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CHAIRMAN, SENATE FINANCE COMMITTEE

W. BRIAN WHITE
CHAIRMAN, HOUSE WAYS AND MEANS

Protest Decision

Matter of: Maddock Construction Equipment, LLC

Case No.: 2016-128

Posting Date: February 16, 2016

Contracting Entity: South Carolina Department of Transportation

Solicitation No.: 5400010560

Contract No.: 4400012280

Description: Extra heavy-duty, PTO-driven, Trailer type Ditchers

DIGEST

Protest alleging improper communications with the purchasing agency and that the successful bidder's product was not in current production is denied.

AUTHORITY

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

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

BACKGROUND

Solicitation Issued	December 8, 2015
Intent to Award Issued	January 22, 2016
Protest Received	February 1, 2016
Award Suspended	February 1, 2016
Protest Amended	February 8, 2016

DISCUSSION

Maddock Construction Equipment, LLC (Maddock) protests the Intent to Award a contract to US Ditcher (Ditcher) for extra heavy-duty, PTO-driven, Trailer type Ditchers for the South Carolina Department of Transportation (DOT). DOT issued this Invitation For Bids to acquire four (4) extra heavy-duty, PTO-driven, trailer type ditchers. DOT received three bids and Ditcher was the apparent lowest priced responsive and responsible bidder. Maddock protests that Ditcher should have been disqualified from competing in this Solicitation for violating the prohibition on communications because of Ditcher's attempt to lobby for a sole source award or change of the specifications during the pendency of the Solicitation; and because Ditcher bid a prototype ditcher that is not "in current production" as required by the Solicitation. Maddock's letter of protest and amendment are incorporated by reference. [Attachment 1]

Maddock alleges that a December 17, 2015, letter from Ditcher's counsel to the procurement officer (Attachment 2) requesting "clarification and explanation of the specifications" and suggesting alternative specification violates a provision in the solicitation prohibiting communication with the purchasing agency or its employees, agents or officials regarding any aspect of the procurement during the solicitation phase of the procurement. This provision is found on page 13 of the solicitation:

PROHIBITED COMMUNICATIONS AND DONATIONS (FEB 2015)

Violation of these restrictions may result in disqualification of your offer, suspension or debarment, and may constitute a violation of law.

(a) During the period between publication of the solicitation and final award, *you must not communicate, directly or indirectly, with the Using Governmental Unit or its employees, agents or officials regarding any aspect of this procurement*

activity, unless otherwise approved in writing by the Procurement Officer. All communications must be solely with the Procurement Officer. [R. 19-445.2010]

(emphasis in original). Since the letter was addressed to the procurement officer, to whom all communications should be directed during the procurement process, there is no violation of the solicitation or the Code. This issue of protest is denied.

Maddock also protests that Ditcher should have been deemed non-responsive because US Ditcher did not bid a ditcher that is “in current production” as the solicitation requires.

Maddock bases its claim on the following:

The brochure that US Ditcher provided with its bid, however, did not include a model RD15H that US Ditcher purports to bid in this Solicitation.

US Ditcher included a picture of a ditcher with its bid, but this is just a picture of the machine with no specifications or claim that US Ditcher meets the Solicitation’s specifications. For example, the Department of Transportation requires that the machine “shall be equipped with an automatic leveling system,” however, it appears that US Ditcher’s machine is not equipped with such an automatic leveling system.

Further evidence that US Ditcher bid a prototype ditcher that is not “in current production” is that US Ditcher failed to include any manufacturer’s literature with its bid. The Solicitation required that bidders “include manufacturer’s latest literature showing complete product specifications and one complete set of service literature.”

US Ditcher, however, failed to include any such service literature with its bid, likely because the ditcher that US Ditcher bid is a prototype that is not “in current production” and therefore does not have such service literature.

While Ditcher failed to include product and service literature with its bid, it did include a DOT provided questionnaire which provides product specifications for the model bid. (Attachment 3) The failure to include cut sheets or product literature is a minor informality which can be waived by the procurement officer under Section 11-35-1520(13) as follows:

Minor Informalities and Irregularities in Bids. A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or

negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing. Examples of minor informalities or irregularities include, but are not limited to:

- (g) failure of a bidder to furnish cut sheets or product literature;

In addition, as noted in Maddock's letter of protest, the procurement officer did verify certain specifications with the Ditcher prior to award (Attachment 4) and the DOT determined that Ditcher's bid was responsive. (Attachment 5) Maddock bears the burden of proof in claiming that the product bid by Ditcher is not in current production. The failure of Ditcher to include requested product documentation with its bid is a minor informality that is waived. The absence of this documentation is not sufficient evidence that the product is not in current production.² This issue of protest is denied.

