

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

Allied Waste Services

Materials Management Office
IFB/RFP No. 5400006249

Solid Waste
Adjutant General's Office

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2013-137

POSTING DATE: December 2, 2013

MAILING DATE: December 2, 2013

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest dated October 31, 2013, from Allied Waste Services (Allied). With this invitation for bids (IFB), the South Carolina Materials Management Office (MMO) attempts to procure solid waste disposal services for the Adjutant General's Office (AGO). Following the evaluation of Allied's bid; MMO rejected Allied as a non-responsible bidder and posted its intent to award to Allwaste Services, Inc. (Allwaste). Allied protested the award to Allwaste challenging MMO's determination of non-responsibility.

In order to resolve the matter, the CPO conducted a hearing November 21, 2013. Appearing before the CPO were Allied, represented by David B. Summer, Jr., and Pamela A. Baker, Esquires; Allwaste, represented by Vickie Towery-Cook; and MMO, represented by John Stevens, State Procurement Officer.

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 June 19, 2013, MMO issued the IFB. (Ex. 1)
2. On July 15, 2013, MMO conducted a pre-bid conference.
3. On July 25, 2013, MMO issued Amendment #1 rewriting the IFB and replacing it entirely. (Ex. 2)
4. On August 13, 2013, MMO opened the bids. (Ex. 3) Allied was the apparent low bidder.
5. On August 29, 2013 at 8:56 AM, following an inquiry by Dave Hatfield of Allied, Richard Edmondson, MMO Procurement Manager, emailed Mr. Hatfield:

The Material Management Office is close to completing the evaluation of the submitted offers for the solicitation listed herein. However, Allied Waste Services offer is missing the information in section V. Qualifications Required Information sub paragraph (b)financial..... . The submission of this information will be treated under 11-35-1520 (13), Minor Informalities..... . Allied Waste Services must submit the documents by e-mail to this Office no later than Tues, September 02, 2013 10 am. Thank you in advance for your assistance. (Ex. 24)

6. On August 29, 2013 at 9:35 AM, Mr. Hatfield responded by email, "I had a copy of our latest statement in the packet when it was delivered. I will however get you that information." (Ex. 24)
7. On August 29, 2013 at 11:12 AM, Mr. Hatfield emailed Mr. Edmondson,

I have attached a financial summary for the last five years. As I mentioned I enclosed the latest financial statement which encompasses two years. They may be confused as our parent company is Republic Services, we are a decentralized in names so we still go by Allied Waste Services and the Federal ID on the bid will show that also. Let me know if you need anything else." (Ex. 25)

The financial statement Mr. Hatfield attached was entitled "Summary Financial Information for Republic Services, Inc."

8. On August 29, 2013 at 11:31 AM, Mr. Edmondson emailed Mr. Hatfield,

The offer submitted to the State is from Allied Waste Services. Therefore, the financial that accompany the solicitation must also be Allied Waste Services. Republic Services, Inc. information cannot be used in the evaluation because they did not submit the offer. Please provide Allied Waste Services financial to the State no later than Tues, September 02, 2013 10 am. (Ex. 26)

9. On August 29, 2013 at 12:11 PM, Mr. Hatfield emailed Mr. Edmondson,

Allied Waste Services is an LLC which is part of Republic Services. Our Federal ID and State vendor number are associated with the LLC which is part of Republic Services much as a local division of any major company would not have

local financial but are part of the parent company. There are actually no financial that are tied directly to this division. We have been servicing the McEntire facility for years as Allied Waste. I have asked our controller for any information she might have.” (Ex. 26)

10. On September 9, 2013 at 10:03 AM, Mr. Hatfield emailed Mr. Edmondson, “I wanted to touch base to see if you have had a chance to finish the evaluation process for solid waste bid.” (Ex. 27)
11. On September 9, 2013 at 2:16 PM, Mr. Edmondson responded, “I am still waiting on Allied Waste Services Financials.” (Ex. 5)
12. On September 9, 2013 at 2:57 PM, Mr. Hatfield emailed Mr. Edmondson, “I have attached a 10K form that in the appendix you will see Allied Waste, Delaware listed as a part of the Republic Services corporate make up. I hope this will give you the information to accept the Republic financials.” (Ex. 5) “Allied Services, LLC of Delaware” was listed among 24 pages of organizations affiliated with Republic Services, Inc.
13. On September 20, 2013 at 8:10 AM, Mr. Hatfield emailed Mr. Edmondson, “Just touching base to see how the evaluation is going. I had sent some other information on the 9th about how our company is structured, I hope that helped.” (Ex. 28)
14. On October 31, 2013, Mr. Edmondson completed a written determination declaring Allied non-responsible citing:

