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Protest Decision

Matter of: U.S. Ink and Toner, Inc.

Case No.: 2018-203

Posting Date: November 1, 2017

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400012442

Description: New Toner Cartridges

DIGEST

Protest of specifications and contract performance is denied. U.S. Ink and Toner's (USIT) letter of protest is included by reference. [Attachment 1]

AUTHORITY

The Chief Procurement Officer (CPO) conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on a review of the procurement file, applicable law, and precedents.

BACKGROUND

Key Events

Solicitation Issued

09/05/2017

Amendment 1 Issued	09/20/2017
Intent to Award Posted	10/12/2017
Protest Received	10/16/2017

ANALYSIS

The State Fiscal Accountability Authority (SFAA) published notification of this Reverse Auction to establish a state term contract for new toner cartridges for Dell, HP, Kyocera Mita, Lexmark, Ricoh and Xerox Printers on September 5, 2017. The solicitation included 6 line items and provided that award would be made by line item. The solicitation required offerors submit “the most current Manufacturer’s Suggested Retail Price list” for each line of products for which it intended to bid. The offeror’s MSRP for selected items, along with estimated quantities, were locked into a spreadsheet that calculated a total for the line item based on a percentage discount supplied by the bidder. Award was made to the lowest calculated price per line item.

During the reverse auction, Vendors will provide their % off the previously entered MSRP for each manufacturer being bid. This percentage (%) will then be automatically calculated for each item listed within that category. The result will be a lower Final Proposed Price for each item and Total Final Cost for each category.

[Solicitation, Page 16]

USIT protests the award of line item 2, New HP Cartridges and line item 3, New Kyocera Mita Cartridges awarded to Rasix Computer Center, Inc., dba Academic Supplier (AS) claiming that the MSRPs submitted by AS are not consistent with MSRPs used by all five of the approved distributors. Differences between MSRPs from different suppliers was identified in Amendment 1 posted on .September 20, 2017:

6.) Page 22 – It is our understanding; we as a bid responder have to provide the most current MSRP list. We have contacted two of our suppliers for this MSRP list. They have responded but the price lists are different. One is consistently higher than the other -5.7% higher. We have asked both of the suppliers why the MSRP list might be different. We have not heard back. But if we are having this issue, it might be each of the bid responders might be working from a different MSRP list. Why would the State not supply the same MSRP list to all the bid responders?

State's response: The Manufacturer Suggested Retail Price list (suggested retail or list pricing) that is to be submitted with your response should only include toner cartridges you offer that are *not* included in the "**product list**" spreadsheet. It is the Offeror's responsibility to collect the MSRP list for each manufacturer you will be bidding.

(emphasis in original) [Amendment 1, Question #6]

Any differences between MSRPs were neutralized by the spreadsheet's automatic calculation and had no effect on the bidding since the award was based on the lowest extended price for the line item.

USIT also protests that AS cannot perform the contract at the price bid.

Final Proposed Price for each item is not reasonable. In order to sell an item at Proposed Price the intended awardee would be selling well below the acquisition cost at any of the five approved distributors. Acquisition cost for an HP CF280A at Synnex is \$83.03. The intended awardee proposes to sell that item to the State for \$61.91. Kyocera TK172 at Synnex - \$49.17. Proposed selling price - \$40.42. Similar differences exist for the majority of HP and Kyocera products. Acquisition costs, shipping charges along with eBridge and ITMO fees put the intended awardee in a financial loss position on each transaction. Given the fact that the intended awardee had past performance issues which caused a re-bid after one year, it is reasonable to assume similar performance issues will occur with this intended award.

The CPO interprets this protest ground as a challenge to AS' responsibility.

Prior to making the award to AS, the procurement officer was required by Section 11-35-1810 to determine that AS was a responsible bidder meeting the definition found in Section 11-35-1410(6):

"Responsible bidder or offeror" means 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.

AS was determined to be a responsible bidder and has agreed to perform in accordance with the contract at the price bid. USIT's allegation that AS will not be able to fully perform the contract because of its pricing proposal is based upon speculation and conjecture. This is matter of

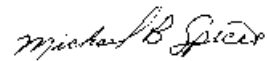
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contract administration and there is no basis for rejecting AS' bid based on a belief that it may violate the contract. *See, e.g., Appeal by Otis Elevator Company*, Panel Case No. 2017-1; *Appeal by Catamaran*, Panel Case No. 2015-2. This issue of protest is denied.

DECISION

For the reasons stated above, the protest of U.S. Ink and Toner, Inc. is denied.

For the Information Technology Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1

From: [Tom Olinger](#)
To: [itmo_protest](#)
Cc: [Barr, Randy](#); ["Preston Stone"](#); ["Sandy"](#)
Subject: Protest to Award Contract 4400017344
Date: Monday, October 16, 2017 12:53:30 PM
Attachments: [image003.png](#)

October 16, 2017 (Monday)

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

by email to: protest-itmo@itmo.sc.gov

Notice of Protest:

Intent To Award Contract Number 4400017344 to ACADEMIC SUPPLIER; 3519 MAIN STREET, UNIT 401; CHULA VISTA CA 91911 was posted October 12, 2017 (Thursday).

U S Ink and Toner protests award of Line Item 2 (New HP Cartridges) and Line Item 3 (New Kyocera-Mita Cartridges).

Grounds for Protest:

The MRPS's made a part of each award are not consistent with MSRP's used by all five of the approved distributors. Differing MSPR's do not constitute a common standard. Synnex's MSRP on an HP CF280A is \$140.73. MSRP used by intended awardee is \$149.17 Synnex's MSRP on a Kyocera TK172 is \$136.75. MSRP used by intended awardee is \$86.00. Similar differences appear for the majority of HP and Kyocera products.

Final Proposed Price for each item is not reasonable. In order to sell an item at Proposed Price the intended awardee would be selling well below the acquisition cost at any of the five approved distributors. Acquisition cost for an HP CF280A at Synnex is \$83.03. The intended awardee proposes to sell that item to the State for \$61.91. Kyocera TK172 at Synnex - \$49.17. Proposed selling price - \$40.42. Similar differences exist for the majority of HP and Kyocera products. Acquisition costs, shipping charges along with eBridge and ITMO fees put the intended awardee in a financial loss position on each transaction. Given the fact that the intended awardee had past performance issues which caused a re-bid after one year, it is reasonable to assume similar performance issues will occur with this intended award.

Relief Sought:

Cancel award of Line Item 2 and Line Item 3 on Contract Number 4400017344 to Academic Supplier. Re-solicit these Line Items using MSRP's provided by HP and Kyocera-Mita. Include these OEM provided MSRP lists as part of the new solicitation document. Deny Academic Supplier approval to participate in the re-solicitation.

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[cc: Randy Barr \(rbarr@mms.sc.gov\)](mailto:rbarr@mms.sc.gov)

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U.S. INK AND TONER

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2017)

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 111.1 of the 2016 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
1205 Pendleton Street, Suite 367, 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.