DECISION

For the reasons stated above, the protest is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

² Ditcher's website includes a page dedicated to its models RD-15 and RD-20 machines. Among other things, the page includes a video dated July 15, 2005, of an RD-15 rotary ditcher in operation. <http://usditcher.com/IND-RD15.html>, last viewed February 16, 2016. The machine bears stenciled markings "SC DOT." The video suggests not only that the RD-15 is no prototype, but that DOT has actually purchased such machinery in the past.

Attachment 1

大成 DENTONS

Jeremy T. Berry

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Dentons US LLP
303 Peachtree Street, NE • Suite 5300
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United States

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dentons.com

February 1, 2016

BY E-MAIL AND FACSIMILE

protest-mmo@mmo.sc.gov
mspicer@itmo.sc.gov
803-737-0639

Michael B. Spicer
Chief Procurement Officer, Materials
Management Office
State of South Carolina
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: Protest of Intent to Award - Solicitation 5400010560 (PTO-Driven, Trailer Type
Ditchers) - Department of Transportation

Dear Mr. Spicer:

This Firm represents Maddock Construction Equipment, LLC (“Maddock”)¹ and files this protest of the Intent to Award posted on January 22, 2016 for Solicitation 5400010560 (PTO-Driven, Trailer Type Ditchers) - Department of Transportation.² The intended award to US Ditcher, Inc. is contrary to the terms of the Solicitation because US Ditcher’s bid should have been deemed non-responsive for failing to meet a material requirement of the Solicitation.

Maddock has standing to file this protest because it is an actual bidder who is aggrieved in connection with the intended award to US Ditcher. This protest is timely filed because it is filed within ten days of the date that the Intent to Award was posted (on January 22, 2016).

Pursuant to S.C. Code Ann. § 11-35-4210(d)(7), Maddock respectfully requests that any contract or award should be stayed while this protest remains pending and for ten days after any decision is issued in response to this protest.

Further, Maddock respectfully requests that US Ditchers be found to be non-responsive to the Solicitation, the Intent to Award to US Ditchers should be rescinded, and the contract awarded to Maddock.

¹ Maddock’s corporate office address is 239 West Grimes Lane, Bloomington, Indiana 47403.

² A copy of the Intent to Award is attached hereto as Exhibit A.

Factual and Procedural Background

Maddock has been supplying ditchers to the State of South Carolina Department of Transportation for the last seven years. The ditchers that Maddock has been supplying to the Department of Transportation have met the Department's requirements during this time.

In April 2015, the Department of Transportation sought to purchase the same type of ditcher that is the basis for the present procurement. See Solicitation 5400009434 - SCDOT Ditcher, Trailer Type.³ Among other specifications, the April 2015 bid required that bidders supply a "model in current production." The RFP stated: "The unit shall be new, and of a *model in current production . . .*" See Exhibit B hereto (emphasis added)⁴. Maddock bid on this contract and was the only bidder to submit a bid.

At that time, US Ditcher did not submit a bid in response to the April 2015 solicitation because, upon information and belief, US Ditcher could not produce a ditcher that would meet the specifications that the Department of Transportation sought. The contract was not awarded, however, because the Department of Transportation determined that there were not enough bidders to make the procurement a competitive bid. See Exhibit C hereto. The Department stated that the contract would be re-solicited with revised specifications. See Exhibit C hereto.

On December 8, 2015, the current Solicitation was issued.⁵ See Exhibit D hereto. As stated in the Solicitation, the Department of Transportation seeks to buy "trailer type ditchers" that are "extra heavy-duty, PTO-driven, trailer type units designed for highway ditch construction and cleaning operations." See Exhibit D, p. 8. Of significant importance to this protest, the Solicitation required that the "units shall be new, and *of a model in current production* or an update of an existing model." See Exhibit D, p. 8 (emphasis added). The requirement for models that are "in current production" was repeated several times in the Solicitation. See Exhibit D, p. 18 ("The unit shall be new, and *of a model in current production* or an update of an existing model."); p. 18 ("The unit shall be of the latest design and *in current production.*") (emphasis added). Indeed, the Solicitation's specification of a model that is "in current production" is identical to the requirement that existed in the April 2015 solicitation.

