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Protest Decision

Matter of: Interstate Transportation Equipment, Inc.

Case No.: 2016-131

Posting Date: March 17, 2016

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400010561

Description: Statewide – School Buses

DIGEST

Protest of a solicitation by Competitive On-Line Bidding (Reverse Auction) is denied where not filed within fifteen days after the invitation for bids was issued.

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.

DISCUSSION

Interstate Transportation Equipment, Inc. (Interstate), protests the use of the Competitive On-Line Bidding (Reverse Auction) source selection method. Interstate's letter of protest is incorporated by reference. [Attachment 1]

FINDINGS OF FACT

Solicitation Issued	December 21, 2015
Amendment 1 Issued	February 5, 2016
Amendment 2 Issued	February 19, 2016
Protest Received	February 22, 2016

The State Fiscal Accountability Authority (SFAA), Division of Procurement Services, Materials Management Office (MMO), issued this solicitation to establish statewide contracts for school buses. The contracts were to be awarded to one offeror by line item in accordance with the bid schedule. The line items were listed as follows:

- Line Item 1: Type C School Bus, 66 Passenger, Diesel Engine
- Line Item 2: Type C School Bus, 66 Passenger, Diesel Engine, Special Needs
- Line Item 3: Type C School Bus, 66 Passenger, Propane Engine
- Line Item 4: Type D School Bus, 78 Passenger, Diesel Engine
- Line Item 5: Type D School Bus, 78 Passenger, Compressed Natural Gas (CNG) Engine

The solicitation provided that bidding was to be conducted as an online reverse auction through eBridge Business Solutions, LLC ("eBridge"), acting as the State's auctioneer.

ANALYSIS

Interstate claims the State improperly determined to use the online bidding (reverse auctioning) source selection method and to award only a single contract per lot. It raises six separate grounds for its protest:

1. The online bidding process used in the IFB does not comply with the requirements of § 11-35-1529(2) of the South Carolina Consolidated Procurement Code (Code) because the State in *[sic]* not accepting the realtime electronic bids.

2. The MMO determination to use online bidding is in violation § 11-35-1529(1) of the Code because on line bidding is not a more advantageous purchasing method than other procurement methods vis a vis the purchase of school buses.
3. The MMO determination to use online bidding is in violation of§ 11-35-20(a) of the Code because it does not "provide increased economy in state procurement activities and ... maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the State ...;"
4. The MMO determination to use on line bidding is in violation of§ 11-35-20(f) of the Code because it does not "ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement."
5. The determination to award a single contract for each bus type and not allow school districts purchasing from the Statewide Term Contract to purchase buses from vendors' whose prices are within four (4%) of the low bidder is in violation of§ 11-35-20(3) because it does not "develop procurement capability responsive to appropriate user needs".
6. The MMO determination to use on line bidding pursuant to§ 11-35-1529 does not comply with § 11-35-210.

In its protest letter, Interstate challenges Amendment 1 to the IFB. However, the issues giving rise to Interstate's protests were first published in the original solicitation on December 21, 2015 and were unchanged in Amendment 1.

The purpose of this solicitation is to establish statewide contracts for school buses. The contracts will be awarded to one offeror by line item in accordance with the bid schedule. The line items are as follows:

- Line Item 1: Type C School Bus, 66 Passenger, Diesel Engine
- Line Item 2: Type C School Bus, 66 Passenger, Diesel Engine, Special Needs
- Line Item 3: Type C School Bus, 66 Passenger, Propane Engine
- Line Item 4: Type D School Bus, 78 Passenger, Diesel Engine
- Line Item 5: Type D School Bus, 78 Passenger, Compressed Natural Gas (CNG) Engine

The bidding for this solicitation will be conducted as an online reverse auction with eBridge Business Solutions, LLC ("eBridge") The offeror with the lowest bid on **each** line item listed above at the conclusion of the auction, in accordance

with the terms in Section VI, will win the award of that line. Vendors may make an offer on one, any or all lines.

[Solicitation, Page 4]

The Code grants prospective bidders the right to protest the solicitation of a contract:

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.

