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MICHAEL B. SPICER
INFORMATION TECHNOLOGY MANAGEMENT OFFICER
(803) 737-0600
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Protest Decision

Matter of: Thermo-Lay Manufacturing, LLC

Case No.: 2021-107

Posting Date: September 30, 2020

Contracting Entity: South Carolina Department of Transportation

Solicitation No.: 5400018763

Description: Truck-Mounted Asphalt Patcher

TDIGEST

Protest by low bidder of a non-responsive determination is denied. The protest letter of Thermo-Lay Manufacturing (TLM) 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:	03/06/2020
Amendment 1 Issued	03/18/2020
Intent to Award Posted	08/25/2020
Intent to Protest Received	08/26/2020
Protest Received	09/08/2020

The South Carolina Department of Transportation (DOT) issued this Invitation for Bids on March 6, 2020 to acquire truck-mounted asphalt patching machines designed to facilitate pavement repair of potholes, cracks and other pavement degradations. An Intent to Award was posted to Excel Truck Group (ETG) on August 25, 2020. TLM filed an intent to protest with the CPO on August 26, 2020 and the protest on September 8, 2020.

ANALYSIS

TLM protests that DOT erred in determining the TLM bid nonresponsive to three specifications and questioning TLM's ability to meet warranty requirements. DOT determined that TLM's bid was nonresponsive to specification Section III: 4.6 which reads:

- 4.6. 5 foot liquid asphalt hand sprayer w/ minimum 15 ft. hose with flush system for cleaning pump, hose, and sprayer. The tank shall have an automatic emulsion rejuvenator system to keep the emulsion oil from separating.

(emphasis added) [Solicitation, Page 13]

TLM protests:

We provide a reversible pump as a standard which allows for agitation of the emulsion oil to help prevent separation. None of our submitted materials indicates that this specification cannot be met.

[Attachment 1]

DOT responds:

This specification required an automatic emulsion rejuvenator system. Thermo-Lay Manufacturing's submission stated they would provide a pump drive directional, which did not meet the specification. Further, in their complaint they indicate they can provide a reversible pump that allows for agitation. This is not an automatic emulsion system, and does not meet the specifications of the solicitation.

[Attachment 2]

A reversible pump is not an automatic emulsion rejuvenator. Protest denied.

DOT also found TLM nonresponsive to Section III: 5.1.2 which required:

5.1.2. The system shall have a dry radiant heat chamber, heated by two burners with vertical exhaust stacks.

[Solicitation, Page 13]

TLM protests:

For a dry radiant system, we provide 4 exhaust stacks with an automatic, electronic damper that closes when the propane burners are not engaged to prevent unnecessary heat loss. Please note photos that are of a unit we built for Clemson University in December 2019 which shows the exhaust stacks. There are 2 on each side.

[Attachment 1]

DOT responds:

Thermo-Lay Manufacturing's submission indicated they provide to [sic] (2) thermostats, but did not specify they could provide the electric dampers, as required. Further, in the equipment brochures provided, there were no vertical exhausts evident, which indicated the specification was not met. While they may be able to custom build to requirements, this was not indicated in their bid submission and we could only evaluate the information provided.

[Attachment 2]

TLM included a brochure with its bid (Attachment 3) that has eight pictures of vehicles and none show vertical exhausts as shown in the picture included in its letter of protest, Attachment 1.

The Procurement Review Panel set the standard for review of responsiveness as follows:

This solicitation was conducted under section 11-35-1520 of the Procurement Code, which provides that award will be made "to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids" unless there is a compelling reason to reject a bid. S.C. Code Ann. § 11-35-1520(10) (2011). A "responsive bidder" is "a person who has submitted a bid ... which conforms in all material aspects to the invitation for bids." S.C. Code Ann. § 11-35-1410(7) (2011). The Panel has consistently held that the responsiveness of a sealed bid must be determined at the time of bid opening solely from the four corners of the bid document. *Appeal by Greenville Office Supply*, Panel Case No. 2014-5 (September 10, 2014); *Appeal by Two State Construction, Co.*, Panel Case No. 1996-2 (April 1, 1996).

See IN RE: Appeal by Butler Chrysler Dodge Jeep, LLC, Panel Case 2016-13. (emphasis added)

Looking at the four corners of the TLM bid, it was properly determined to be nonresponsive to this specification. This issue of protest is denied.

DOT also found the TLM bid nonresponsive to specification Section III: 6.8 which requires:

- 6.8. Hydraulically operated rear lift platform to secure vibratory roller mounted on right rear of the unit. Platform shall be secured in the up position for transport.