On January 5, 2016, Maddock, US Ditchers, and L&E Management submitted bids in response to the Solicitation.⁶ On January 22, 2016, the Procurement Office issued the Intent to Award, which stated that US Ditcher was the apparent winning bidder with ditchers offered at a unit price of \$89,650.00 for a total contract value of \$358,600. See Exhibit A.

³ See <http://webprod.cio.sc.gov/SCSolicitationWeb/contractSearch.do?solicitationnumber=5400009434>.

⁴ For brevity purposes, Maddock is including only a portion of the April 2015 Solicitation.

⁵ See <http://webprod.cio.sc.gov/SCSolicitationWeb/contractSearch.do?solicitationnumber=5400010560>.

⁶ See Exhibit A. L&E Management was deemed non-responsive for not meeting the Solicitation requirements.

US Ditcher Should Have Been Deemed Non-Responsive.

US Ditcher's bid should have been deemed non-responsive such that it was erroneous to award the contract to US Ditcher. Maddock should have been awarded the contract because it is the only entity that bid that can provide a ditcher that is "in current production" like the Solicitation requires. Upon information and belief,⁷ US Ditcher cannot meet the substantive requirement of the Solicitation for a ditcher "in current production" because US Ditcher does not have a ditcher in current production that meets the Solicitation's requirements.

The Solicitation's requirement for a ditcher that is in "current production" is clear and unequivocal. The Solicitation stated the requirement of a ditcher "in current production" three times in the Solicitation document. *See* Exhibit D, pp. 8, 18. This is the same requirement that was present in the April 2015 solicitation that was issued prior to the present Solicitation. *See* Exhibit B.

The purpose of the Solicitation's requirement for a ditcher that is "in current production" is intended to prevent prospective bidders from submitting bids with equipment that the bidder has not designed and built previously. The Department of Transportation did not want a prototype ditcher that had not been designed, tested, and used previously. By using the phrase "in current production" several times in the Solicitation, it is clear that the Department wants a ditcher that the Department can inspect and ensure that the ditcher works. "Current" means "existing now."⁸ Thus, to be responsive to the Solicitation, US Ditcher was required to bid a ditcher that 1) meets the Solicitation's specifications; 2) is not a prototype; and 3) that "exists now" in US Ditcher's production (a ditcher that has been designed and used previously). US Ditcher cannot meet this three-part test because it does not currently produce a ditcher that meets the Solicitation's specifications. If the Department of Transportation wanted to obtain a ditcher that met the Solicitation's specifications from US Ditcher today, the Department would be unable to do so because US Ditcher does not have such a ditcher "in current production." US Ditcher might have a prototype that has not been tested, but US Ditcher does not have a ditcher that meets the Department's specifications and has been designed and built previously.

US Ditcher should have been deemed non-responsive because it cannot meet the material requirement of the Solicitation to provide a ditcher that 1) meets the Solicitation's specifications; 2) is not a prototype; and 3) is "in current production."⁹ The requirement of a ditcher "in current production" is not a "minor informality or irregularity" that can be waived

⁷ Maddock is submitting a Freedom of Information Act request today that seeks, among other things, copies of US Ditcher's response to the Solicitation. *See* Exhibit E. Maddock reserves the right to supplement this bid protest and will do so after Maddock has obtained copies of US Ditcher's bid and any other relevant documents to substantiate this protest.

⁸ *See* <http://www.merriam-webster.com/dictionary/current>. It is appropriate to rely upon the dictionary definition of "current" because the Solicitation does not define this term.

⁹ *See* S.C. Code Ann. § 11-35-4210(7) (defining a "responsive bidder" to mean "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.").

because the requirement is fundamental to the Solicitation because the Department clearly seeks to obtain a ditcher that has been designed, tested, and used and is not a prototype.¹⁰ Therefore, Maddock respectfully requests that US Ditchers be found to be non-responsive to the Solicitation, the Intent to Award to US Ditchers should be rescinded, and the contract awarded to Maddock.

Respectfully yours,



Jeremy T. Berry

Enclosures

cc: Maddock Construction Equipment, LLC

ATLANTA 5687626.2

¹⁰ See S.C. Code Ann. § 11-35-1520(13) (“A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders.”).

