

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

Landscaping and Mower, Inc.

Department of Transportation
IFB No. 5400005983

Rest Area and Welcome Center
Maintenance

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2013-124

POSTING DATE: September 6, 2013

MAILING DATE: September 6, 2013

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest dated July 23, 2013¹, from Landscaping and Mower, Inc. (L&M). With this invitation for bids (IFB), the South Carolina Department of Transportation (SCDOT) attempts to procure grounds maintenance for various welcome centers and rest areas located in the upstate. Following the evaluation of the bids received, SCDOT posted its intent to award. L&M protested SCDOT's awards of Item 3, Spartanburg Welcome Center, to Carlton Landscaping (Carlton), and Item 5, Laurens and Newberry rest areas, to ABC Landscaping (ABC) alleging inordinate difficulties submitting his bid that caused his request for the resident contractor preference to not be considered.

After attempting to resolve the matter failed, the CPO conducted a hearing August 27, 2013. Appearing before the CPO were Chris Hinson of L&M, James Speed of ABC, and Glennith Johnson of SCDOT.

¹ Chris Hinson of Landscaping and Mower, Inc. advised the CPO in an email entitled Intent to Protest, dated June 24, 2013, "There was an online bid that I participated on and I intend to protest the results on 4 of the awards." The email provided no grounds for the intent to protest.

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 2, 2013, SCDOT issued the IFB. [Ex. 1]
2. On May 3, 2013, SCDOT issued Amendments 1, 2, 3, and 4. [Ex. 2] None is relevant here.
3. On May 31, 2013, SCDOT conducted its public bid opening. The actual bids received for Items 3 and 5 were:

<u>Bidder</u>	<u>Item 3 Bid Amount</u>	<u>Item 5 Bid Amount</u>
Carlton	\$1,500.00	
L&M	\$1,395.00	\$2,550.00
ABC	\$2,415.84	\$2,693.75

[Ex. 5]

Both Carlton and ABC requested the South Carolina Resident Contractor Preference. After applying the preference, the adjusted bid amounts were as follows:

<u>Bidder</u>	<u>Item 3 Bid Amount</u>	<u>Item 5 Bid Amount</u>
Carlton	\$1,395.00	
L&M	\$1,395.00	\$2,550.00
ABC	\$2,415.84 ²	\$2,505.19

[Ex. 6]

In order to break the tie for Item 3, SCDOT conducted a coin toss in accordance with SC Code 11-35-1520(9)(e), with Carlton winning the coin toss.

4. On July 19, 2013, SCDOT posted its intent to award. [Ex. 7]
5. On July 23, 2013, L&M filed its protest with the CPO. SCDOT suspended its intent to award. [Ex. 8]

² DOT apparently did not calculate the preference against ABC's bid for Item 3 because application of the preference would not have caused ABC's bid to be low.

DISCUSSION

According to Mr. Hinson, SCDOT asked the bidders to submit bids online, something he had never done before in SCEIS, the state's automated procurement system. He had great difficulty learning the SCEIS bid submittal system causing him to contact the SCEIS Help Desk four times and Andy Bowman, SCDOT Procurement Officer, many times. He finally was successful in submitting his bid on line, but worried so much that it had not been submitted successfully he completed another hard copy bid and hand delivered it to the SCDOT bid opening just in case. Upon arriving at the bid opening, Mr. Hinson informed SCDOT bid clerk Sandra Suber that he had submitted his bid on line, but had brought a hard copy too just in case his online bid had not been submitted successfully. Ms. Suber stamped the hard copy bid received and then checked and confirmed receipt of Mr. Hinson's on line bid. Upon learning that his hard copy bid had arrived successfully, Mr. Hinson retained his hard copy bid without surrendering it to SCDOT.³ Regarding his hard copy bid, Mr. Hinson stated during the hearing, "I didn't leave it." He actually attended the public bid opening annotating bidders' prices on the bid schedule of his hard copy bid. After the bid opening, Mr. Hinson left with his hard copy bid in hand thinking he had won Items 3 and 5, as well as, Item 2.

Anxious for the awards, Mr. Hinson called Ms. Bowman regarding the posting of the awards. Ms. Bowman advised him that after SCDOT applied the South Carolina Resident Contractor Preference, he had, in fact, only won Item 2 because he had not requested the preference. Checking his hard copy bid, which was still in his possession, he realized that he had requested the Resident Contractor Preference on the hard copy bid, but not on his on line bid - he had made a critical mistake.

³ The CPO cautions all agencies against stamping a bid received, but not keeping it.

Mr. Hinson asks the CPO to ignore his on line bid, accept his hard copy bid, in which he requested the Resident Contractor Preferences, and award L&M Items 3 and 5.

CONCLUSIONS OF LAW

Mr. Hinson acknowledged that he erred on his on line bid in that he did not request the SC Resident Contractor Preference, saying, "I made a mistake." This is a very unfortunate situation for both L&M and the State of South Carolina. However, regarding requesting the preference, the Consolidated Procurement Code requires:

(E)(1) A business is not entitled to any preferences unless the business, to the extent required by law, has:

(4) A solicitation must provide potential bidders an opportunity to request the preferences that apply to a procurement. By submitting a bid and requesting that a preference be applied to that bid, a business certifies that its bid qualifies for the preference for that procurement. For purposes of applying this section, a bidder is not qualified for a preference unless the bidder makes a request for the preference as required in the solicitation.