S.C. Code Ann. § 11-35-4210(1)(a) (emphasis supplied). The Panel has applied this limitation to the specific context of a protested amendment. In *Appeal by First Sun EAP Alliance, Inc.*, Panel Case No. 1994-11, the Panel held a protest must be filed within fifteen days after the amendment raising the issue:

At the beginning of the Panel hearing, USC made a motion to dismiss for lack of jurisdiction certain protest issues. USC argues that the Panel has no jurisdiction to hear this case due to the untimeliness of First Sun's protest issue identified as self referral. The Panel finds that the questions and answers of Amendment #1 discuss the issue raised by First Sun, which it terms self referral. In Amendment #1, the question and answer numbered 6, specifically states "Yes" to the question of whether the agency itself could provide additional services in counseling with the same therapist, without a conflict of interest. First Sun's issue deals with Family Service referring clients to itself. First Sun's issue is directly related to the question and answer in Amendment #1, therefore First Sun had fifteen days from the issuance of Amendment #1 to file its protest on this issue. First Sun filed its protest on June 29, 1994, twenty-six (26) days after the issuance of Amendment #1. Clearly, the protest issue was not filed timely under S. C. Code Ann. Section 11-35-4210(1)....

(internal quotations and reference omitted) In issuing Amendment 1, SFAA reproduced the entire solicitation including the following statement:

IMPORTANT NOTICE: To be consistent with the manner in which vehicle 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.

In an effort to assist your review of the amendment, we have endeavored to highlight changes in yellow. To use this feature, offerors will need to view the electronic version of this document.

Despite our best efforts, there is a chance that a change was inadvertently left unhighlighted. Therefore, offerors are cautioned that they are responsible to review the content of the entire document and cannot rely detrimentally on highlights identifying all changes.

[Amendment 1, Page 4]

Asserting its protest is to Amendment 1 does not help Interstate. In response to a similar argument, the Panel wrote:

The Panel finds that an amendment would only be “at issue” if it provided new or different information than the solicitation documents. Otherwise, the fifteen days for protesting the solicitation would be extended by any amendment issued. In this case, the issue of protest is based on the language in the solicitation document that “those with G.C. license whose primary function is that of mechanical & electrical contracting shall not be considered.” The amendment does not alter the exemption in the solicitation, but merely confirms it. The protested issue concerns information clearly contained in the Invitation For Bids (IFB), which is not altered by the addendum. Thus, in this case, the time to file a protest begins with the issuance of the solicitation and not the amendment. The protest letter of September 15, 1995, was filed more than fifteen days from the August 28, 1995, date of publication of the IFB, and therefore the protestant is not timely filed. The Panel does not have jurisdiction to hear the merits of the protest.

Mechanical Contractors Ass’n of S.C., Panel Case No. 1995-12. It repeated that ruling in *S.C. Ass’n of the Deaf*, Panel Case No. 2008-2:

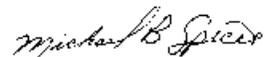
SCAD's insistence that its protest was filed within one day of the issuance of Amendment 2 is unavailing. First, its original protest grounds all refer to Amendment 1, not Amendment 2. As noted above, the deadline for filing a protest of Amendment 1 was February 12, 2008, and SCAD's protest was not filed until February 13, 2008. Therefore, by the very terms of its stated protest grounds, SCAD's protest is untimely.

Moreover, a close reading of SCAD's follow-up questions to Amendment 1 and its protest grounds reveals that the questions that the State did not answer in Amendment 2 all related to the original IFB specifications, not to new information contained in Amendment 1. Finally, the fact that the State did answer two questions in Amendment 2 that related to new information contained in Amendment 1 did not extend the time for protest of the remaining questions because those questions all related to the original IFB specifications. Therefore, the Panel finds that SCAD's explanations are an impermissible attempt to extend the applicable protest period by claiming that its protest relates to an amendment and not the original IFB specifications.

DECISION

The issues giving rise to Interstate's protests were first published in the original solicitation on December 21, 2015 and were unchanged in Amendment 1. Interstate did not file its protest until February 22, 2016, 63 days after the initial publication of the State's intention to award this contract through the Competitive On-Line Bidding source selection method and to award a single contract for each lot. Interstate's protest was not timely filed and the Chief Procurement Officer lacks jurisdiction to consider this matter. The protest of Interstate Transportation Equipment, Inc. is dismissed.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1

MCNAIR
ATTORNEYS

February 22, 2016

M. Elizabeth Crum

Via E-mail and Hand Delivery

2016-131

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John St. C. White. P.E.
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RECEIVED

FEB 23 2016 *as*

OFFICE OF STATE ENGINEER

Re: Protest of Invitation For Bid Online Reverse Auction Amendment #1—
Solicitation 5400010561