February 8, 2016

BY E-MAIL AND FACSIMILE

protest-mmo@mmo.sc.gov

mspicer@itmo.sc.gov

803-737-0639

Michael B. Spicer
Chief Procurement Officer, Materials
Management Office
State of South Carolina
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: Supplement to Protest of Intent to Award - Solicitation 5400010560 (PTO-Driven, Trailer Type Ditchers) - Department of Transportation

Dear Mr. Spicer:

Pursuant to S.C. Code Ann. § 11-35-4210(2)(b), Maddock Construction Equipment, LLC (“Maddock”) supplements its protest of the Intent to Award posted on January 22, 2016 for Solicitation 5400010560 (PTO-Driven, Trailer Type Ditchers) - Department of Transportation that Maddock filed on February 1, 2016. As explained in more detail below, US Ditcher should have been disqualified from competing in this Solicitation for violating the prohibition on communications because of US Ditcher’s attempt to lobby for a sole source award or change of the specifications during the pendency of the Solicitation. Supplementing Maddock’s February 1, 2016 protest, Maddock has additional proof that US Ditcher bid a prototype ditcher that is not “in current production” like the Solicitation requires.¹ For these reasons, and those explained in Maddock’s initial protest, Maddock respectfully requests that US Ditcher be disqualified from this Solicitation or, alternatively, US Ditcher’s bid be deemed to be non-responsive to the Solicitation, the Intent to Award to US Ditchers should be rescinded, and the contract awarded to Maddock.

US Ditcher Violated the Prohibition on Communications

US Ditcher should be disqualified because of prohibited communications from US Ditcher’s counsel to the Department of Transportation Procurement Officer while the Solicitation was pending. In no uncertain terms, the Solicitation dictates that during “the period between publication of the solicitation and final award, ***you must not communicate, directly or indirectly, with the Using Governmental Unit or its employees, agents or officials regarding any aspect of this procurement activity***, unless otherwise

¹ See Solicitation, pp. 8, 18.

approved in writing by the Procurement Officer.” (Solicitation, p. 13) (emphasis in original). Violation of this restriction on communication “may result in disqualification of [the bidder’s] offer.” (Solicitation, p. 13).

On December 17, 2015, which was nine days after the Solicitation was issued and thus during the period of prohibited communications, counsel for US Ditcher wrote to the Procurement Officer to claim that US Ditcher was a “sole-source provider” and requested that the Department of Transportation “adopt and incorporate the proposed specifications” that the attorney sent with his letter. See December 17, 2015 letter from Butch Bowers to Emmett Kirwan, attached hereto as Exhibit A. US Ditcher’s counsel argued that “it was improper and not in the State’s best interests” to use older specifications (from a procurement that Maddock won)² for the current solicitation and instead requested “an explanation as to why those specifications were used [in the current Solicitation].” See Exhibit A. Though US Ditcher did not file a pre-solicitation protest to challenge the specifications, US Ditcher’s counsel was lobbying for new specifications while the procurement was pending and proposed that the Department of Transportation “adopt and incorporate” specifications that only US Ditcher could meet. See Exhibit A.³

This December 17, 2015 letter from US Ditcher’s counsel violated the prohibition on communications while the Solicitation was pending. The letter from US Ditcher’s counsel was not a permitted communication during the pendency of a procurement such as a communication intended to clarify a specification or ask a question that would be permitted during the Solicitation. To the contrary, the letter from US Ditcher’s counsel was meant to change the specifications of the Solicitation while the Solicitation was pending and apparently an attempt to persuade the Department of Transportation that US Ditcher was a “sole-source provider.” See Exhibit A (“Moreover, we respectfully request that you adopt and incorporate the proposed specifications enclosed herein for this particular solicitation.”). US Ditcher should be disqualified for this impermissible communication from its counsel that violated the prohibition on communications while the procurement was pending.

US Ditcher Bid a Prototype That is Not “In Current Production” Like the Solicitation Requires.

As Maddock explained in its February 1, 2016 initial protest of the Intent to Award, US Ditcher should have been deemed non-responsive because US Ditcher did not bid a ditcher that is “in current production” like the Solicitation requires. See Solicitation, pp. 8, 18. US Ditcher bid a prototype that is not in current production, as the following paragraphs explain.