[11-35-1524, Resident Vendor Preference.] Decisions of the Procurement Review Panel have enforced the statutory language. *E.g., Appeal by Tekna Corporation*, Panel Case No. 2012-7; *see Appeal by Warren Truck Equipment, Inc.*, Panel Case No. 2002-1 (vendor who claimed not to have received bid schedule showing preferences not permitted to request preferences post-opening).

SCDOT's IFB instructed the bidders on the preference and how to request it and provided an opportunity for bidders to request the preference beside each line item. In his on line bid, the only bid Mr. Hinson surrendered to SCDOT, Mr. Hinson answered "No" to each preference.⁴ Therefore, he is not eligible to receive the preference.

⁴ Mr. Hinson also filled out the paper bid schedule, which he scanned and uploaded as an attachment to his electronic submittal. Just as he had done in the on line bid, he failed to claim the preferences on the attachment.

On his hard copy bid, the one Mr. Hinson says he brought to the bid opening, Mr. Hinson answered “Yes” to each preference question. He asks the CPO to substitute the hard copy bid—which he never surrendered to SCDOT—for the on line bid he actually submitted to SCDOT. That bid, however, was not in the State’s possession at the time of the bid opening; therefore, it cannot be considered.⁵

To the extent L&M asks that its on line bid be treated as a mistake and corrected, the Code grants no comfort. Regarding bidder mistakes, the Code reads, “Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code.” [11-35-1520(6) Bid Acceptance and Bid Evaluation.] It reads further, “After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted. After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations promulgated pursuant to it.” [11-35-1520(7) Correction or Withdrawal of Bids; Cancellation of Awards.]

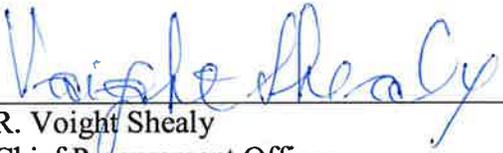
The supporting regulations read, “To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.” [19-445.2085. Correction or Withdrawal of Bids; Cancellation of Awards.B.] Correction Creates Low Bid.] Allowing L&M to “correct” its mistake, thus applying the preference, would cause its bid to be low. There is nothing irregular about L&M’s on line bid. Neither on the electronic form nor on the uploaded attachment did it claim any preference. Any mistake is not, then, “clearly

⁵ From review of L&M’s hard copy bid, it is clearly evident that it was not in SCDOT’s possession during the bid opening because, as Mr. Hinson acknowledged, he wrote down the bids received as they were opened.

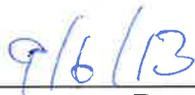
evident from examining the bid document.” L&M cannot correct its bid and claim the preference. *Appeal by Koch Industries, Inc.*, Panel Case No. 1999-4.

DETERMINATION

For the foregoing reasons the protest is 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 June 2013)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

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

FILING FEE: Pursuant to Proviso 108.1 of the 2013 General Appropriations Act, “[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. [The Request for Filing Fee Waiver form is attached to this Decision.] If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing.” PLEASE MAKE YOUR CHECK PAYABLE TO THE “SC PROCUREMENT REVIEW PANEL.”

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

-
1. What is your/your company's monthly income? _____
 2. What are your/your company's monthly expenses? _____
 3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.

PROTEST OF SOLICITATION 5400005983 INTENT TO AWARD REGION 3 AND
REGION 5 FOR GROUNDS MAINTENANCE.
ATTENTION MR. V. SHEALLY

To: Chief procurement officer Mr. V. Sheally
From: Chris Hinson (Landscaping and Mower Inc.)
Subject: My right to protest solicitation 5400005983 intent to award region 3 spartanburg
and region 5 laurens and newberry

Date: July 23, 2013

Dear Mr. V. Sheally Chief Procurement officer materials managemnt
My name is Chris Hinson owner of Landscaping and Mower Inc. In Chester South
Carolina. I wish to protest solicitation 5400005983 and intent to award region 3
Spartanburg welcome center to Carlton Landscape and Region 5 newberry and laurens
rest areas to ABC Landscaping. I have tried to list reasons and explanations below as to
my feelings why this protest is necessary. Please take time to consider and review this
protest.