Dear Mr. White:

The SFAA, Div. of Procurement Services, MMO (MMO) issued an Invitation For Bid Online Reverse Auction Amendment #1—Solicitation 5400010561 (Amendment #1) for a statewide state term contract for the purchase of school buses. Amendment # 1 was issued on 02/05/2016, which was a complete new document and replaced the original solicitation (IFB). On behalf of our client, Interstate Transportation Equipment (Interstate), we respectfully protests the IFB on the following grounds:

1. The online bidding process used in the IFB does not comply with the requirements of § 11-35-1529(2) of the South Carolina Consolidated Procurement Code (Code) because the State in not accepting the real-time electronic bids.
2. The MMO determination to use online bidding is in violation § 11-35-1529(1) of the Code because online bidding is not a more advantageous purchasing method than other procurement methods vis a vis the purchase of school buses.
3. The MMO determination to use online bidding is in violation of § 11-35-20(a) of the Code because it does not “provide increased economy in state procurement activities and ... maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the State ...;”

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4. The MMO determination to use online bidding is in violation of § 11-35-20(f) of the Code because it does not “ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement.”
5. The determination to award a single contract for each bus type and not allow school districts purchasing from the Statewide Term Contract to purchase buses from vendors’ whose prices are within four (4%) of the low bidder is in violation of § 11-35-20(3) because it does not “develop procurement capability responsive to appropriate user needs”.
6. The MMO determination to use online bidding pursuant to § 11-35-1529 does not comply with § 11-35-210.

DISCUSSION

The MMO is the purchasing agency. MMO is a creature of statute and its authority is dependent upon statute, in this case, the Code. As such, the MMO and the CPO, also a creature of statute, can only exercise “those powers that are conferred expressly or by reasonable necessary implication, or are merely incidental to powers expressly granted.” Brooks v. South Carolina State Bd. of Funeral Serv., 271 S.C. 457, 461, 247 S.E.2d 820, 822 (1978). In this matter, the MMO is possessed only with those powers that are specifically delineated in the Code. See City of Rock Hill v. S.C. Dep’t of Health and Envtl. Control, 302 S.C. 161, 394 S.E.2d 327 (1990); City of Columbia v. Bd. of Health and Envtl. Control, 292 S.C. 199, 355 S.E.2d 536 (1987). In Hitachi Data Systems Corporation v. Leatherman, a case involving a statutory interpretation of the Code, the Supreme Court of South Carolina found:

[i]n construing statutes, we seek to effectuate legislative intent. The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operations. The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.

Hitachi, 309 S.C. 174, 420 S.E.2d 843, 846 (1992) (Citations omitted).

The MMO’s determination to use online bidding is final and conclusive “unless clearly erroneous, arbitrary, capricious, or contrary to law. S.C. Code Ann. § 11-35-2410(A). In re: Protest of Value Options, Case No. 2001-7 (Aug. 3, 2001), this Panel held:

The burden of proof is on the appellants to demonstrate by a preponderance of the evidence that the determination made by the procurement officer is clearly erroneous, arbitrary, capricious or contrary to law. “To prove arbitrary and capricious conduct such as will permit the court to overturn a procurement

decision, the aggrieved bidder must demonstrate a lack of reasonable or rational basis for the agency decision or subjective bad faith on the part of the procuring officer or clear and prejudicial violation of relevant statutes and regulations which would be tantamount to a lack of reasonable or rational basis”.

Id., p. 3 (citation omitted)(emphasis in original). See *State v. Rogers*, No. 5170, 2013 WL 4734571 (S.C. Ct. App. Sept. 4, 2013) (“A finding is clearly erroneous if it is not supported by the record.”)

MMO’s determination to use online bidding to procure a Statewide Term Contract for school buses is clearly erroneous, arbitrary and capricious and contrary to law for the reasons set forth below.

1. The IFB online bidding process violates § 11-35-1529(2) because the State is not accepting the real-time electronic bids. Section 11-35-1529 provides for procurement by online bidding and provides, in pertinent part: “[a]t the Opening Date and Time, the State must begin accepting real time electronic bids.” (Emphasis added) Pursuant to the IFB, a private company, eBridge and not the State, is conducting the online reverse bidding. In pertinent part, the IFB provides:

The bidding for this solicitation will be conducted as an online reverse auction with eBridge Business Solutions, LLC (“eBridge”) (sic) The offeror with the lowest bid on each line item listed above at the conclusion of the auction, in accordance with the terms in Section VI, will win the award of that line. Vendors may make an offer on one, any or all lines. (Emphasis added)

Exhibit 1, IFB, SCOPE OF SERVICES, ACQUIRE SUPPLIES / EQUIPMENT (Modified), p. 4.