² The old specifications that US Ditcher complained about were from a 2012 solicitation pursuant to which Maddock was awarded the contract. See Statement of Award, Solicitation 5400005219, awarded to Maddock, available at <http://webprod.cio.sc.gov/SCSolicitationWeb/contractSearch.do?solicitnumber=5400005219>.

³ US Ditcher bid using a form from the 2012 solicitation that they complained about and not from the current Solicitation. See US Ditcher Bid, enclosed as Exhibit B, page 3 (top of page is labeled “SCDOT Spec. No. 0241.22 – 7/01/12”).

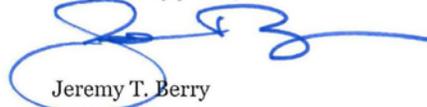
The brochure that US Ditcher submitted does not represent the machine specifications of US Ditcher's model RD15H ditcher that US Ditcher bid. US Ditcher bid a model RD15H. *See* Exhibit B, page 3 (stating that US Ditcher was bidding a model RD15H ditcher). The brochure that US Ditcher provided with its bid, however, did not include a model RD15H that US Ditcher purports to bid in this Solicitation. *See* US Ditcher Brochure, enclosed here as Exhibit C. US Ditcher included a picture of a ditcher with its bid (*see* Exhibit B, p. 5), but this is just a picture of the machine with no specifications or claim that US Ditcher meets the Solicitation's specifications. For example, the Department of Transportation requires that the machine "shall be equipped with an automatic leveling system,"⁴ however, it appears that US Ditcher's machine is not equipped with such an automatic leveling system. US Ditcher could not provide a brochure for its ditcher because it is a prototype that is not "in current production" and does not include the specifications the Solicitation required.

Further evidence that US Ditcher bid a prototype ditcher that is not "in current production" is that US Ditcher failed to include any manufacturer's literature with its bid. The Solicitation required that bidders "include manufacturer's latest literature showing complete product specifications and one complete set of service literature." *See* Solicitation, p. 17, Section II.B. Special Instructions, "DESCRIPTIVE LITERATURE – REQUIRED."). US Ditcher, however, failed to include any such service literature with its bid, likely because the ditcher that US Ditcher bid is a prototype that is not "in current production" and therefore does not have such service literature. US Ditcher also failed to submit the required qualification documents that the Solicitation required. *See* Solicitation, p. 23 (QUALIFICATIONS -- REQUIRED INFORMATION (MAR 2015)).

Because US Ditcher did not include all of the specifications in its bid for the ditcher, the Procurement Officer needed to inquire whether US Ditcher could meet certain specifications. *See* January 11, 2016 emails between Emmitt Kirwan and Frank Scordilis (of US Ditcher), enclosed hereto as Exhibit D. Had US Ditcher complied with the specifications and provided all of the details about its ditcher in its bid, the Procurement Officer would not have needed to ask US Ditcher about the specifications. It is telling that Mr. Scordilis responded to this inquiry that he "hope[s] to have complied with [the] requested specification." *See* Exhibit D. If in fact US Ditcher complied with the specifications, Mr. Scordilis would have known that US Ditcher's product complied and would not have needed to "hope" that the ditcher met the specifications.

For the reasons explained in Maddock's initial protest and this supplement, Maddock respectfully requests that US Ditcher be disqualified from this Solicitation or, alternatively, US Ditcher's bid be deemed to be non-responsive to the Solicitation, the Intent to Award to US Ditchers should be rescinded, and the contract awarded to Maddock.

Respectfully yours,



Jeremy T. Berry

⁴ *See* Solicitation, Requirement 5.2, p. 18.

Attachment 2

BOWERS LAW OFFICE LLC

Post Office Box 50549
Columbia, South Carolina 29250

Phone: 803-753-1099

butch@butchbowers.com

December 17, 2015

Emmett Kirwan
SCDOT Procurement Office
PO Box 191
Columbia SC 29202-0191

Re: S.C. Department of Transportation Solicitation No. 5400010560
Extra heavy-duty, PTO-driven, Trailer type Ditchers

Dear Mr. Kirwan:

On behalf of my client U.S. Ditcher, Inc., a sole-source provider headquartered in Spartanburg, S.C., we respectfully request a clarification and explanation of the specifications for the above-referenced solicitation. Specifically, we believe it was improper and not in the State's best interests to use the outdated specifications from the July 1, 2012 trailer-type ditcher solicitation in this solicitation, and we would appreciate an explanation as to why those specifications were used here. Moreover, we respectfully request that you adopt and incorporate the proposed specifications enclosed herein for this particular solicitation.

