

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

Flint Equipment Company

Materials Management Office
IFB No.: 5400004309

Statewide Term Contract for
Motor Graders and Backhoes

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2012-137

POSTING DATE: October 8, 2012

MAILING DATE: October 8, 2012

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest dated August 7, 2012 (filed with the CPO August 9, 2012), from Flint Equipment Company (Flint). With these invitations for bids (IFB), the South Carolina Materials Management Office (MMO) attempts to procure statewide term contracts for motor graders and backhoes. Flint protested the awards, complaining that MMO did not issue awards for each line item to the low bidder and every other bidder whose bid price was within four percent (4%) of the low bid. As relief, Flint asked, "I am requesting the three low bidders be included, Volvo, John Deere and Caterpillar on the state contract. By doing so, the purchasing agencies can make their own decision as to what is in their best interest and tax payer. The state DOT can also buy the low bid if that is what they chose [*sic*]."

As the controlling issue in this case is a matter of law, this decision is prepared without the benefit of a hearing.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On May 21, 2012, MMO issued IFB No. 5400004309. On pages 12 and 13, it included the following provisions:

I. SCOPE OF SOLICITATION

It is the intent of MMO to establish statewide term contracts for Heavy Duty Motor Graders and Backhoes (Medium, Heavy Duty and Super Duty). These contracts may be used by State Agencies and political subdivisions in South Carolina. This is a one-year contract with two additional one-year renewal options. The maximum potential contract period is 3 years. We anticipate awarding up to 3 contracts per line item. No manufacturer will be awarded more than one contract per line item. The intention is to provide flexibility to contract users while promoting salutary competition. (Ex. 1, p. 4)

The IFB read further regarding the determination of awards:

AWARD CRITERIA -- BIDS

The State anticipates making award(s) to multiple bidders by individual line item. There is no guarantee of award to any specific number of bidders.

Award(s) may be considered to:

1. The lowest responsive and responsible bidder for each line item, and
2. Other responsive and responsible bidders whose price is within 4% of the lowest responsive and responsible bid for that same line item.

Award(s) may be issued up to the 3 (three) lowest responsible and responsive [reasonable] offerors per line item. No manufacturer will be awarded more than one contract on each line item. The number of contracts awarded may be less if fewer than 3 responsive and responsible offers are received for any line item whose price is within 4% of the lowest responsive and responsive bid for the same line item.

2. On June 12, 2012, MMO conducted a pre-bid conference.
3. On June 19, 2012, MMO issued Amendment 1 to the IFB. (Ex. 2) It made substantive changes rewriting the entire IFB, as follows:

IMPORTANT NOTICE: To be consistent with the manner in which equipment amendments have been processed in the past, the state has opted to issue a complete new document. This approach has been selected in an effort to ensure the clarity of the

contract documents during both the “Pre-Award” and “Post Award” phases of this procurement.

Prospective bidders should discard the original solicitation document and use this document when preparing their on-line bids.

The original Amendment 1 included the underling and capitalization shown above, and its text was highlighted in yellow. (Ex. 2, p. 4)

The Scope of Solicitation section quoted above was rewritten, as follows:

I. SCOPE OF SOLICITATION

It is the intent of MMO to establish statewide term contracts for Heavy Duty Motor Graders and Backhoes (Medium, Heavy Duty and Super Duty). These contracts may be used by State Agencies and political subdivisions in South Carolina. This is a one-year contract with two additional one-year renewal options. The maximum potential contract period is 3 years. ~~We anticipate awarding up to 3 contracts per line item.~~ No manufacturer will be awarded more than one contract per line item. The intention is to provide flexibility to contract users while promoting salutary competition. (Ex. 2, p. 5)

The award provisions were changed to read:

AWARD CRITERIA -- BIDS

The State anticipates making award(s) to multiple bidders by individual line item. There is no guarantee of award to any specific number of bidders.

Award(s) may be considered to:

1. The lowest responsive and responsible bidder for each line item, **and**
2. All other responsive and responsible bidders whose price is within 4% of the

lowest responsive and responsible bid for that same line item.