Step 3 – eBridge Training

Each vendor authorized to participate in the online reverse auction will receive notice directly from eBridge, and NOT the State. Authorized vendors will participate in individually conducted training sessions to become familiar with the eBridge processes and software. The auction will not take place until eBridge training has been completed by all vendors. (Emphasis added)

Id., p. 5.¹

Additionally, the State is not even answering questions about eBridge’s policies or procedures that will be used during the online reverse bid.

¹ See also, *Id.*, “Important Dates Related to this Solicitation”.

*****Questions concerning eBridge must be directly addressed with eBridge. The State will not answer questions concerning eBridge, it's policies, procedures, etc.***** (Emphasis in original)

Exhibit 1, **IMPORTANT NOTICE**, p. 1. Finally, the IFB provides: "At the completion of the online reverse auction, all vendors are required to complete the 'Bus Evaluation Spreadsheet Bus Evaluation Spreadsheet Amend 1' and turn them in to eBridge by sending to Rebecca.flaherty@ebridgeglobal.com." (Emphasis added) Exhibit 1, p. 21 Clearly, e-Bridge² and not the State is receiving the online reverse bids in contravention to the § 11-35-1529(2).

The MMO does not have the statutory authority to delegate this online auction to eBridge or any other vendor. The Code very clearly delineates all instances in which authority or duty under the Code may be delegated. The following sections expressly provide for the chief procurement officer or the head of a using agency to delegate authority to perform a task for which each is authorized or required to perform: § 11-35-20(h) delegating roles and responsibilities to the various government procurement officers; § 11-35-310. Definitions, (26) "Purchasing agency"; § 11-35-840, Delegation of authority; § 11-35-1560, Sole source procurement; and §11-35-2740, Relationship with using agencies. Each delegation of authority authorized by the Code is by one governmental official or agency to another governmental official or agency and not to a private company.

MMO is the State. There is no provision in the Code that authorizes MMO to delegate its responsibility to receive online bidding to another governmental entity, much less to a private company. Having specifically delineated the instances in which the State can delegate its procurement responsibilities, by not authorizing the State to delegate its responsibility to receive online electronic bids, the General Assembly clearly evidenced its intent to prohibit delegation in online bidding. Under the well-established rule of statutory construction *expressio unius est exclusio alterius*, statutes listing specific things or characteristics evidence the intent of the Legislature that the list exclude all other things and characteristics not mentioned. State v. Burton, 301 S.C. 305, 391 S.E.2d 583, 584 (1990); Pennsylvania Nat'l Mutual Casualty Insurance Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458, 463 (Ct. App. 1984). Thus, where the General Assembly did not provide specific delegation authority, it did not intend the agency to have such authority.

The IFB is in violation of § 11-35-1529(B), since the State is not accepting the reverse online bids and has expressly divorced itself from any oversight of the bidding process. The IFB should be withdrawn and solicited in accordance with the requirements of the Code.

² E-bridge's Information, Exhibit 2, states that the MMO will accept bids. That is not a correct since the eBridge information makes clear that the bids will be submitted through the eBridge website.

2. Online bidding for school buses is not more advantageous to the State than other procurement methods contained in the Code. Section 11-35-1529(1) provides:

(1) Conditions for Use. When a purchasing agency determines that on line bidding is more advantageous³ than other procurement methods provided by this code, a contract may be entered into by competitive on line bidding, subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section. (Emphasis added)

MMO has engaged eBridge to conduct the online bidding. Exhibit 2, eBridge Information, Amendment #1, p. 1. The successful vendor will have to pay e-mail a fee of 1.5% of the total order anytime a bus order is placed. Certainly, the vendor will not absorb the cost of the fee but will pass it on to the State.

