

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Contract Controversy of:

Great Lakes Petroleum Company

Materials Management Office
IFB No 5400003081
E10 Ethanol Blended Gasoline
Transport and Tankwagon

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2012-108

POSTING DATE: June 19, 2012

MAILING DATE: June 19, 2012

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter from Great Lakes Petroleum Company (Great Lakes) dated March 5, 2012, requesting resolution of a contract controversy. With this invitation for bids (IFB), the Materials Management Office (MMO) contracted for E10 Ethanol Blended Gasoline Transport and Tankwagon. According to the IFB, "The purpose of this solicitation is to establish a statewide term contract for E10 ethanol blended gasoline in transport and tankwagon quantities for use by eligible customers in the State of South Carolina. For the purposes of SC statewide bulk fuel contracts, transport quantities are defined as 7,500 gallons or more. Tankwagon quantities are defined as less than 7,500 gallons." (Ex. 3, p. 3, Scope of Solicitation) Great Lakes won Items 1 – 4, E-10 Tankwagon loads for Zones 1 – 4. Other awards were made to Petroleum Traders and Hess Corporation.

In his request for resolution, Mr. Jeffrey Platko, Chief Operating Officer and General Counsel, of Great Lakes, wrote, in part:

Upon information and belief, Petroleum Traders has been billing an additional \$.045 per gallon on all gallons sold by Petroleum Traders under its transport E-10 gasoline contract(s) with the State of South Carolina. John Stevens of your office indicated to me on Friday of last week Petroleum Traders was allowed by the State to invoice the additional \$.045 per gallon based on a letter or some other document inserted into Petroleum Traders' bid package which indicated should the \$.045 per gallon Federal ethanol blender's credit ever expire, Petroleum Traders would invoice State customers at \$.045 per gallon more than the awarded contract prices (the "Letter").

Great Lakes Petroleum believes the Letter is a variance to the bid specifications, thereby rendering Petroleum Traders' bid non-compliant and void. Had Great Lakes Petroleum known the State was willing to accept variances to the bidding package such as the Letter, Great Lakes Petroleum would have made a similar variance to its bid package in order to raise the per gallon price of E-10 gasoline upon any termination of the Federal ethanol blender's credit.

On February 2, 2012 Allen Register of your office sent Great Lakes Petroleum, Petroleum Traders and Hess Corp. an email addressing the request by Great Lakes Petroleum and Petroleum Traders for an additional \$.045 per gallon based on the expiration of the Federal ethanol blender's credit. In that email Mr. Register wrote "This office is NOT approving the requested price increases..." On February 7, 2012 Great Lakes Petroleum received the last correspondence from your office regarding the request for the additional \$.045 per gallon, and nowhere in this correspondence did Mr. Register indicate Petroleum Traders was being granted, or was being considered for the additional \$.045 per gallon.

Great Lakes Petroleum will need the additional \$.045 per gallon retroactive to 1-1-12 in order to continue to service the State's customers under the above-referenced contracts.

The CPO scheduled a hearing for April 25, 2012. However, Mr. Platko declined to appear. Therefore, this decision is prepared based upon an administrative review of the procurement file without benefit of a hearing.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On May 24, 2011, MMO published the IFB. (Ex. 1)
2. On May 27, 2011, MMO published Amendment # 1. (Ex. 2)
3. On June 3, 2011, MMO published Amendment #2. (Ex. 3)
4. On June 17, 2011, MMO published Amendment # 3. (Ex. 4)
5. On June 20, 2011, MMO published Amendment #4. (Ex. 5)
6. On June 23, 2011, MMO opened the bids received.

7. On July 11, 2011, MMO posted awards including Items 1 – 4 to Great Lakes. (Ex. 6)

DISCUSSION

Great Lakes requested a price increase based upon termination of the Federal ethanol blender's credit of \$0.045 per gallon. MMO rejected Great Lakes' request. Great Lakes contests MMO's rejection of its price increase request.

Relevant sections of Amendment # 2, the governing solicitation document,¹ read:

The contract price will be based on the daily publication of the Oil Price Information Service (OPIS) "morning report," which is typically published each business day at 10:00 am eastern time. The State has been divided into four (4) zones (see the list of counties at the end of this document). The gross average price per gallon for the three (3) grades of E10 ethanol blended gasoline as indicated on the OPIS morning report for the following terminals will be used as a basis for bidding and contract pricing.

