

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

Carolina Waste & Recycling, LLC

Materials Management Office
IFB No. 5400005049

Solid Waste Disposal for the Medical
University of South Carolina (MUSC),
Trident Technical College (TTC), and
The Citadel

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2013-113

POSTING DATE: July 8, 2013

MAILING DATE: July 8, 2013

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Carolina Waste & Recycling, LLC (Carolina). With this invitation for bids (IFB), the South Carolina Materials Management Office (MMO) attempted to procure solid waste disposal for the Medical University of South Carolina (MUSC), Trident Technical College (TTC), and The Citadel. Following evaluation of the bids, MMO posted notices of Intent to Award for The Citadel and TTC to Nature's Calling and MUSC to Waste Pro of South Carolina (Waste Pro). Carolina protested only the award to Waste Pro. Its protest letter alleged:

First, the 18-yard compactors are hauled to Berkeley County as a special waste, not as solid waste. The compactor disposal fee is paid per ton not via the user fee. The bid sheet does not include a line item for this disposal cost. That number may make a significant difference in the bottom line. The compactor is hauled 6 times per week.

Second, the front page of the MUSC bid only allows for consideration of the permanent work on schedule. The number submitted by our competitor is lower than ours for the permanent work. In 2012 MUSC ordered a significant number of temporary roll-off containers. The second page/work sheet has the temporary cost numbers. Our numbers are lower by \$31.00 per haul and \$8.00 per ton.

Since the issue to be decided is clearly a matter of law, this decision is prepared based on an administrative review of the protest letter and the procurement file 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 December 14, 2012, MMO issued the IFB. (Ex. 1) The Scope of Work read:

Provide all labor, equipment, transportation, associated services with the collection, and disposal of refuse, trash, and recycling materials. This service is to be provided for the following Charleston Higher Education Procurement Alliance (CHEPA) Colleges:

1. Medical University of South Carolina (MUSC)
2. Trident Technical College (TTC)
3. The Citadel
4. College of Charleston (C of C)

(Ex. 1, Scope of Work, p. 3)

Relevant to the protest, the solicitation also instructed the bidders, under Specifications:

The colleges listed herein will not pay invoice's that contain the following line item [*sic*]:

- Fuel surcharge
- Administration fees
- or any other fees/charges that are not identified

Therefore, the vendor's monthly unit cost must include all fees and surcharges.

For MUSC, the IFB provided bidders with a worksheet that itemized an extensive list of front load dumpsters (16), compactors (8), 30 cubic yard roll-offs (4), identified the frequency rates for collections for each unit, and allowed bidders to calculate their prices. The worksheet allowed bidders to calculate a flat-rate price per month for each unit, plus breakdown prices for compactors, temporary roll-off containers and permanent roll-off containers, as well as landfill and recycle fees, and a price for a dedicated truck route for roll-off containers, culminating in MUSC's monthly cost proposal total. (Ex. 1, Medical University Work Sheet, pp. 8-10)

The IFB also provided a bidding schedule asking bidders to offer a monthly flat rate price and an extended flat rate price for MUSC.

2. On January 23, 2013, MMO issued Amendment #1 cancelling a pre-bid conference previously scheduled and calling for questions from prospective bidders by January 24, 2013. (Ex. 2).

3. On February 22, 2013, MMO issued Amendment #2 (Ex. 3) instructing prospective bidders to “Discard the Original Solicitation” and highlighting all changes from that original IFB. Relevant to the protest, Amendment #2 removed the College of Charleston from the solicitation and divided the IFB into two lots: one for MUSC and another for The Citadel and TTC collectively. Specific to MUSC and the protest, Amendment #2 amended the IFB as follows:

At this time, Charleston County is the only designated MSW (medical solid waste) location for agencies that are within the county limits. Trident Tech has locations that are in Berkeley County and Dorchester County in which their MSW must be disposed of per the policies and instruction of each County. Therefore, any future MSW site changes will be done in the form of a written change order to reflect any changes by the State Procurement Officer.

MUSC Designated Facilities

Special Waste: Oakridge Landfill	Refuse: TBD
Paper: Sonoco	Pallets: TBD
Scrap Metal: Charleston	Steel Mixed Recyclables: TBD
Yard waste: Charleston County Compost Facility	Construction Waste: TBD

(Ex. 3, p. 3)

Extra pick-ups will be billed at the work sheet unit price herein for MUSC locations.

(Ex. 3, p. 5)

User Fee

Charleston County has not billed MUSC overage fees for the last five (5) years for its MSW. Therefore, MUSC is confident that no overage fees will be invoiced during the maximum contract period.

However, if Charleston County invoices the contractor for overage fees for MUSC’s MSW, the contractor must supply a receipt copy for the overage to MUSC from Charleston County with the breakdown of the charge.

(Ex. 3, p. 7)

The Medical University Worksheet was amended to adjust the number and frequency of collections and other services. (Ex. 3, pp. 9-11)

Amendment 2 changed the award criteria:

CALCULATING THE LOW BID

1. To determine the low bid for MUSC, the State will identify the lowest responsive and responsible offeror based on the “Extended Price” for Item #1.