The DOE has been allocated \$30,000,000 in the FY 2015-2016 FY budget by the General Assembly for purchase of school buses. By way of example, assume a type school bus costs between \$90,000 and \$100,000. At \$100,000 per bus, without the eBridge fee, with \$30,000,000 DOE could buy 300 buses ($\$300,000,000 \div \$100,000$). One and a half percent \$100,000 is \$1,500. So the vendor will add \$1500 to the cost of each bus to cover the eBridge fee. Adding the eBridge fee to each bus, the bid price for 300 buses would be \$30,450,000. In essence, the State loses \$450,000 or 4.5 school buses because of the addition of the e-Bridge fee. So the DOE could only purchase 26.5 buses with its \$30,000,000. If the bus cost were only \$90,000, the 1.5% fee on \$90,000 is \$1350. At \$90,000 per bus, without the eBridge fee, with \$30,000,000 DOE could buy 333.3 buses ($\$300,000,000 \div \$90,000$). Adding the eBridge fee to each bus, the bid price for 333.3 buses would cost \$30,446,955. In essence, the State loses \$446,955 or 4.8 school buses because of the addition of the e-Bridge fee.

An invitation to bid issued pursuant to § 11-35-1520 does not involve an additional fee that the vendors will pass through to the State so all funds appropriated by the General Assembly will actually go to the cost of purchasing much needed school buses in order to replenish an aging fleet. Using the acknowledge successful invitation for bid process maximized the State appropriated dollars.

Additionally, neither the MMO nor the Department of Education (DOE), on information and belief,⁴ based the determination to use online bidding on any empirical data that suggests,

³ On February 12, 2016, we requested, pursuant to the Freedom of Information Act, copies of documents regarding MMO's determination that online bidding of school buses is more advantageous to the State. We have not yet received a response to our requests. We also requested copies of any such determination regarding the advantages of online bidding from the Department of Education (DOE). Again, we have not yet received a response to our requests. Copies of our FOIA letters are attached hereto as Attachment A and B respectively.

⁴ On February 12 and February 16, 2016, McNair sent freedom of information requests both to DOE and to MMO. MMO answered both requests on February 19. On February 17, 2016, McNair received a response from DOE stating that it would reply by March 7, 2016. See Exhibit 3, attached e-mail chain.

must less demonstrates, that the purchase of school buses, using South Carolina specifications, will save the State money or allow it to maximize its purchasing power. MMO, in its September 30, 2015 "Determination for Using Competitive Online Bidding (11-35-1529)" (Determination)⁵, specifically stated that it would use the information gathered from this IFB to determine the impact of inline bidding on pricing ("we will be conducting analysis on the impact of this prices on the competitive environment and price" Exhibit 4, Determination, p. 1. Notably, the Determination found that the "regulations provide relief should the results not be in the best interest of the State."

The plain and unambiguous language of § 11-35-1529(1) requires that the purchasing agency must determine that online bidding is more advantageous than other methods of procurement, not that it has the potential to achieve a better outcome. The Determination stated the following:

Since, (sic) the IFB process has been used successfully many times to process the statewide school bus contract,⁶ use of a different source selection method should, at a minimum, have the potential to achieve a significantly better outcome. In this case, we define better outcome as lower pricing, increased competition or both.

...

The process contemplated has the potential to achieve lower pricing for school busses. ... The potential benefit ...⁷ ...

... We have been informed that all 3 of the manufacturers, who are usually represented in offers when we solicit via an IFB, have actively participated in competitive online bidding in other states. Therefore, we anticipate little or no change in the competitive environment. ...

... The 1.5% charged by the state contractor to run the auction is to be included in the offered bid price. Therefore a price neutral result will have the net effect of a 1/5% reduction in the profit margin for the awardee.⁸

⁵ The Determination makes it clear that the DOE requested that MMO conduct the solicitation using online bidding. Exhibit 4, p. 1.

⁶ It is not reasonable to assume that "[s]ince the IFB process has been used successfully many times to process the statewide school bus contract", using another method of procurement, at a minimum, should have the potential to have a better outcome. "Successful", by definition means: having the correct or desired result : ending in success". <http://www.merriam-webster.com/dictionary/successful> February 22,2016.

⁷ The example given in the Determination is based on "probability".

⁸ It is not reasonable to assume that bidders will reduce their profit margins by 1.5% and the MMO has no way to enforce such. Further, this statement is contrary to that contained in Exhibit 2, the eBridge information published with Amendment 1, which says the fee will be added to the cost. See *infra*.

Exhibit 4, pp. 1-2.

The Determination certainly does conclude that online bidding is more advantageous to the IFB process that “has been used successfully many times to process the statewide school bus contract.” The Determination defined “better outcome” as more competition or better pricing and then admitted that there would not be more competition (“we anticipate little or no change in the competitive environment”).