Thank you for time and attention to this matter. If you have any questions regarding this request, please do not hesitate to contact me.

Yours very truly,

BOWERS LAW OFFICE LLC



Karl S. Bowers, Jr.

Encl.

QUESTIONNAIRE
(To be completed and returned with bid)

MAKE US DITCHER - DOND MODEL RD 15 H

WEIGHT ~ 13500 Lbs

TIRES: Size 36/31 x 16^{24 ply} Type BOENKE RETREADS Load Range ~ 30000

PERFORMANCE:

Cutter head rotation in rpm's 280

HYDRAULIC SYSTEM:

System Operating Pressure ~ 4500

Number of Cylinders for booms and head rotation 4

Reservoir capacity in gallons 52

LIST AND DESCRIBE THE OPERATIONAL SYSTEM: 540 RPM PTO DRIVEN TRAILER ARM DITCHER. HYDROSTATIC DRIVE, PTO - DRIVE SHAFT CONNECTS TO TRACTOR. 540 RPM - OUT LET. WITH ELECTRICAL JOYSTIC CONTROL.

DITCHER HEAD MODEL DRUM - HEAVY-DUTY STEEL - WITH CARBIDE TOOLS AND EJECTION BLADES. 45 DEGREE DITCH PROFILE WITH 12" INCH BOTTOM x 24" INCH DEEP. DISCHARGING TO RIGHT AND/OR LEFT HAND. REVERSABLE ROTATION.

DELIVERY: 7/15/2016 AND 8/15/2016.

US Ditcher, Inc.
1805 Southport Road
Spartanburg, SC U.S.A. 29306
Sam P. Daniels

Attachment 4

From: [US Ditcher](#)
To: [Kirwan, Emmett I.](#)
Subject: RE: Ditcher Questions
Date: Monday, January 11, 2016 3:55:49 PM
Importance: High
Sensitivity: Confidential

Dear Mr., Emmett,

Confirming herewith as follows:

- Proposed side arm ditcher RD15HYDRO will cut a trapezoidal ditch with 45 – 53 degree sides.
- Boom minimum reach is 138 inches plus from tractor centerline to ditch centerline
- The down reach is at least 50 inches plus.

Hope to have complied with requested specification.

Sincerely
Frank P Scordilis
President
US Ditcher, Inc.
FIN: 57-1057839

From: Kirwan, Emmett I. [mailto:KirwanEI@scdot.org]
Sent: Monday, January 11, 2016 2:40 PM
To: fscordilis@usditcher.us
Subject: Ditcher Questions

Mr. Scordilis

Please confirm the below are met by the proposed ditcher.

- The ditcher head is capable of cutting a trapezoidal ditch with 45-53 degree sides.
- Boom reach is a minimum 138 inches from tractor centerline to ditch centerline.
- The down reach is at least 50 inches

Thank you,

Emmett I Kirwan
SCDOT Procurement Manager
955 Park St, Columbia, SC 29201 | 803-737-0676 |

Attachment 5

Determination for award for Solicitation 5400010560

Three responses were received in response to Solicitation 5400010560 **Extra heavy-duty, PTO-driven, Trailer type Ditchers.**

The lowest bidder, L&E Management, proposed equipment that did not meet the agency's specifications. This was determined during the review of the literature provided by L&E.

US Ditcher was the next lowest apparent responsive bidder. After evaluation by the end users of their brochure and submitted literature, and after confirming with US Ditcher on certain aspects of the specification, at the request of the end user, they were determined to be a responsive bidder.

The third bidder, Maddock Construction, took exception to the Delivery Terms of 120 Days. As this is a material requirement of the solicitation Maddock was determined to be non-responsive. Regulation 19-445.2070(C) states "Any bid which fails to conform to the delivery schedule, to permissible alternates thereto stated in the invitation for bids, or to other material requirements of the solicitation may be rejected as non-responsive." There were no alternates stated for the delivery schedule.

Therefore award is recommended to US Ditcher.

Emmett Kirwan

SCDOT Procurement Officer

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised September 2015)

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 111.1 of the 2015 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 209, 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.