[Solicitation, Page 13]

TLM protests:

On page 7 of the specifications that we submitted; you will see that we indicated that the lift will be placed on the rear of the patch body. It is true that we offer multiple lift locations and we will put the lift in any one of four spots, behind the cab on both driver and passenger side as well as both rear locations which include the driver and passenger sides. Please observe the same truck that was built for Clemson University that shows the lift location on the rear of the patch body (this can be placed on passenger rear also). Once again, there was nothing that we submitted that indicates that we cannot meet this specification.

[Attachment 1]

DOT responds:

Thermo-Lay Manufacturing's submission listed the hydraulic life location as driver's side rear (left rear), and the photographs provided with their submission show this configuration. The specification was for the placement on the passenger side (right rear), for operator safety. Their submission did not meet specifications.

[Attachment 2]

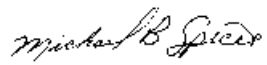
TLM included a specification sheet with its bid which indicates that the hydraulic lift for the roller is located on the driver side rear of the vehicle. The attached brochure also shows lift on left rear of the vehicle. Based on the four corners of the bid, TLM's bid was nonresponsive to this specification. This issue of protest is denied.

DOT also included a note of concern about TLM's ability to meet the warranty requirements of the solicitation in its determination of nonresponsibility but did not include this as an issue of nonresponsiveness. TLM's protest of this issue is denied as moot.

DECISION

For the reasons stated above, the protest of Thermo-Lay Manufacturing is denied.

For the Materials Management Office

A handwritten signature in cursive script, appearing to read "Michael B. Spicer".

Michael B. Spicer
Chief Procurement Officer

Attachment 1

From: brian@thermo-lay.com
To: [Protest-MMO](#)
Subject: [External] Formal Protest of 5400018763 - Procurement Officer Jeffery Schwalk
Date: Tuesday, September 8, 2020 4:59:49 PM
Attachments: [Solicitation 5400018763_Determination with responses 20200904.pdf](#)

Good afternoon,

Please accept this as our formal protest of the award of Solicitation 5400018763.

I have attached a document that responds to each of the 3 line items which led to the "non-responsive" finding. The basis of our protest is that the evaluation was not done using information submitted with our response and therefore produced an incorrect finding.

We are a manufacturer that has been in existence since 1978 with a reputation for building quality machines while providing excellent service and support after the initial sale. Most importantly, we are able to provide warranty and post-warranty support for machines sold all throughout the US and Canada. We build each machine to order so therefore we are able to meet most specifications if it relates to an auger-driven patch body. Having said that, we will not submit bids for solicitations where we cannot meet all of the specifications which allows us to maintain our reputation for building quality patch bodies.

Please do not hesitate to contact me if you have any questions.

Sincerely,
Brian Adkins
General Manager
brian@thermo-lay.com
406.690.5852 Cell
406.545.2907 Office



Attachment 2

Solicitation 5400018763 – Truck-Mounted Asphalt Patcher

Determination of Non-Responsive Bid: Submitted bid did not meet specifications

Please note responses to each deficiency below...

It has been determined through review of submitted bids that the offer submitted by the apparent low bidder, Thermo Lay Manufacturing LLC, does not meet the specifications outlined in Section III of the solicitation document.

The deficiencies are as follows:

- 1) Section III: 4.6 specifies an automatic rejuvenator system and the contractor can only provide a pump-based system. **We provide a reversible pump as a standard which allows for agitation of the emulsion oil to help prevent separation. None of our submitted materials indicates that this specification cannot be met.**
- 2) Section III: 5.1.2 specifies vertical exhaust stacks with electronic damper to prevent heat loss, and the contractor is unable to meet this specification. **For a dry radiant system, we provide 4 exhaust stacks with an automatic, electronic damper that closes when the propane burners are not engaged to prevent unnecessary heat loss. Please note photos that are of a unit we built for Clemson University in December 2019 which shows the exhaust stacks. There are 2 on each side.**





- 3) Section III: 6.8 specifies the roller to be on the right rear, away from traffic for safety. The contractor's equipment has the roller on the front of the body on the driver's side, which would put our driver/operator in the path of traffic. **On page 7 of the specifications that we submitted; you will see that we indicated that the lift will be placed on the rear of the patch body. It is true that we offer multiple lift locations and we will put the lift in any one of four spots, behind the cab on both driver and passenger side as well as both rear locations which include the driver and passenger sides. Please observe the same truck that was built for Clemson University that shows the lift location on the rear of the patch body (this can be placed on passenger rear also). Once again, there was nothing that we submitted that indicates that we cannot meet this specification.**

