

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
In the Matter of Protest of: )  
ProSource, LLC )  
IFB # 5400003300 )  
Glass-lined Commercial Gas Water Heater)

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE No. 2011 - 142

POSTING DATE: January 25, 2012

MAILING DATE: January 25, 2012

This matter is before the Chief Procurement Officer (“CPO”) pursuant to a letter of protest from ProSource, LLC (ProSource) under the provision of Section 11-35-4210(1)(b) of the South Carolina Consolidated Procurement Code (“Code”). With this invitation for bids (“IFB”), the South Carolina Department of Corrections (“SCDC”) attempts to procure a glass-lined commercial gas water heater. [Exhibit 1, IFB; Exhibits 2 and 3, Amendments] SCDC posted an intent to award to Ferguson Enterprises, Inc. on September 22, 2011. [Exhibit 4, Award Extension; Exhibit 5, Intent to Award] ProSource challenges that decision.

The CPO has conducted an administrative review without a hearing. This Decision is based on the procurement documents and the applicable law.

### **NATURE OF PROTEST**

ProSource’s letter of protest is attached and incorporated herein by reference.

### **DISCUSSION**

Section 11-35-4210(1)(b) of the Code provides in relevant part:

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...within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code...(Emphasis added)

In order to be timely, the protest must be in writing and received by the CPO within the above timeframe. Section 11-35-4210(2)(b). The Code defines “days” to mean calendar days and specifies how a period of time prescribed by the Code is to be calculated. Section 11-35-310(13).

In this case, the intent to award to Ferguson Enterprises, Inc. was posted on September 22, 2011. [Exhibit 5] Therefore, any protest was due to the CPO by at least 5:00 PM on October 3, 2011. However, ProSource did not file its protest of this intent to award with the CPO until November 21, 2011.

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

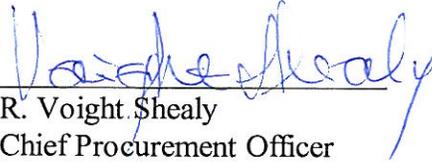
[I]t is essential to the operation of government that challenges its purchasing decisions be limited. If the time for filing protests can be waived, the state will be unable to determine with certainty when it can enter into a contract with one vendor for vital goods and services without the danger of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

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

Here ProSource filed its protest beyond the time allowed under the Code. Accordingly, the CPO does not have the authority to hear this protest, and this protest must be dismissed as untimely filed.

**DETERMINATION**

For the aforementioned reason, the protest is dismissed.



R. Voight Shealy  
Chief Procurement Officer  
for Supplies and Services

January 25, 2012  
Columbia, SC.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW  
Protest Appeal Notice (Revised July 2011)

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.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

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

**FILING FEE:** Pursuant to Proviso 83.1 of the General Appropriations Act for Fiscal Year 2011-2012, "[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 hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

**LEGAL REPRESENTATION:** In order to prosecute an appeal before the Panel, an incorporated business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. Protest of Lighting Services, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and Protest of The Kardon Corporation, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

**Skinner, Gail**

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**From:** Protest-MMO [Protest-MMO@mmo.sc.gov]  
**Sent:** Monday, November 21, 2011 12:56 PM  
**To:** \_MMO - Procurement; Shealy, Voight; Skinner, Gail  
**Subject:** FW: Solicitation 5400003300

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**From:** Grover Martin[SMTP:GMARTIN@PROSOURCESUPPLY.COM]  
**Sent:** Monday, November 21, 2011 12:55:49 PM  
**To:** Protest-MMO  
**Subject:** Solicitation 5400003300  
**Auto forwarded by a Rule**

**We would like to submit an official protest to the award of solicitation 5400003300 to Ferguson Enterprises for \$152,500.00.**

**Our submitted bid was \$104,180.25 for an equal heater. Besides a 3" difference in the cold water connection which should not be an issue at all for a replacement, there was no difference in the unit. We are a S.C. registered company, they are a foreign owned company. We are a small business, they are not. The fact that the difference in the bids was nearly 32% would have one believe that something is terribly wrong in the decision to the purchased heater over one that is equal. The fact that our State is constantly talking about its lack of funds, I question as to how it can overspend by \$48,319.75 on one order. I realize that there is only a 15 day window to protest the decision, however, I was just notified by our sales department and I feel that to let this issue stand without some notification is inappropriate. Please respond as soon as possible.**

**Grover Martin  
CEO ProSource LLC  
Greenville SC  
864-232-2545**