Allied Waste Services submitted an offer for this solicitation containing the lowest price, resulting in their offer initially being classified as the apparent low bidder. However, during the evaluation to follow, the Procurement Manager discovered the offer was incomplete in that it did not include the required financial statements for Allied Waste Services but included financial documentation for Republic Service Inc. The Procurement Manager could not ascertain from the submitted information if it was submitted in error. Therefore, the Procurement Manager elected to classify Allied Waste Service’s omission of it financial documentation as a “Minor Informality per 11-35-1520(13)). An e-mail notification was sent on August 29, 2013 by the Procurement Manager affording Allied Waste Services an opportunity to cure the omission by submitting their financial statements. The solicitation was the first reasonable request for information pursuant a responsibility determination, which is all that is required per 11-35-1810(2). The email was the second reasonable request.

Republic Services Inc. did not submit an offer on its behalf nor on behalf of a subcontractor. However, the Procurement Manager subsequently received from Allied Waste Services, financial summary for Republic Services, Inc. (attached). Based solely on the information provided, it would appear the offeror does not have financial documentation to satisfy the responsibility determination. The failure to cure the requirement to provide the last 2 years of financial statements after 2 reasonable requests from the Procurement Manager is sufficient grounds in

and of itself for a “Non-Responsibility Determination”. Additionally, the refusal to provide the requested information caused the Procurement Manager to speculate as to the reason for same and seek additional information.

In the absence of the required financial information and prior to drafting a “Non-Responsibility Determination”, the Procurement Manager elected to run a Dunn & Bradstreet (D&B) report to gain additional insight as to Allied Waste Services financial position. The following report information is **NOT** indicative of an offeror with the financial means to fully perform as specified in the solicitation:

1. Financial Stress Class Score ranking of four (4). The scale ranges from 5 (being highest risk) to 1 (lowest risk).
2. Credit Score class of 5. The scale ranges from 5 (being the highest risk) to 1 (being the lowest risk).

The Procurement Manager has carefully reviewed all the items herein, and has made a determination based on same. The incomplete offer submitted, incomplete cure, an (sic) no financial statements provided, and the D&B report combine clearly indicate Allied Waste Services does not meet the definition of “Responsible bidder or offeror” as defined in 11-35-1810, 19-445.2125, and 11-35-1410(6). (Ex. 7)

15. On October 31, 2013, MMO posted its Intent to Award to Allwaste. (Ex. 8)

16. On October 31, 2013, Allied filed its protest with the CPO.

17. On November 12, 2013, MMO suspended its Intent to Award. (Ex. 9)

DISCUSSION

MMO solicited bids for solid waste disposal at twelve (12) AGO facilities in Richland County. The IFB required the contractor to “install the types and sizes of containers per the current frequency list herein.” A total of 69 containers ranging in size from 2 yards to 40 yards were required. (Ex. 2, p. 18) The IFB read “This specification covers refuse, trash and recycling collection, transportation and disposal services. The work required includes the furnishing of all labor, transportation, equipment and materials necessary to provide the required level of services.” (Ex. 2, Specifications, p. 17) Disposal required the transportation of the containers to “designated and authorized refuse collection sites on a certain frequency schedule appropriate for each container.”