As to pricing, the Determination is nothing more than mere speculation that there may be lower pricing (“Our best estimates indicate that the outcome is likely to be neutral or better.” Exhibit 4, p. 2). However, this estimate is based on the assumption:

The 1.5% charged by the state contractor to run the auction is to be included in the offered bid price. Therefore a price neutral result will have the net effect of a 1.5% reduction in the profit margin for the awardee.

Id. To the contrary in the eBridge information to bidders issued on February 5, 2016 in conjunction with Amendment 1, it states:

The awarded supplier is obligated to pay a transaction fee to eBridge pursuant to the Terms & Conditions accepted upon placement of initial bid. The fee will be based on the final total purchase price assessed as one and one half (1.5%) percent of the awarded price. The transaction fee is assessed on the final selling price.

Exhibit 2, p. 3. There is absolutely no rational reason for the MMO or the DOE to believe that bidders will absorb the 1.5% fee and reduce their profit margins rather than build it into their bids.

Finally, MMO did not discuss the fact that the State would be conducting an online bid for the school bus contract with the known three (3) vendors before the specifications committee met with the vendors, although MMO said that it would. The e-mail between MMO and DOE states:

At some point after the specs are complete and before the committee meets with the vendors, I will submit an email to the vendors with our intention of using the reverse auction process to perform this solicitation. It will be very carefully worded and provide them with Brian’s contact information so they can speak directly to him about the process.⁹ I understand that you don’t want this message to go out too soon so I’ll coordinate with your office for the timing.

⁹ This statement only serves to reiterate the fact that the online bid process is not the State’s process, rather eBridge’s process.

Exhibit 3, E-mail dated September 30, 2015 from Michael Speakmon to Tim Camp, p. 2, ¶ 6. The e-mail went on to say: "Like I said before, if there are any legislators that are friendly to the DOE and support the reverse auction process, it would be good to get them onboard before word gets out so we can have our backup ready." Exhibit 3, p. 2. Certainly, when a purchasing agency has allegedly made a determination that it is using a procurement process that is more advantageous to the State than other procurement processes, it does not have to be careful what it tells vendors or have legislative support lined up to support the determination.

Finally, when the MMO told vendors at the meeting with the specifications committee that the new bus contract would be procured through a reverse online bidding process, the vendors were finally given the opportunity to submit questions at the pre-bid conference conducted on January 20, 2016,¹⁰ after the initial solicitation had been issued. Interstate raised numerous questions and issues regarding the pricing aspect and that fact that the online bid process would not result in the State getting the lowest price, just the most recent price. See Exhibit 6, Interstate's Pre-Bid Questions. These questions are incorporated in this protest as if fully set forth herein and constitute additional evidence as to why the online bidding processes is not more advantageous than the tried and true successfully used invitation for bid process.

In short, the Determination is NOT a finding that online bidding is more advantageous than the long tried and true and successful traditional invitations for bid. Rather, the Determination is nothing more than a determination that there may be a potential for a neutral outcome or some savings, let's try and see and if it doesn't work, we can fix it by regulation—presumably terminating the bid and resoliciting buses.

The IFB is in violation of § 11-35-1529(A), since the State's alleged Determination is arbitrary and capricious, not in accordance with law and purely speculative¹¹ and amounts to nothing more than a test to see if online bidding might work. The IFB should be withdrawn and solicited in accordance with the requirements of the Code. Further, we expressly request that the CPO not make any decision or hold any hearing until after March 7, 2016, when DOE has indicated it will respond to the freedom of information requests referenced in Exhibit 7.

3. The IFB violates § 11-35-20(a) of the Code because it does not provide "provide increased economy in state procurement activities and to maximize to the fullest extent practicable the

¹⁰ It is noteworthy that at the January 20, 2016 pre-bid meeting, the president of eBridge told the meeting attendees that eBridge had not participated in online bidding for school buses.

