

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

BioGX, Inc.

Department of Health and
Environmental Control

IFB No. 5400005189
Cepheid Smart Cycler II – Two-Block
Desktop System

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2013-101

POSTING DATE: March 6, 2013

MAILING DATE: March 6, 2013

This matter is before the Chief Procurement Officer (CPO) pursuant to a protest emailed to Matt Winslow, DHEC Procurement Officer, on January 7, 2013 from Michael Vickery, Ph.D., CSO, EVP & Founder of BioGX, Inc. Mr. Winslow forwarded the protest email to the CPO on January 8, 2013.¹ With this invitation for bids (IFB), the South Carolina Department of Health and Environmental Control (DHEC) attempts to procure a Cepheid Smart Cycler II – Two-Block Desktop System. Following evaluation of the bids, DHEC posted its Statement of Award to Fisher Scientific Co., LLC (Fisher). BioGX protested the award, alleging:

To our knowledge Fisher Scientific does not have scientific staff trained in Cepheid instrument setup, real-time PCR, and Cepheid Smart Cycler software training. BioGX quoted a price that includes onsite setup and full training for up to 2 days as per the bid specification. If SC does not require these services we quoted a deduction of \$2,000.00 from our quoted price of \$53,230.12, which

¹ The Consolidated Procurement requires that every protest be filed with the Chief Procurement Officer. In this case, BioGX did not file its protest with the CPO, but rather with Madison Winslow, Procurement Manager for DHEC. However, DHEC contributed to the problem. The Code requires the purchasing agency to advise bidders on every Statement of Award how to file a protest with the CPO. On the Statement of Award, DHEC used an unauthorized clause providing bidders an incorrect email address for filing a protest with the CPO. DHEC advised bidders to email protests to mmo@mo.sc.gov. The correct protest email address for this CPO, which must be provided on every award, is Protest-MMO@mmo.sc.gov. Fortunately, neither mistake was fatal because the protest was forwarded to the CPO within the filing period.

would bring the total to \$51,230.12, well below Fisher's quoted price of \$52,000.00. Cepheid offers a free web based very basic training upon request.

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

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On November 27, 2012, DHEC issued IFB No. 5400005189. (Ex. 1)
2. On December 13, 2012, DHEC opened the bids received.
3. On January 3, 2013, DHEC posted a Statement of Award to Fisher for \$52,000. (Ex. 2)
4. On January 7, 2013, BioGX emailed its protest to Madison Winslow of DHEC.
5. On January 8, 2013, DHEC forwarded BioGX's protest to the CPO.

DISCUSSION

The IFB read, "It is the intent of the State of South Carolina, South Carolina Department of Health and Environmental Control (DHEC) to solicit offers to purchase a Cepheid Smart Cycler II Two-Block Desktop System in accordance with the requirements stated herein." (Ex. 1, p. 3, Scope of Solicitation) Due to an embedded base of equipment, DHEC solicited bids for a Cepheid Smart Cycler II Two-block Desktop system and required all bidders to "Bid as Specified." (Ex. 1, p. 14) Substitutions were not allowed.

The Specifications required bidders to include in their bid prices the equipment, a one-year manufacturer's (Cepheid) standard warranty, support, and shipping. "Support" included on-site installation and training.

CONCLUSIONS OF LAW

BioGX alleged that Fisher's bid was nonresponsive to the requirement for training, which read:

3.1.3.2 Training must be conducted at DHEC's Bureau of Laboratories location and include familiarization, routine operation, trouble shooting, and familiarization with unique features and capabilities.

3.1.3.2.1 Training must be conducted over a minimum of two days for laboratory staff.

3.1.3.2.2. Training costs are to be inclusive of all travel related charges and are the responsibility of the bidder.

(Ex. 1, p.14, 3.1 Specifications)

Tom Nicholson submitted Fisher's written response writing, "Fisher Scientifics' price submission is fully inclusive of installation and training in accordance with the required specification. These services will be provided on our behalf by fully trained and qualified personnel from the product manufacturer, Cepheid."

Madison Winslow, DHEC Procurement Manager, also submitted written response writing, "The award was based on bid responses for the total price, to include the above-referenced support. BioGX quoted a total price of \$53,230.12 while the low bidder (Fisher Scientific) bid a total price of \$52,000.00. DHEC had (and has) no reason to believe Fisher Scientific is incapable of providing the required support."

Regarding an IFB, the Consolidated Procurement Code requires award, "to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids." S.C. Code Ann. § 11-35-1520(10) (2011)

Fisher submitted the lowest bid price. DHEC evaluated Fisher's bid and determined it responsive to the requirements of the IFB. BioGX submitted no evidence to the contrary. In his protest letter, Michael Vickery of BioGX did not allege he knew that Fisher was nonresponsive, he merely implied it, writing "*to our knowledge* Fisher Scientific does not have scientific staff trained." (Emphasis added) Worse, regarding bid prices, Mr. Vickery wrote that BioGX offered the full training required; implying, but not actually alleging that Fisher did not. Following

receipt of the protest, the CPO communicated with all parties to the protest in an attempt to resolve it. Mr. Vickery offered no evidence of his assertions.

DETERMINATION

The CPO finds no evidence to warrant interrupting the procurement. The Procurement Review Panel has ruled consistently that “the burden of proof lies with the protestant, which must sustain its allegations by the weight or preponderance of the evidence.” *E.g., In Re: Protest of Johnson Controls, Inc.*, Panel Case No. 1989-9. BioGX has not met that burden. Therefore, the protest is denied.



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 January 2013)

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, 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
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.