Zone 1 – Spartanburg, SC
Zone 2 – North Augusta, SC
Zone 3 – Charlotte, NC
Zone 4 – Charleston, SC

Each bidder must offer a price mark-up of plus (+) or minus (-) from the OPIS morning report average price for each zone. The price mark-up shall include any and all charges (no taxes) F.O.B. destination. The State will then add the morning report OPIS average, contractor's price mark-up, MMO Administrative fee (\$0.015), inspection fee (currently \$0.0025), state environmental impact fund fee (currently \$0.0050), federal L.U.S.T tax (currently \$0.001), federal oil spill tax (currently \$0.0019), and SC road tax (currently \$0.1600) to determine the total delivered price per gallon for the respective zones and grades of gasoline.

(Ex. 3, p. 24, Contract Price)

Regarding award, the IFB read "Award will be made to the responsible and responsive bidder(s) which offer(s) the lowest price mark-up for each respective line item." (Ex. 3, p. 18,

Award Criteria – Bids)

¹ The text of the amendment began with the following bolded legend:

ATTENTION: THIS AMENDMENT (#2) REPLACES THE ORIGINAL INVITATION FOR BID AND AMENDMENT #1 ENTIRELY. YOU MAY DISCARD ANY COPIES OF THOSE DOCUMENTS YOU HAVE.

In response to the IFB, Great Lakes bid:

| | |
|----------|-----------------------|
| Item # 1 | Price Mark-Up \$.104 |
| Item # 2 | Price Mark-Up \$.104 |
| Item # 3 | Price Mark-Up \$.118 |
| Item # 4 | Price Mark-Up \$.118 |

Based on the mark-up prices bid, Great Lakes won Zones 1-4 and received the contracts.

The IFB also included the following language:

The initial term of this contract is fixed for one year. There are two mutual renewal options of one year apiece, making the maximum contract period three years. See 'Term of Contract' clauses in Section VII B.

(Ex. 3, p. 3, Scope of Solicitation)

Start date: 07/01/2011 End date: 06/30/2012. Dates provided are estimates only. Any resulting contract will begin on the date specified in the notice of award.

(Ex. 3, p. 4, Maximum Contract Period – Estimated)

Any pricing provided by contractor shall include all costs for performing the work associated with that price. Except as otherwise provided in this solicitation, contractor's price shall be fixed for the duration of this contract, including option terms. This clause does not prohibit contractor from offering lower pricing after award.

(Ex. 3, p. 21, Fixed Pricing Required)

Upon approval of the Procurement Officer, prices may be adjusted for any renewal term. Prices shall not be increased during the initial term.

(Ex. 3, p. 32, Price Adjustment – Limited – After Initial Term Only) (Emphasis added). As established by the Notice of Award, the effective dates of Great Lakes' contracts were July 10, 2011 meaning the initial twelve month term covered the period of July 10, 2011 – July 9, 2012.

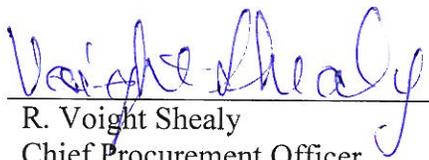
CONCLUSIONS OF LAW

Great Lakes' filed its request for a price increase within the first year of the contract. Upon award of the contracts to Great Lakes, all the terms of the solicitation were incorporated

into those contracts. Price increases during the initial term of the contracts are expressly prohibited by the contract language quoted above.

DETERMINATION

MMO was correct to deny the price increase requested by Great Lakes to be effective January 1, 2012, as it was expressly prohibited by the contract terms. Case denied.



R. Voight Shealy
Chief Procurement Officer
For Supplies and Services



Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised March 2012)

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: 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 2011 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 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." 2011 S.C. Act No. 73, Part IB, § 83.1. 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

From: Protest-MMO [Protest-MMO@mmo.sc.gov]
Sent: Monday, March 05, 2012 9:49 AM
To: _MMO - Procurement; Shealy, Voight; Skinner, Gail
Subject: FW: Tankwagon E-10 Gasoline, Contract Numbers 4400003925, 4400003926, 4400003927, 4400003928
Attachments: DOC030512-001.pdf

From: Jeff Plaiko[SMTP:JPLATKO@GLPETRO.COM]
Sent: Monday, March 05, 2012 9:48:19 AM
To: Protest-MMO
Cc: Tom L. Arcoria; Anthony Arcoria
Subject: Tankwagon E-10 Gasoline, Contract Numbers 4400003925, 4400003926, 4400003927, 4400003928
Auto forwarded by a Rule

To Mr. Voight Shealy-

Great Lakes Petroleum requests resolution of a controversy under the above-referenced contracts. Upon information and belief, Petroleum Traders has been billing an additional \$.045 per gallon on all gallons sold by Petroleum Traders under its transport E-10 gasoline contract(s) with the State of South Carolina. John Stevens of your office indicated to me on Friday of last week Petroleum Traders was allowed by the State to invoice the additional \$.045 per gallon based on a letter or some other document inserted into Petroleum Traders' bid package which indicated should the \$.045 per gallon Federal ethanol blender's credit ever expire, Petroleum Traders would invoice State customers at \$.045 per gallon more than the awarded contract prices (the "Letter").