~~Award(s) may be issued up to the 3 (three) lowest responsible and responsive [reasonable] offerors per line item. The number of contracts awarded may be less if fewer than 3 responsive and responsible offers are received for any line item whose price is within 4% of the lowest responsible and responsive bid for the same line item.~~ **No manufacturer will be awarded more than one contract on each line item.** (Ex. 2, p.42)

Again, language deleted or added by the amendment was indicated by struck-through text or bolded and underlined text, respectively, and highlighted in yellow.

4. On June 26, 2012, MMO closed the question period.
5. On June 27, 2012, MMO issued Amendment #2 (Ex. 3) that also substantially rewrote the solicitation reading:

IMPORTANT NOTICE: To be consistent with the manner in which equipment amendments have been processed in the past, the state has opted to issue a complete new document. This approach has been selected in an effort to ensure the clarity of the contract documents during both the “Pre-Award” and “Post Award” phases of this procurement.

*****Prospective bidders should discard the original solicitation document and use this document when preparing their on-line bids.*****

Changed language in Amendment 2 was emphasized as it had been in the first amendment. (Ex.

3, p. 4) However, Amendment #2 made no further changes to the revised award criteria.

6. On June 28, 2012, MMO issued Amendment #3, which made no changes to the provisions for award. (Ex. 4)
7. On July 17, 2012, MMO opened the bids received.
8. On August 2, 2012, DOT posted Statements of Award (Ex. 5) as follows:

<u>Item #</u>	<u>Description</u>	<u>Awarded Bidder</u>
1	Super Duty Backhoe	Altman Tractor & Equipment
1	Super Duty Backhoe	Hills Machinery Company
2	Medium Duty Backhoe	Flint Equipment Company
2	Medium Duty Backhoe	Hills Machinery Company
3	Heavy Duty Backhoe	Altman Tractor & Equipment
3	Heavy Duty Backhoe	Flint Equipment Company
4	Heavy Duty Backhoe w/ Options	Altman Tractor & Equipment
5	Heavy Duty Motor Grader	ASC Construction Equipment

9. On August 9, 2012, Flint filed its protest with the CPO.
10. On August 10, 2012, MMO suspended the intents. (Ex. 6)

CONCLUSIONS OF LAW

Flint's protest letter states:

Please be advised that we respectfully protest the award of contract 4400005538 for Motor Graders under the State of South Carolina MMO Term Contract. We strongly feel the award is contrary to the intent of the state contract. It clearly limits or prevents any deviations from the supposedly, low bidder process and is in difference to the previous state contract, dated April 13, 2010 and ended April 12, 2012. In that contract award was based on the three lowest bidders regardless of price difference as long as bidders met state specifications. All purchasing bodies could make their own decision between, Volvo, John Deere and Komatsu motor graders as to which manufacturer was in their best interest to purchase. By limiting the award to only those bidders that come within 4% of the low bid you have therefore awarded the contract to the lowest bidder as the second and third place bidders exceeded the 4% prices difference. The contract as written is taking away the process of fairness and evaluation of product, manufacturer preference, dealer support and location in relevance to the end user. It also takes away the past experience part of the purchasing equation that is so important as to operating cost, cost to repair, parts cost and product life.

The original IFB indicated that awards would be made as Flint argues. Amendment #1, issued June 19, 2012, rewrote the award section. It retained the permissive language permitting consideration for award of each item to the lowest responsive and responsible bidder and all other responsive and responsible bidders whose bid price is within 4% of the lowest responsive bid for that same line item. It eliminated all references to "three offerors," in the description of the criteria and in the example. Flint did not protest the amendment. The rewritten award provisions of the IFB were reiterated by Amendment #2, dated June 27, 2012. Flint did not protest Amendment #2 either.

Section 11-35-4210(1)(b) of the Consolidated Procurement Code permits protests of the award of a contract:

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is

earlier, is posted in accordance with this code; **except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.**

(emphasis added) Section 11-35-4210(1)(a) requires protests of a solicitation be filed within fifteen days of its issuance.

