questions but since the deadline for additional questions had already passed, there was no opportunity for additional clarity. The procurement officer then issued an updated scope of work that listed the current pricing that was being charged at Clemson. By doing this, it left further confusion regarding the bid.

Although Clemson stated that they would discuss pricing with the successful bidder, it did not clarify if a price increase would be allowed by Clemson or when pricing would be discussed. With this information, we were led to believe that the current prices being charged would be the expectation at the time of install and that discussions for pricing changes were possible in the future (during the life of the 5-year agreement) but not guaranteed. Because of this, we offered a commission rate based on the current pricing level.

Clemson announced their intent to award to Canteen on 7/27 based on a 25% commission rate and \$35,000 in scholarships offered (actual offer from Canteen was \$30,000 in scholarships offered). We immediately requested a copy of the winning offer from Canteen and found that they had offered these incentives based on price increases and not based on the current pricing presented in the RFB. If we had been made aware in the RFB that Clemson would allow price increases, our percentage offered would have been much higher. The price increases proposed by Canteen represented between an 11% to 38% (depending on item) increase in retail prices for the students and faculty of Clemson University.

By changing the rules in the RFB after the fact, this presented an unfair playing field for all potential bidders. Had Cromer Food Services proposed a 30% commission rate with higher pricing than Canteen offered, who would have been awarded the business? Certainly, this would have resulted in a similar protest from Canteen. We are requesting that this Solicitation be reissued with the retail prices to be charged by all potential bidders. We are confident that this will result in a fair bidding process and a higher overall commission for Clemson University.

Sincerely,

A handwritten signature in black ink, appearing to read "Brent Cromer", written over a horizontal line.

Brent Cromer
President
Cromer Food Services

Attachment 2

From: [Michael Nebesky](#)
To: [Spicer, Michael](#); [April Pitts](#)
Subject: Re: [External] Protest of Solicitation #132930820 Clemson Snack Vending Services
Date: Tuesday, August 4, 2020 10:20:46 AM

Mike

Thanks. To confirm per our previous email and request to cancel the award, Clemson does not contest the points made in this protest and we believe the only fair way to handle this would be to rebid with some change to the scope and award criteria.

Please let us know if you need anything else from us at this point.

Thank you

Mike

Mike Nebesky **CLEMSON UNIVERSITY**

Procurement Director
Procurement and Business Services
391 College Ave, Suite 203, SC 29634
864.656.2067 Office

Procurement and Business Services website
Current Bid Opportunities

Attachment 3



July 31, 2020

Mr. Michael Spicer
Procurement Services
1201 Main St., Suite 600
Columbia, SC 29201

Re: Request for Cancellation of Award Prior To Performance

Dear Mr. Spicer:

I respectfully request cancellation of the award for solicitation #132930820 Vending Services based on inadequate or ambiguous specifications were cited in the invitation under Regulation 19-445.2085(C)(1).

Historically, Clemson has utilized a third-party supplier to provide vending services via our campus Dining Contract. Recently and upon its renewal, this service was phased out of this contract and the option to continue providing vending services for the campus fell to Clemson University.

Upon creating this new solicitation, Clemson University provided current pricing & historical information and directed that offerors utilize this information as a basis for suppliers to provide a guaranteed revenue percentage. This percentage was used as a basis of award. It was brought to our attention after the Intent to Award that there was a flaw in our logic; that a specific pricing scenario was the best way to ensure apples-to-apples comparison of offers.

In an effort to remedy any confusion that may have occurred and provide the fairest decision for all offerors, Clemson University requests this award be cancelled so that we may resolicit this service and provide a more clearly stated approach to the cost evaluation. Continuing with the award as made or even changing the award by different interpretation of the award criteria would leave one offeror slighted in either case.

I submit this request for your consideration and am available to answer any questions you may have - please contact me at 864-656-2067 or mnebesk@clemson.edu.

A handwritten signature in black ink, appearing to read "Mike Nebesky".

Mike Nebesky
Director, Procurement Services

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.