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On February 2, 2012 Allen Register of your office sent Great Lakes Petroleum, Petroleum Traders and Hess Corp. an email addressing the request by Great Lakes Petroleum and Petroleum Traders for an additional \$.045 per gallon based on the expiration of the Federal ethanol blender's credit. In that email Mr. Register wrote "This office is NOT approving the requested price increases..." On February 7, 2012 Great Lakes Petroleum received the last correspondence from your office regarding the request for the additional \$.045 per gallon, and nowhere in this correspondence did Mr. Register indicate Petroleum Traders was being granted, or was being considered for the additional \$.045 per gallon. This despite the fact that via email on February 6, 2012, I made a public records request for copies of the Petroleum Traders and Hess transport E-10 bid packages, a request that remains unfulfilled to this day.

On Friday of last week I was reviewing the State procurement site regarding this issue and noticed Petroleum Traders had in fact been granted the \$.045 per gallon increase. Frankly, I am shocked that the State would grant such an increase given the clear directive of Mr. Register's February 2, 2012 email. Moreover, there is no doubt that fair play amongst the State's fuel vendors has been violated

3/5/2012

given that no communication was made to Great Lakes Petroleum regarding Petroleum Traders' being granted the \$.045 per gallon increase, and the State conveniently failed to respond to my public records request.

Great Lakes Petroleum will need the additional \$.045 per gallon retroactive to 1-1-12 in order to continue to service the State's customers under the above-referenced contracts. Great Lakes Petroleum played by the rules and did not vary the specifications of the E-10 bid and has now been punished by the State through the State's denial of the additional \$.045 per gallon. Petroleum Traders did not play by the rules, submitted a non-compliant bid that should have been voided, and now enjoys an additional \$.045 per gallon. At this point Great Lakes Petroleum considers the State to be in breach of the above-referenced contracts.

Pertinent emails to the above narrative are attached for your convenience.

Jeffrey Platko, COO and General Counsel
Great Lakes Petroleum Co.
4478 Johnston Parkway
Cleveland, Ohio 44128
216-478-0501 (Office)
216-701-7119 (Cell)
216-478-0510 (Fax)
jplatko@glpetro.com

Jeff Platko

From: Register, Allen <ARegister@mmo.sc.gov>
Sent: Tuesday, February 07, 2012 9:51 AM
To: Jeff Platko
Cc: Stevens, John; Norfleet, Carol; Alston, Vivian; Patrick, Cheryl; Langdale, Stacy
Subject: RE: Response to Price Increase Requests for E10 Fuel Contracts + FOIA Request

Mr. Platko,

It is disappointing to receive Great Leaks notice of termination at the end of the initial term. We will add the resolicitation of the E10 Tankwagon contracts to our work schedule today.

Our analysis was limited to the markup for that is the only component of pricing that was solicited, evaluated, and awarded. When we prepared our response, we understood that 4.5 cents is a small percentage of the total price for a gallon of fuel. Unfortunately, over the years fuel suppliers have successfully pushed for these contracts to be structured to provide a guaranteed margin (markup or markdown) and that is what any requested price increase will be based upon. Guaranteed margins and daily pricing serve the suppliers' interests. We also fully understood that the markups or markdowns awarded reflect a combination of the tax incentive for ethanol and hedging the market to beat OPIS pricing. We have no expectation that our contractors are relying solely on the tax credit to achieve their desired profit margins. I am unaware of this office ever approving an increase to markups/markdowns awarded on any contract with that type pricing structure without a proportionate increase in scope.

As long as E10 remains available at the terminals, the State expects Great Lakes Petroleum's full performance throughout the remainder of the first term. In the interim we will treat your request for copies of Petroleum Traders' and Hess's offers as a FOIA request and forward it to the appropriate personnel. Have changed the font color and size associated with said request in your e-mail below to make it easier for our personnel to locate.

We have both stated our respective positions and it does not appear further negotiations will be fruitful. Additionally, as stated in our previous e-mail, none of the procurement managers on staff have the authority to approve the size price increase requested. Based on the above, this office's staff time is being directed elsewhere. If Great Lakes does not agree that this matter is concluded, it should direct its future communications to the State Procurement Officer (John Stevens – jrstevens@mmo.sc.gov; 803-737-0612). He has been briefed.