(Ex. 3, p. 35)

Finally, the Bidding Schedule/Price Proposal for MUSC was amended to ask bidders for a per month unit price and an extended price for sixty (60) months. (Ex. 3, p. 47)

4. On February 26, 2013, MMO issued Amendment #3 (Ex. 4) re-writing the IFB again and altering the solicitation, but not in a manner germane to the protest.
5. On March 14, 2013, MMO opened the bids received.
6. On April 4, 2013, MMO posted its Intent to Award for MUSC to Waste Pro. (Ex. 5)
7. On April 16, 2013, Carolina filed its protest with the CPO.

CONCLUSIONS OF LAW

Although Carolina asserts its protest to be of the award, its letter expressly complains that the bid form does not include items Carolina believes should be considered for award. Both of its claims allege deficiencies known to Carolina during the solicitation process. The IFB, dated December 14, 2012, provided the bidding schedule. Amendment #2, dated February 22, 2013, designated the waste processing facilities for MUSC. The final amendment, Amendment #3, dated February 26, 2012, rewrote the solicitation, but did not alter the bidding schedule or the list of waste processing facilities. Obviously, the bid sheet was also included in the IFB and amendments identifying the prices to be offered and providing explanation of how the low bidder would be determined. Carolina could have protested the original IFB, Amendment #2 or Amendment #3, but chose not to. Additionally, as Carolina acknowledged in its Protest Ground #2, “The number submitted by our competitor is lower than ours for the permanent work”, but Carolina asserts its unit prices from page 2 of the worksheet were lower writing, “Our numbers are lower by \$31.00 per haul and \$8.00 per ton.” However, the worksheet was provided for

bidders to offer prices for additional work that might occur during the contract. It was not the bidding schedule and was not utilized in determining the award.

The Consolidated Procurement Code provides prospective bidders the opportunity to protest a solicitation and actual bidders to protest an award. It reads:

- (a) A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. An Invitation for Bids or Request for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this code.
- (b) 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.

(11-35-4210, Right to Protest; Exclusive Remedy) (Emphasis added)

The CPO finds that MMO informed Carolina with sufficient information to raise both of its issues of protest no later than February 26, 2013, the date of the last amendment, yet Carolina did not file its protest until April 16, 2013, forty-nine (49) days later. Therefore, the CPO finds Carolina's protest to be untimely filed.¹

The South Carolina Procurement Review Panel (Panel) has repeatedly held that the time for filing cannot be waived. *See Protest of Jones Engineering Sales, Inc.*, Panel Case No. 2001-8

¹ Even if the protest were timely filed it would fail. The IFB, as amended, clearly stated bids would be evaluated based on the bid schedule. The bid schedule included pricing only for "permanent work." It is true, as Carolina states in its protest, that its price for temporary work was lower. It is also true, as Carolina admitted, that Waste Pro was the low bidder for the "permanent work" found on page 9 of the worksheet as well as page 47, the bid schedule. Since there is no issue of Waste Pro's responsiveness or responsibility, as low bidder it must be awarded the contract.

(finding that the CPO did not have jurisdiction to rule on the protest issue because the time for filing protests of the solicitation is jurisdictional and may not be waived); *Protest of National Cosmetology Ass'n*, Panel Case No. 1996-17 (finding that “where the appeal is not taken within the time provided, jurisdiction cannot be conferred by consent or by waiver”); *Protest of Vorec Corporation*, Panel Case No. 1994-9 (finding that a protest of award was untimely when it was filed one day after the deadline established by the Code prior to its amendment). The Panel has explained its rationale for why this time limit is jurisdictional and cannot be waived as follows:

[I]t is essential to the operation of government that challenges to its purchasing decisions be limited. If the time for filing protests can be waived, the State will be unable to determine with certainty when it can enter into a contract with one vendor for vital goods and services without the danger of being liable to another vendor.

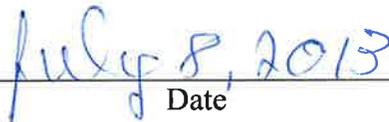
Protest of Oakland Janitorial Services, Inc., Panel Case No. 1988-13.

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 June 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 108.1 of the 2013 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.

Carolina Waste & Recycling, LLC

Commercial, Industrial, Residential
C&D Waste Collection Services
5264 B International Blvd. Suite 100
North Charleston, SC 29418
(843) 576-1100 office
(843) 576-0684 fax

April 16, 2013

Richard Edmondson
SC Budget and Control Board
Materials Management Office
Protest-mmo@mmo.sc.gov

Ref: Bid Protest
Bid Number: 5400005049-CHEPA Solid Waste Term Contract

Mr. Edmondson,

Please consider this letter our formal protest of the intent to award the Medical University of South Carolina waste and recycling services to Waste Pro of South Carolina. We reviewed the bids submitted by all potential vendors. There are a few items of uncertainty that may be of considerable cost to you if they are left unaddressed and awarded as the bid stands.

First, the 18-yard compactors are hauled to Berkeley County as a special waste, not as solid waste. The compactor disposal fee is paid per ton not via the user fee. The bid sheet does not include a line item for this disposal cost. That number may make a significant difference in the bottom line. The compactor is hauled 6 times per week.

Second, the front page of the MUSC bid only allows for consideration of the permanent work on schedule. The number submitted by our competitor is lower than ours for the permanent work. In 2012 MUSC ordered a significant number of temporary roll-off containers. The second page/work sheet has the temporary cost numbers. Our numbers are lower by \$31.00 per haul and \$8.00 per ton.

Thank you for your consideration,

Donna Barfield
Director of Sales
843-568-7446