

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In Re: Protest of Airgas USA, LLC
(National Welders).

CASE NO. 2015-145

POSTING DATE: April 14, 2015

MAILING DATE: April 14, 2015

Protest of Solicitation No. 5400009090 for
Industrial Gases Statewide Term Contract

The South Carolina Consolidated Procurement Code (the Code) grants any actual bidder the right to protest the award or intended award of a contract, except that a matter that could have been raised as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract. S.C. Code Ann. § 11-35-4210(1)(b). This solicitation was issued by the Information Technology Management Office (ITMO) for a statewide term contract for Industrial Gases. Airgas USA, LLC (National) protests the intended award of a contract to Praxair Distribution. [Attachment 1] The Chief Procurement Officer¹ issues this ruling without a hearing.

Findings of Fact

Invitation For Bids Published:	01/29/2015
Amendment 1 Issued	01/29/2015
Bid Opening	03/09/2015
Intent To Award Issued	03/20/2015
Protest Received	03/28/2015

Discussion

National protests that:

It is Airgas USA, LLC (National Welders) belief that the intended recipient (Praxair) of the Statewide Industrial & Medical Gas contract **5400009090 /Award 4400010282** does not meet the Overall Qualifications listed in **sections V.**; coverage to adequately supply the number of state agencies within the State of South Carolina within the prescribed time allowance referenced in Amendment I, section **Delivery Date (Jan 2006).** ...

[National Welders Letter of Protest, Page 1]

National Welders understood what it would take to meet the new delivery requirements, and added the necessary infrastructure and assets to our bid. It is unfathomable that the intended recipient could place enough resources, assets or additional locations in place in

¹ The Interim Materials Management Officer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

10 days to meet the state expectations, and are the grounds that the intent to bid be rescinded and reviewed for all technical, logistical and overall effectiveness to the State of South Carolina.

[National Welders Letter of Protest, Page 2]

Section V includes two standard clauses: Qualification of Offeror (Jan 2006) and Subcontractor – Identification (Feb 2015). [Solicitation, page 21] Amendment 1 added a paragraph to the general qualifications clause:

Evaluation of responsibility may be based on but not limited to administrative and technical capacity, production capabilities, financial resources, past or current performance records, proximity to regions, and timeliness.

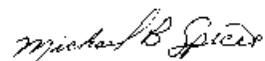
[Amendment 1, page 18] There are no specific resource requirements for offerors, nor are there any special standards of responsibility. *See* S.C. Code Ann. Reg 19-445-2125(F).

Section 11-35-4210(2)(b) requires that “A protest, including amendments, must set forth both the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided.” National’s letter of protest includes a wealth of information about its own capabilities, including number of trucks, drivers, routes, distribution points, and customers it serves. It does not identify any specific requirement of the solicitation that Praxair failed to meet, nor does it point to any Praxair deficiencies that would prevent Praxair from performing the contract. Essentially, National expresses in its protest nothing beyond its own belief that Praxair will not be able to perform. This is not a proper ground of protest. *See, e.g., ASC Medistar Service, Inc.*, B- 213724 (Comp.Gen.), 84-1 CPD ¶45, 1983 WL 27814 (“Moreover, whether a contractor complies with its obligations under a contract is a matter of contract administration and is not for resolution under the Bid Protest Procedures....”); *Kitco, Inc.*, B- 221386 (Comp.Gen.), 86-1 CPD ¶321, 1986 WL 63328 (“It is beyond the bid protest function of this Office to review matters of contract administration because our procedures are reserved for considering whether an award of a contract complies with statutory, regulatory, and other legal requirements, not with post award performance.”)

Determination

For the reasons stated above, National Welders protest is denied.

For the Information Technology Management Office



Michael B. Spicer
Chief Procurement Officer

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised October 2014)

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 2014 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 for 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.



March 28, 2014

To: Chief Procurement Officer MMO- Protest

From: Airgas USA, LLC (National Welders)

Subject: Protest of Solicitation **5400009090** / Award **4400010282**

Description: **Industrial Gases Statewide Term Contract**

It is Airgas USA, LLC (National Welders) belief that the intended recipient (Praxair) of the Statewide Industrial & Medical Gas contract **5400009090** /Award **4400010282** does not meet the Overall Qualifications listed in **sections V**; coverage to adequately supply the number of state agencies within the State of South Carolina within the prescribed time allowance referenced in Amendment I, section **Delivery Date (Jan 2006)**.

National Welders currently employees 200+ associate in the State of SC. Of these associates National Welders currently deploys (74) Route Delivery vehicles with (61) Full Time Route Drivers, and an additional (17 Hot Shot Route Drivers). The recipient is estimated to have (~20) Route Delivery vehicles, and approximately (~20) Full Time Route Drivers, and approximately (100) associates.

Operationally National Welders owns and operates (11) Industrial/Medical Branches that serve the State of SC, and (6) Branches in the surrounding states of GA, and NC, while the recipient operates (4) in the State of SC, and (2) in the same surrounding states. Overall National Welders operates (46) Branches, while the recipient operates (~16) in the same geographies.

Logistically the State of SC has ~41,500 miles of US/State and secondary roads. National Welders furthest point from a given distribution point of our servicing a state, local government, municipality, or technical institute is (39) miles. Of the (757) current ship to' locations (75%) of those sites fall within a (1-25) miles of an institution, and (25%) are less than (26-39) miles. The recipient as estimated by the same institutions would be (35%) within (1-25) miles, (15%) within (26-45) miles, and (50%) more than 50 miles.

Cylinder Assets and Infrastructure are critical to supplying the State with the necessary throughput to perform related research, testing, repairs of products, life saving, and dispensing of products. It is also critical to the state to have a supplier that can assist and perform in all emergent requests or unannounced events such as Hurricanes, Severe Weather, or Catastrophic events. National Welders currently services 75% of the Hospital Systems in the State of SC, and an estimated 45% of the Hospital Systems across the US, while we estimate the recipient is less than 20% nationally and less than 8% regionally in South Carolina.

Summation:

In our protesting the Industrial Gas intent to award, our only desire is to insure that the decision of the State has been met with all the necessary due diligence, and that we recognize that the “new” requirement of delivering products within a (24) hour notification period will be a challenge for any organization to meet to include National Welders. As the current provider of the Statewide Industrial Gas contract for the previous 20 years, we had 1st hand knowledge of what it would take to meet this requirement.

The State bid documents (does not provide actual quantities, and uses reference quantities for determining award) and in itself is no justification to award the business to the anticipated recipient.

National Welders understood what it would take to meet the new delivery requirements, and added the necessary infrastructure and assets to our bid. It is unfathomable that the intended recipient could place enough resources, assets or additional locations in place in 10 days to meet the state expectations, and are the grounds that the intent to bid be rescinded and reviewed for all technical, logistical and overall effectiveness to the State of South Carolina.

Thank you for allowing us to service your business. For further discussions or communications I can reached at my office in Charlotte, NC at (704) 644-3208 or email at steve.marinelli@airgas.com.

Best regards,

Airgas USA, LLC

Steve Marinelli
President, Airgas National Welders Region

SPM/bcb