The solicitation included the following standard language:

QUALIFICATION OF OFFEROR (JAN 2006)

To be eligible for award of a contract, a prospective contractor must be responsible. In evaluating an Offeror's responsibility, the State Standards of Responsibility [R.19-445.2125] and information from any other source may be considered. An Offeror must, upon request of the State, furnish satisfactory evidence of its ability to meet all contractual requirements. **Unreasonable failure to supply information promptly in connection with a responsibility inquiry may be grounds for determining that you are ineligible to receive an award.** S.C. Code Section 11-35-1810. [05-5005-1]

(Ex. 2, p. 23) (emphasis supplied) Along with their bids, bidders were required to include:

- a) A brief history of the offeror's experience in providing work of similar size and scope.
- b) Your most current financial statement, financial statements for your last two fiscal years, and information reflecting your current financial position. If you have audited financial statements meeting these requirements, you must provide those statements.
- c) A detailed, narrative statement listing the three most recent, comparable contracts (including contact information) which you have performed and the general history and experience of your organization.
- d) A list of every business for which offeror has performed, at any time during the past three year(s), services substantially similar to those sought with this solicitation. Err on the side of inclusion; by submitting an offer, offeror represents that the list is complete.
- e) List of failed projects, suspensions, debarments, and significant litigation.

(*Id.*, Qualifications—Required Information) In response to the requirement to submit financial statements, Allied provided extensive financial information for Republic Services, Inc., its parent.

On August 29 at 8:56 AM, Mr. Edmondson asked for Allied's financial statement. Mr. Hatfield responded, "I had a copy of our latest statement in the packet when it was delivered. I will however get you that information." (Ex. 24) The financial information Mr. Hatfield referenced was for Republic Services, Inc. On August 29, 2013 at 11:12 AM, Mr. Hatfield emailed Mr. Edmondson, "I have attached a financial summary for the last five years. As I mentioned I enclosed the latest financial statement which encompasses two years. They may be

confused as our parent company is Republic Services, we are a decentralized in names so we still go by Allied Waste Services and the Federal ID on the bid will show that also. Let me know if you need anything else.” Again, the financial information provided by Allied was for Republic Services, Inc. (Ex. 25) At 11:31 AM, Mr. Edmondson advised Mr. Hatfield “The offer submitted to the State is from Allied Waste Services. Therefore, the financial that accompany the solicitation must also be Allied Waste Services. Republic Services, Inc. information cannot be used in the evaluation because they did not submit the offer. Please provide Allied Waste Services financial to the State no later than Tues, September 02, 2013 10 AM.” (Ex. 26) On September 9, 2013, at 2:16 PM, Mr. Edmondson responded, “I am still waiting on Allied Waste Services Financials.” (Ex. 5) On September 9, 2013 at 2:57 PM, Mr. Hatfield emailed Mr. Edmondson, “I have attached a 10K form that in the appendix you will see Allied Waste, Delaware listed as a part of the Republic Services corporate make up. I hope this will give you the information to accept the Republic financials.” (Ex. 5) Mr. Hatfield never provided the procurement officer any financial statements for Allied, despite the requirement in the solicitation and three specific requests for that information.

CONCLUSIONS OF LAW

The Consolidated Procurement Code (Code) requires the procurement officer to determine a bidder’s responsibility before awarding a contract. Section 11-35-1520(10). The Code defines a responsible bidder as “a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.” Section 11-35-1410(6). Section 11-35-1810(1) of the Code also states “Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement

officer concerning capacity to meet the terms of the contract and based upon past record of performance for similar contracts.”

In response to the solicitation, and each time Mr. Edmondson requested financial information for Allied Waste Services, the actual bidder, Mr. Hatfield responded with financial information for Republic Services, Inc., Allied’s parent company. From August 29 to October 31, 2013, Allied never provided Mr. Edmondson any financial statements for itself. The first financial statements of Allied Waste Services were submitted at the hearing before the CPO on November 21, 2013.

The Code provides, “The unreasonable failure of a bidder or offeror to supply information promptly in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror.” Section 11-35-1810(2). The accompanying regulation provides in pertinent part:

At any time prior to award, the prospective contractor shall supply information requested by the procurement officer concerning the responsibility of such contractor. **If such contractor fails to supply the requested information, the procurement officer shall base the determination of responsibility upon any available information or may find the prospective contractor non responsible if such failure is unreasonable.** In determining responsibility, the procurement officer may obtain and rely on any sources of information, including but not limited to the prospective contractor; knowledge of personnel within the using or purchasing agency; commercial sources of supplier information; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; government agencies; and business and trade associations.

S.C. Code Ann. Reg. 19-445.2125B (emphasis supplied). The solicitation reiterates this requirement by repeating the statutory language. In his determination of non-responsibility Mr. Edmondson specifically referred to Allied’s failure to provide financial information, despite

several requests.¹ In fact, his determination highlighted the quoted portion of Section 11-35-1810(2).