¹¹ MMO stated that it had "been informed that all 3 of the manufacturers, who are usually represented in offers when we solicit via an IFB, have actively participated in competitive on line bidding in other states." Exhibit 4, pp. 1-2. However, the eBridge Bus Buds Summary (Exhibit 5) shows that different manufacturer brokers, not the manufacturers themselves, have participate only in local school district online bidding, except for Central Indiana Educational Service Center, which "is a 503c non-profit providing free and at-cost educational programs throughout central Indiana." <http://www.ciesc.k12.in.us/about/about> There is no state wide online bidding for school buses. Further, there is no demonstration that the bids received from very minimal online bidding resulted in either neutral or lower prices.

purchasing values of funds while ensuring that procurements are the most advantageous to the State ...” By choosing to utilize a contractor that charges an ongoing 1.5% fee of the total cost of buses each time that a bus order is placed, the State is devaluing by 1.5% the amount (\$30,000,000 in FY 2015-2016) of money appropriated by the General Assembly each year to DOE for the purchase of the school buses. The term of this contract is a minimum three (3) years. Through the term, any time a bus is purchased, either by DOE or another public procurement unit, the 1.5% fee must be paid to eBridge. To the extent that the General Assembly appropriates additional funds for school buses in the next two fiscal years, all purchases of buses will be subject to the 1.5% fee.

The Determination specifically found that the DOE is its “primary customer.” Exhibit 4, p. 2. However, since this is a Statewide Term contract, many, if not all of the school districts that have funding to buy school buses, buy their buses through the Term Contract. The local school districts will also have their buying capacity diminished by 1.5% when they purchase buses.

Further, as noted in protest ground 2 above, the online bidding process is not more advantageous to the State than the tried and true, and by MMO’s on admission, successful, traditional invitation for bids. The IFB is in violation of § 11-35-20(a) as it does not maximize to the fullest extent practicable the purchasing values of funds while ensuring the procurement is most advantageous to the State.

4. The IFB violates § 11-35-20(f) of the Code because it does not “ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement.” The Determination’s “Bottomline” (sic) is:

Previous reverse auctions conducted for SC governmental entities in various markets have realized significant savings.¹² Our best estimates indicate the outcome is likely to be neutral or better. Our primary customer [DOE] understands the known associated risks¹³ and wants us to move forward. Conducting the auction is the only way to obtain actual data specific to the SC

¹² On information and belief, none of the previous reverse auctions involved vehicle procurement or involved solicitations when the known historic universe of potential bidders was identified and there were only three (3) bidders. As was acknowledged in the Determination, there would be “little to no change in the competitive environment.” Exhibit 4, p. 2. The previous reverse auctions involved commodities such as motor oil, where there is a very large universe of potential bidders for the reverse auction.

¹³ Remarkably, these “known risks” are not outlined in the Determination although the decision was clearly anticipated to be controversial since it was closely held and not released early and the suggestion was made that legislative support be garnered.

school bus market to analyze.¹⁴ The regulations provide relief should the results not be in the best interest of the State.

Exhibit 4, p. 2.

Obviously, the statement that “regulations provide relief should the results not be in the best interest of the State” anticipates that there may have to be a resolicitation of the bus contract because it is not more advantageous to the State. In essence, this IFB is a trial balloon to see if online bidding works with school bus procurement. Someone apparently did a modicum of research on eBridge’s three (3) prior online school bus bids. No information is provided on: 1) when the bids were conducted; 2) how many buses were procured; 3) whether competition was increased; 4) whether cost savings were realized; 5) how many vendors bid online and 6) whether the procuring agencies were satisfied with the process and are still using the process.

To conduct a solicitation with, at a minimum, the realization that it might not be successful and might result in a second solicitation it not fair to vendors. As that CPO is aware, it is time consuming and expensive for vendors to participate in a solicitation for a Statewide Term Contract for school buses. It is neither fair nor equitable nor does it increase public confidence in the procurement process when the Determination allegedly finding a method of procurement more advantageous recognizes on its face that the solicitation may fail and the State has a regulatory means to correct the failure and require the vendors to go through another solicitation.

The IFB is in violation of § 11-35-20(f) as it does not “ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement.”

5. The determination to award a single contract for each bus type and not allow school districts purchasing from the Statewide Term Contract to purchase buses from vendors’ whose prices are within four (4%) of the low bidder is in violation of § 11-35-20(c) because it does not “develop procurement capability responsive to appropriate user needs”. Statewide term contracts are specifically designed so that political subdivisions of this State can have an opportunity to enjoy the purchasing power of the State and to save money for local taxpayers through the State’s purchasing power. The IFB provides:

USING GOVERNMENTAL UNIT means the unit(s) of government identified as such on the Cover Page. If the Cover Page identifies the Using Governmental Unit as "Statewide Term Contract," the phrase "Using Governmental Unit" means any South Carolina Public Procurement Unit [11-35-4610(5)] that has submitted a

¹⁴ Given the known limited number of school bus manufacturers in the United States, it is unclear why the State cannot rely on data gathered by other states using online bus purchasing. This seems particularly obvious when the State relied on the fact that three (3) manufacturers have participated in online purchasing.