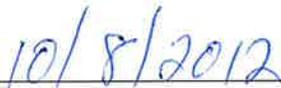
Any protest over the structure of how many awards would be made should have been filed in response to Amendment 1, or no later than July 5, 2012. Flint did not protest until August 9, 2012, over a month later. Its protest is not timely.

DETERMINATION

For the foregoing reasons the protest is dismissed.



R. Voight Shealy
Chief Procurement Officer
For Supplies and Services



Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised July 2012)

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>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2012 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, an incorporated business must retain 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).

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, 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.



FLINT EQUIPMENT COMPANY

August 7, 2012

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29021

Reference: Solicitation 5400004309

Description: Motor Graders & Backhoe
Statewide Term Contract

Subject: Protest of Award for Motor Graders
Contract Number: 4400005538

Please be advised that we respectfully protest the award of contract 4400005538 for Motor Graders under the State of South Carolina MMO Term Contract. We strongly feel the award is contrary to the intent of the state contract. It clearly limits or prevents any deviations from the supposedly, low bidder process and is in difference to the previous state contract, dated April 13, 2010 and ended April 12, 2012. In that contract award was based on the three lowest bidders regardless of price difference as long as bidders met state specifications. All purchasing bodies could make their own decision between, Volvo, John Deere and Komatsu motor graders as to which manufacturer was in their best interest to purchase. By limiting the award to only those bidders that come within 4% of the low bid you have therefore awarded the contract to the lowest bidder as the second and third place bidders exceeded the 4% prices difference. The contract as written is taking away the process of fairness and evaluation of product, manufacturer preference, dealer support and location in relevance to the end user. It also takes away the past experience part of the purchasing equation that is so important as to operating cost, cost to repair, parts cost and product life.

Not wanting to belabor this, I would like to point out that in the 2010 state contract in which we were second to Volvo in pricing, John Deere sold 29 motor graders and wrote checks to the State of South Carolina in the amount of \$ 35,770.99. These deliveries were the result of counties, National Guard, SCDNR acting as independent agencies to decide they preferred the higher price machine for several reasons. It is extremely costly for towns, counties, water districts, etc. to go out for bid. The State of South Carolina MMO contract offers them the opportunity to buy the product they feel best suits their equipment needs, budgets and repair options so long as you are on the state contract. Several agencies have voiced concern at the intent of the state to award motor graders to only one bidder. You will be forcing these agencies to look at total cost bids, working through buying coops or using a variety of lease options which ultimately will cost the state rebate fees.

Branch Office:

3464 Sunset Boulevard
West Columbia, South Carolina 29169
Office: 803-794-9340
Fax: 803-794-9346

Locations:

Albany, Georgia
Adairsville, Georgia
Atlanta, Georgia
Aynor, South Carolina
Braselton, Georgia
Brunswick, Georgia

Columbus, Georgia
Cuthbert, Georgia
Dothan, Alabama
Grovetown, Georgia
Ladson, South Carolina
Macon, Georgia
Perry, Florida

Savannah, Georgia
Simpsonville, South Carolina
Tallahassee, Florida
Troy, Alabama
Walterboro, South Carolina
West Columbia, South Carolina

www.flintequipco.com



JOHN DEERE
A FlintGo Company

I am requesting the three low bidders be included, Volvo, John Deere and Caterpillar on the state contract. By doing so, the purchasing agencies can make their own decision as to what is in their best interest and tax payer. The state DOT can also buy the low bid price if that is what they chose.

John Deere is a U. S. based manufacturer with many facilities in this country. Also, Flint Equipment Company is an equipment dealership with 19 branch locations of which 6 are located right here in South Carolina. Flint Equipment is owned by Mr. Chris Cannon with corporate headquarters in Albany, Georgia. John Deere and Flint Equipment Company are truly U.S. The low bidder cannot make that claim.

I would like to leave open the door to further discuss this issue as based on the current direction this is not headed in the best interest of the tax payers of South Carolina or the local government entities.

Respectfully,

A handwritten signature in cursive script that reads "Bob Thompson". The signature is written in black ink and is positioned above the typed name.

Bob Thompson
Carolina Division Manager