A procurement officer's responsibility determination is a matter of discretion and cannot be overturned unless the protestant shows it was "clearly erroneous, arbitrary, capricious, or contrary to law." S.C. Code Ann. 11-35-2410(A). In *Protest of Value Options*, Panel Case No. 2001-7, the South Carolina Procurement Review Panel noted that procurement officers are given broad discretion in making their responsibility determinations because these are a matter of business judgment. The Panel explained that "[t]o 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 faith² 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.*, citing *Robert E. Derecktor of Rhone Island, Inc. v. Goldschmidt*, 516 F.Supp. 1085 (U.S.D.C. Rhode Island 1981); see also generally, *Leventis v. SC Dep't of Health and Environmental Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000) (finding that the agency is the ultimate fact finder and its findings are not clearly erroneous even where they differ from the hearing officer's.) In other words, the issue before the CPO is not whether Mr. Edmondson's decision was correct. If there is any rational basis for his determination, the CPO must deny the protest.

¹ In the absence of financials specific to the bidder, Mr. Edmondson made an inquiry regarding Allied Waste Services through Dunn & Bradstreet. His determination referred to poor ratings for Financial Stress and Credit Score in the D&B report as additional grounds for finding Allied non-responsible.

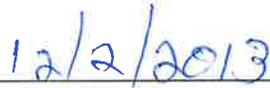
² Mr. Hatfield acknowledged in his testimony he had no reason to believe that Mr. Edmondson acted in bad faith or harbored any ill will toward Allied.

DETERMINATION

The CPO finds Allied's refusal to provide Mr. Edmondson financial statements for Allied Waste Services, even after repeated requests, was a reasonable or rational basis for the determination of non-responsibility. Therefore, 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.



ALLIED WASTE SERVICES



October 31, 2013

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

This is a letter of protest for the intent to award bid number 5400006249 on contract number 5000013914 to Allwaste Service Inc.

We have been given a letter of non-responsibility determination for the solicitation.

Section 11-35-1410 Capability to perform Sub (6)

In my cover letter I stated that we are the second largest solid waste company in the United States. In the background page I noted that we run 16 commercial routes and 18 industrial routes confirming our ability to provide service. In our references section you will see that we currently service McEntire AFB as one of our current contracts which would make us the incumbent for this work.

Section 11-35-1810 Failure to supply information

After receiving notice that the financials submitted were Republic Services and not listed as Allied Waste Services, I called Mr. Edmondson and explained that we are a decentralized company and that we are part of Republic Services due to a merger and that no financials exist for Allied Waste.

Section 19-445.2125 Responsibility of Bidders

Financials for Republic Services were enclosed as well as list of references, background information, strategy and ownership information including stock exchange listing symbol. The names of the primary Liaison and secondary as requested were listed.

In subsequent conversations and emails I send additional financials as well as a 10K form that addressed the merger of companies.

The Federal ID and state Vendor number are listed to Allied Waste and were supplied. There is no D&B listing for Allied Waste as it is part of Republic Services.

In an email from Mr. Edmondson he stated that the financials submitted not being listed as Allied Waste service would be considered a minor informality. I then sent him additional years of financials for Republic Services in an effort to satisfy the request.

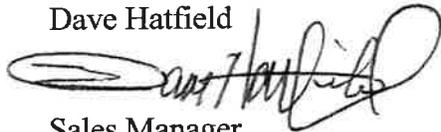
I attended the bid opening in person and with the reading of the totals, I was the apparent low bidder. After reviewing the intent to award, the tally of costs show we were the low bidder by \$13, 416.00 per year which is \$67,080 lower for the term of the contract. This is a substantial savings to the Adjutant Generals Office.

Every effort was made to comply with all request and the determination that we do not have the necessary financial strength or resources are completely incorrect. If you just look at the number of years we have serviced this and the surrounding communities we are above the rest. Then taking in consideration that we own and operate two disposal facilities gives us the ability to take care of your needs for the long term. No other company participating in the bid process can make that statement.

I would ask that the intent to award be set aside and Allied Waste Service, a division of Republic Services be awarded the bid as low responder.

Thank you and I look forward to hearing your response. I am available for a meeting if you would like to discuss further.

Dave Hatfield



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