Purchase Order to you pursuant to the contract resulting from this solicitation. Reference the clauses titled "Purchase Orders" and "Statewide Term Contract."

Exhibit 1, p. 6.

(a) With this solicitation, the state seeks to establish a term contract (as defined in Section 11-35-310(35)) available for use by all South Carolina public procurement units (as defined in Section 11-35-4610(5)). Use by state governmental bodies (as defined in Section 11-35-310(18)), which includes most state agencies, is mandatory except under limited circumstances, as provided in Section 11-35-310(35). See clause entitled "Acceptance of Offers 10% Below Price" in Part VII.B. of this solicitation. Use by local public procurement units is optional. Section 11-35-4610 defines local public procurement units to include any political subdivision, or unit thereof, which expends public funds. Section 11-35-310(23) defines the term political subdivision as all counties, municipalities, school districts, public service or special purpose districts.

Id., p. 31. Pursuant to § 11-35-4610(5), a public procurement unit is either a "local public procurement unit or a state public procurement unit." The IFB anticipates school districts statewide purchasing from the Statewide Term Contract.

Historically, the invitations for bid for school buses awarded contracts for line items for multiple bidders. Each line item was awarded to the lowest bidder and any vendor whose bid was within 4% of the lowest bidder for that line item could participate in the contract. See Exhibit 6, p. 2 ("Award of Statewide Contract") The CPO can take judicial notice that while DOE had to purchase its buses from the lowest bidder for each line item, school districts could purchase any specific item from any line item contractor. This multiple award flexibility provided local school districts the option to choose from a vendor whose buses best meet their needs, such as bus design, current fleet, service/training experience for existing fleet, availability of service locations, and parts standardization.

In the September 30, 2015 e-mail to DOE, MMO wrote, in pertinent part:

2. Also per DOE's request, we will award to only one vendor for each bus type. The pros and cons of a single award approach were provided¹⁵ and DOE has elected to assume the risks associated with same. Anytime a contract ends before the end of the maximum contract period listed on the award, a contract lapse is likely to occur and the re-solicitation will be worked in for processing with scheduled procurement as time permits.

¹⁵ The freedom of information requests specifically requested this type information and we have not yet been provided the same. See Exhibit 7, February 16, 2016 letter.

3. The line item structure is structure is to include base units plus add and deduct options. The number and type of options are to be kept to a minimum.

Exhibit 3, p. 1. Michael Speakmon to Tim Camp.

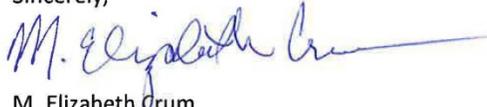
As noted above, the Determination does not address known risks. More importantly, the determination to award a line item only to one vendor takes away and to keep the number and type of options to a minimum deprives the school districts and other public procurement units of any flexibility in ordering through the Statewide Term Contract. This single award determination is not responsive to appropriate user needs for school districts and other non-DOE public procurement unit users that are eligible to purchase from the Statewide Term Contract and is in violation of § 11-35-20(c).

6. The Determination is in violation of § 11-35-210 because it not "documented in sufficient detail to satisfy the requirements of audit as provided in Section 11-35-1230." Even assuming the Determination makes a finding that online bidding is more advantageous to the state (it does not), it is not documented with sufficient detail to satisfy audit requirements. Instead, the Determination finds that there is the "potential", the anticipated favorable outcomes are based on application of theory as opposed to practice, there will be little to no increase in the competitive environment, and that "[o]ur best estimates indicate the outcome is likely to be neutral or better." See Exhibit 4. Certainly, this is not a finding that the use of online bidding is more advantageous to the State than the invitation for bid "process [that] has been used successfully many times to process the statewide school bus contract." *Id.* Finally, the Determination, while it acknowledges "known risks", does not discuss or attempt to document why proceeding either with an online bid or a single item award is the preferred course of action. The Determination is made in violation of § 11-35-210.

CONCLUSION

For the reasons discussed above, the IFB should be cancelled and MMO should be instructed to resolicit the Statewide Term Contract for school buses.

Sincerely,



M. Elizabeth Crum

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.