The reason for my protest: I have been a vendor for the SCDOT for 5 years. During all
bids we have always been responsible for putting together bid packages consisting of all
documentation needed and submit it in a sealed envelope to the person responsible for
obtaining these bids. I have participated in several of these bids and when our information
is submitted, it is all submitted at once. This year we were told that it would be an online
bid and we were told that we were to submit all documentation online however we would
be allowed to submit a hard copy in the event we were unsuccessful with the online bid.
We were told by Andrea (Andy Bowman) in the pre bid conference that we needed to
submit it online but she would be available up until 10.00 am the morning of the bid to
assist us if we had problems. I went ahead and prepared all my documentation as we were
always required even though we were only asked for a few documents this time. The
solicitation, proof of business for 5 years and pictures of businesses we do along with
references and equipment layout. I supplied all of those and went ahead and submitted all
other documentation like letter of credit, insurance etc. When I got ready to submit my info
online I obtained a lady who didn't know how to do it. She finally told me that she was
trying to help me out of a book. I had scanned all of my documents into computer on my
wifes computer at her work and emailed them to my computer at my residence. I had
Checked the no box of the SC resident contractors preference but the recorded
conversation states and its heard on the first call that night that I was checking yes.
However I had scanned the info into the computer as a no box by accident. I called that
lady on the help desk and she told me I needed to call back. That was two days before the
bid due date. I had already made the correction in my hard copy which I took with me to
the bid opening and submitted it to Mrs Suber which she stamped in received at 9.58 am
on May 31, 2013 stating received SCDOT. I told her that I had submitted this online but
Mrs Bowman told us we could submit the hard copy as a back up if needed. She told me
to just hold onto it at that time. The hard copy of which she stamped in had the SC
Resident contractor preference checked yes. I had uploaded the other forms not knowing
exactly what to do due the fact I had tried 4 times to talk with a help desk. Mrs Bowman

was out sick Two or Three days prior to bid mornin. I had made numerous calls at least 10-15 each day to Mrs. Bowman and left numerous messages trying to ask her for help but I did not know she was out sick. I called Lee Tsiantis emailed Lee Tsiantis cause I did not know how to do the online bid. I finally got Lee and He called me and gave me a name. I found out Andy was out sick and was not available to help. Complete panic set in and I did not get to change the uploaded sheets that went by email however I had changed them in the hard copy that I brought with me bid opening morning. They did not ask to keep it cause they said it had came through online. I did not know I had not changed the sheets I uploaded cause I did not know how due to no help. Mr. Sheally, in talking with Andy Bowman about this, she stated to me that maybe the SCDOT should have offered some type training for vendors so they would know and understand the do's and don'ts the hows and how not to's. In the recorded phone calls you can hear the panic from me. The emails to lee reveals the panic. The calls and calls to Andy getting no where reveals the panic. The online help desk reveals that she was helping me out of a book till at the last minute a lady helped me and my documents went throught however the wrong sheets went through instead of the documents I submitted with my hard copy.

Simple mistakes happen. Andy said we should have had some type training prior to bid so we would all know and understand

The help desk lady completely confused me causing major panic. When I realized what the SC contractors preference meant I had already uploaded my documents. The corrected documents were in my hard copy bid that I presented on bid morning at 9.58 am and stamped in my Mrs .Suber

Andy was absent due to sickness and not able to help- so many phone calls and no help then I got worried about deadline.

Even after the bid submission, we were allowed to submitt proof of 5 years of business cause we were told that our references etc were not sufficient. We were allowed to send this after all bid was opened cause others did not understand what was needed to prove 5 years business. This was allowed even though bids had already been opened and reviewed. Mrs. Suber stanped my hard copy in of which I have with me. You can see when looking at them where I wrote the totals of all bids on each sheet that day. I even told Mrs Suber and Andy that I had my hard copy with me. Andy said my bid came through but I didn't realize until later that I didn't change the uploaded sheets to the correct sheets on SC resident contractors preference. In talking with Tim and Donna Traxler they too said that they heard we could present a hard copy.

On the day the intent to award was posted--it was accidentally posted on my award all of ABC landscapings info. My awards were not posted until I got in touch with Andy Bowman on Monday and she fixed it. She said it was accidentally put in there like that but I could refresh my computer and it would be right now. Whats right is right.

RELIEF REQUESTED-- from me (Landscaping and Mower Inc.)---To award region 3 spartanburg to Landscaping and Mower in the amount of \$1395.00 per month of which I bid and to award Landscaping and Mower Inc. region 5 newberry, and laurens to Landscaping and Mower Inc. in the amount of \$2550.00 per month. Both of my bids were lower. The SC resident contractor preference created a tie bid for spartanburg in the amount of \$1395.00. A coin toss was completed and ABC got the toss. The other was awarded to Carlton Landscaping due to the SC contractors preference which made them

alittle lower than us but Andy states they will still be awarded their amount in the event I lose this protes.

Please take time to review this and consider this. Ask Andy if she was absent and unable to help. Also ask her if you would if she said we should have had a training class offered prior to these new bidding ways. I've bid all regions low as possible making only alittle profit in the event we are successful in obtaining all bids. We have to bid in the hopes that we receive all regions. If not and we bid for each job, bids will be to high and not even in the running. This will not shut my business down, however I would hope that as I have explained all detail to you it would be considered to award these regions to Landscaping and Mower Inc. I will overnight the hard copy to you that was stamped in in hopes that it would be returned to me after review. Again please consider my plea. I was the only vendor to show up for bid opening on that day.

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Sincerely,

Chris Hinson--Landscaping and Mower Inc. Owner

2756 Gaston farm road, Chester SC 29706--ph-803-242-0452 fax-803-789-3155or 5745

Email--cjhinson@truvista.net