As an additional note, there is concern that the WARRANTY (Special) provision may not be able to be met, as there are no registered parts and services dealerships provided, and the factory is Montana based, with 8 employees. **We can meet the WARRANTY (Special) provision regardless of our location and number of employees. We have sold machines all over the United States since 1978 without the use of patch body dealers in most areas. Depending on the severity of the claim, we will send our technician to the equipment location (at our expense). On the more minor instances, we will reimburse the customer for labor or contract with a local repair facility if the customer is unable to perform the repair. In all cases, we will reach a reasonable plan that will allow for the least machine down-time. All of this will be provided in writing upon delivery of a unit.**

As an additional note, we have many customers on the Eastern side of the United States that would be willing to discuss our warranty instances (rate) and warranty process upon these instances. These references are available upon request.

Due to these deficiencies, and subject to R 19—445.2070 (A), this bid is found to be non-responsive and is rejected.

May 15, 2020

Jeffery Schwalk
Procurement Officer



South Carolina
Department of Transportation

Procurement Director
Commodities & Service Contracts
Emmett I. Kirwan
(803) 737-0676 ♦ Fax (803) 737-2046

September 15, 2020

RE: Protest to 5400018763/Thermo-Lay Manufacturing: Case 2021-107

Mr. Spicer,

The following is the SCDOT response to the Protest filed by Thermo-Lay Manufacturing on September 8, 2020, pursuant to Solicitation 5400018763.

Thermos-Lay Manufacturing is protesting the SCDOT Determination of Non-Responsive Bid.

SCCDOT summarizes and responds the four (4) items included in the Protest as follows:

1) Section III: 4.6 specifies an automatic rejuvenator system and the contractor can only provide a pump-based system.

Thermo-Lay Manufacturing's Complaint:

We provide a reversible pump as a standard which allows for agitation of the emulsion oil to help prevent separation. None of our submitted materials indicates that this specification cannot be met.

SCDOT Response:

The specification is stated as follows in Section III: 4.6:

4.6. 5 foot liquid asphalt hand sprayer w/ minimum 15 ft. hose with flush system for cleaning pump, hose, and sprayer. The tank shall have an automatic emulsion rejuvenator system to keep the emulsion oil from separating.

This specification required an automatic emulsion rejuvenator system. Thermo-Lay Manufacturing's submission stated they would provide a pump drive directional, which did not meet the specification. Further, in their complaint they indicate they can provide a reversible pump that allows for agitation. This is not an automatic emulsion system, and does not meet the specifications of the solicitation.

2) Section III: 5.1.2 specifies vertical exhaust stacks with electronic damper to prevent heat loss, and the contractor is unable to meet this specification.

Thermo-Lay Manufacturing's Complaint:

For a dry radiant system, we provide 4 exhaust stacks with an automatic, electronic damper that closes when the propane burners are not engaged to prevent unnecessary heat loss. Please note photos that are of a unit we built for Clemson University in December 2019 which shows the exhaust stacks. There are 2 on each side.

SCDOT Response:

The specification is states as follows in Section III: 5.1.2:

5.1.2. The system shall have a dry radiant heat chamber, heated by two burners with vertical exhaust stacks.

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Thermo-Lay Manufacturing's submission indicated they provide to (2) thermostats, but did not specify they could provide the electric dampers, as required. Further, in the equipment brochures provided, there were no vertical exhausts evident, which indicated the specification was not met. While they may be able to custom build to requirements, this was not indicated in their bid submission and we could only evaluate the information provided.

3) Section III: 6.8 specifies the roller to be on the right rear, away from traffic for safety.

The contractor's equipment has the roller on the front of the body on the driver's side, which would put our driver/operator in the path of traffic.

Thermo-Lay Manufacturing's Complaint:

On page 7 of the specifications that we submitted; you will see that we indicated that the lift will be placed on the rear of the patch body. It is true that we offer multiple lift locations and we will put the lift in any one of four spots, behind the cab on both driver and passenger side as well as both rear locations which include the driver and passenger sides. Please observe the same truck that was built for Clemson University that shows the lift location on the rear of the patch body (this can be placed on passenger rear also). Once again, there was nothing that we submitted that indicates that we cannot meet this specification.

SCDOT Response:

The specification is stated as follows in Section III: 6.8.:

Hydraulically operated rear lift platform to secure vibratory roller mounted on right rear of the unit. Platform shall be secured in the up position for transport.