Sincerely,

Allen Register, CPPO, ASCPM
Senior Procurement Manager

From: Jeff Platko [mailto:jplatko@glpetro.com]
Sent: Monday, February 06, 2012 5:39 PM
To: Register, Allen
Subject: RE: Response to Price Increase Requests for E10 Fuel Contracts

Mr. Register- Ok, thank you for your response and your assistance in this matter. The loss of the 4.5 cents is real, and it significantly impacts Great Lakes Petroleum. I cannot speak as to why Hess would reply as they did. The loss of the 4.5 cents has an even greater impact on Hess than on Great Lakes. Your margin analysis can easily be viewed as flawed as it does not take into consideration the cost of the fuel itself, but rather only the margin bid. Your commentary on the "known expiration date" is, at best, self-serving for SC. Congress created and then approved the ethanol blend subsidy for over 20 years (it is widely known and accepted that there would be no ethanol blending industry without the subsidiary) and there certainly was no reason to believe the subsidy would come to an end after being so long in existence. The end of this subsidiary merely shows the dire fiscal straights of the Federal government.

Kindly consider this email to be notice to the State of SC that Great Lakes Petroleum will terminate this contract at the end of its term. Please confirm the State has received this notice and accepts this email as notice of such termination. Such notice should not be considered in any way a waiver of any other rights, contractual or otherwise if any, of Great Lakes Petroleum to terminate this contract prior to its expiration.

Lastly, kindly consider this email to be a public records request for a copy of the bid package submitted by both Petroleum Traders and Hess for solicitation number 5400003081. Thanks for your assistance. Jeff

Jeffrey Platko, COO and General Counsel
Great Lakes Petroleum Co.
4478 Johnston Parkway
Cleveland, Ohio 44128
216-478-0501 (Office)
216-701-7119 (Cell)
216-478-0510 (Fax)
jplatko@glpetro.com

From: Register, Allen [mailto:ARegister@mmo.sc.gov]
Sent: Thursday, February 02, 2012 10:39 AM
To: Gayle Newton; Jeff Platko; crodelo@hess.com
Cc: Stevens, John; Norfleet, Carol; Langdale, Stacy; Patrick, Cheryl
Subject: Response to Price Increase Requests for E10 Fuel Contracts

Ms. Rodelo, Ms. Newton, Mr. Platko:

Thank you for your continued interest in doing business with the State of South Carolina.

Over a period of a couple of months, this office received requests from 2 of our 3 contractors for E-10 fuel. Both requests were for a \$0.045 per gallon increase in the awarded fuel mark-up due to the expiration of a federal government credit equaling that amount. We were able to confirm the 12/31/2011 expiration of the federal tax credit and its value relatively quickly. Since these are high use / high profile contracts, the requests merited careful consideration.

The most compelling fact that gave us pause was our 3rd contractor, who was competitively priced, was not seeking a price increase. We contacted our 3rd contractor and they indicated their awarded mark-up was priced separate of the federal credit and they did not need to increase their mark-up.

We then checked the bid tab to verify the awarded mark-ups on the transport contracts were comparable. They were. We also analyzed the price differential between the awarded mark-ups and those of its competitors on all contracts awarded. Our review found that a \$0.045 per gallon price change would exceed the difference between the low and next low offerors. In some cases it would exceed the 3rd low offer. Additionally, a \$0.045 is huge when compared to the awarded margins (40% – 400% depending on the contract - Tankwagon or Transport). It is clearly beyond our discretionary authority to approve. Finally, it was brought to our attention that the credit expiration date was known or should have been known by all parties submitting offers when preparing same. This office cannot determine from the submitted offers which ones factored the federal credit into its pricing and which did not. The solicitation document contains the clause "Price Adjustment – Limited – After Initial Term Only". Since the initial term would not end until 07/10/2012 and the credit was set to expire on 12/31/2011, it would appear to be a high risk bidding strategy to factor the federal tax credit into the offered mark-up.

This office is NOT approving the requested price increases for the reasons stated above. Although, it would have been more compelling if all 3 contractors had requested the same increase, there remains a high probability that it would not have been approved. It would be unfair to the other offerors to approve a change of the requested size 6 months into the initial term of the contracts clearly making it beyond our discretionary authority.

Both contractors requesting the price increases have the following options:

1. Continue to perform the contract through the remainder of the initial term and opt out of the term option (**requires written notice to this office within 15 days of this notice that the contractor elects to terminate its contract(s) at the end of the current term**).
2. Continue to perform the contract through the remainder of the initial term and exercise one or more of the term options.

We hope the contractors find this response to be reflective of a thoughtful and careful review. While we understand that it is not likely to be the desired response, we must be mindful of this decision's implications to the sealed bid process. More specifically we must ensure a level playing field is maintained for all potential offerors throughout the entire procurement process.

Sincerely,

Allen Register, CPPO, ASCPM
Senior Procurement Manager