Thermo-Lay Manufacturing's submission listed the hydraulic lift location as driver's side rear (left rear), and the photographs provided with their submission show this configuration. The specification was for the placement on the passenger side (right rear), for operator safety. Their submission did not meet specifications.

4) As an additional note, there is concern that the WARRANTY (Special) provision may not be able to be met, as there are no registered parts and services dealerships provided, and the factory is Montana based, with 8 employees.

Thermo-Lay Manufacturing's Complaint:

We can meet the WARRANTY (Special) provision regardless of our location and number of employees. We have sold machines all over the United States since 1978 without the use of patch body dealers in most areas. Depending on the severity of the claim, we will send our technician to the equipment location (at our expense). On the more minor instances, we will reimburse the customer for labor or contract with a local repair facility if the customer is unable to perform the repair. In all cases, we will reach a reasonable plan that will allow for the least machine downtime. All of this will be provided in writing upon delivery of a unit.

As an additional note, we have many customers on the Eastern side of the United States that would be willing to discuss our warranty instances (rate) and warranty process upon these instances. These references are available upon request.

SCDOT Response:

SCDOT was unable to locate a listing of service providers within a reasonable distance. While Thermo-Lay Manufacturing asserts they can meet WARRANTY (SPECIAL) Provisions regardless of location and number of employees, they failed to provide procedures, instructions, and forms

needed for warranty claims with their bid, as requested in Section VII TERMS and CONDITIONS
– B. SPECIAL: WARRANTY (SPECIAL) which states:

WARRANTY (SPECIAL)

The patcher unit shall be warranted against defects in materials and workmanship for a period of not less than twelve (12) months. The warranty start date shall be based on the unit's in-service date as established by its issue from the Department's Equipment Depot to the using field custodian and the vendor shall perform all the administrative work necessary to accomplish this following notification by the Department.

In the event there is not an authorized parts and service dealership within a reasonable distance of the unit's place of assignment, there shall be a procedure for the Department to make a claim for recovering the cost of parts, labor, and shipping/transport charges incurred in performing repairs which otherwise would have been covered by the warranty. Instructions and forms needed for warranty claims should be attached to the bid.

The unit shall be furnished with a copy of the warranty statement and any necessary cards, booklets, or certificates needed to receive warranty repairs at a dealership.

The truck cab-chassis shall be warranted against defects in materials and workmanship for a period of not less than twelve (12) months. The engines shall be warranted against defects in materials and workmanship for a period of not less than forty-eight (48) months- 100,000 miles (pro-rating not allowed), to include connectors and adapters to the transmission. The transmission shall be warranted for a period of not less than twenty-four (24) months- 50,000 miles (pro-rating allowed). The unit shall be furnished with a copy of the warranty statement and any necessary cards, booklets or certificates needed to receive warranty repairs at a dealership.

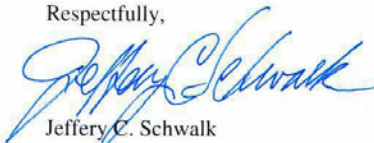
As such, SCDOT determined there was cause for concern about the ability of this bidder to provide efficient and timely response to warranty issues.

Section III: SCOPE OF SPECIFICATIONS: 2. GENERAL states:

The units shall be of the latest design and in current production. They shall be furnished completely assembled, fully serviced, and ready for immediate operation. The right is reserved to reject any and all bids proposing to furnish equipment which, in the opinion of the Department's engineers and/or staff, is not satisfactory for the Department's use in the proposed application.

In SCDOT's evaluation, this equipment did not meet specifications, and is not satisfactory for the Departments use.

Respectfully,



Jeffery C. Schwalk

Procurement Manager/SCDOT

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Northwest Manufacturing and Distribution Inc. began making the Thermo-Lay Pothole Patcher in 1978. During the last 40 years, high quality machines have been shipped not only domestically but all over the world. In 2017, the company changed ownership and became Thermo-Lay Manufacturing. Thankfully, the entire team made the transition and we are still making the same, superior quality machines that we always have.

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- 2-Speed Auger Motor
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- 180° Delivery Chute
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- Short Turning Radius
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- UD 625-120 - 6.25 Yard Tandem Axle





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STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2019)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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

FILING FEE: Pursuant to Proviso 111.1 of the 2019 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. [The Request for Filing Fee Waiver form is attached to this Decision.] If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1205 Pendleton Street, Suite 367, Columbia, SC 29201

Name of Requestor

Address

City

State

Zip

Business Phone

-
1. What is your/your company's monthly income? _____
2. What are your/your company's monthly expenses? _____
3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.