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Protest Decision

Matter of: Clover Imaging Group, USA
OTN Solutions
Identico Print Services LLC dba Print.Save.Repeat

Case No.: 2020-210, 211, 212

Posting Date: January 8, 2020

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400018519

Description: STC Toner Cartridges – Remanufactured (HP, Dell)

DIGEST

This Decision addresses two protests and an intent to protest. Protest by a non-bidder is denied for lack of standing; protest that apparent successful bidder cannot perform the requirements of the contract at the price bid is denied for failing to state a claim; and intent to protest is dismissed for failure to file an actual protest. The protest letters of Clover Imaging Group (CIG) and Identico Print Services (IPS) and the intent to protest by OTN Solutions (OTN) are included by reference. (Attachment 1)

AUTHORITY

The Chief Procurement Officer¹ (CPO) conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on materials in the procurement file and applicable law and precedents.

BACKGROUND

Solicitation Issued	09/11/2019
Amendment 1 Issued	10/18/2019
Amendment 2 Issued	11/05/2019
Amendment 3 Issued	11/22/2019
Amendment 4 Issued	11/22/2019
Intent to Award Posted	12/20/2019
OTN Solutions Protest Received	12/20/2019
Clover Imaging Protest Received	12/24/2019
IPS Protest Received	12/30/2019

The State Fiscal Accountability Authority (SFAA) issued this Invitation to Bid to establish a state term contract for remanufactured toner cartridges on September 11, 2019. SFAA posted an Intent to Award to The Office Pal, Inc. (TOP) on December 20, 2019. Protest letters were received from CIG and IPS alleging that the apparent successful bidder cannot perform the requirements of the contract at the price bid. OTN filed an intent to protest within seven days of award posting as required by the Code. However, the CPO did not receive a protest from OTN within the 15 days as required by the Code.

ANALYSIS

Protest by CIG

Section 11-35-4210(1)(b) grants any actual bidder offeror contractor or subcontractor the right to protest the award of a contract:

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

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall notify the appropriate chief procurement officer in writing of its intent to protest within seven business days of the date that award or notification of intent to award, whichever is earlier, is posted and sent in accordance with this code. Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract and has timely notified the appropriate chief procurement officer of its intent to protest, may protest to the appropriate chief procurement officer in the manner stated in subsection (2) within fifteen days of the date award or notification of intent to award, whichever is earlier, is posted and sent in accordance with this code; except that a matter that could have been raised pursuant to subitem (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

In response to an inquiry by the CPO, CIG acknowledges that it is not an actual bidder:

Good afternoon,

Thank you for providing this confirmation of receipt.

If you can share the list of participants, or guide me to a web site, then I could connect this request to a specific dealer.

Clover provides numerous private label brands for many partner resellers.

Humbly stated, as measured by volume, Clover is the largest remanufacturer, and collector of empty cartridges - in the world.

As a policy, we do not directly bid, nor do we sell directly to consumers. Please watch - [Who is Clover Imaging Group?](#)

My intent was to confirm market standards to validate consumer expectations, offer an update on potential liability, and note the evolving Environmental, Health and Safety concerns.

If the State of South Carolina is not entertaining a Clover hosted solution, then we could recommend several dealers.

This would help ensure that South Carolina is getting the best possible remanufactured product, and satisfying your environmental sustainability objectives.

(Attachment 2) As a non-bidder, CIG lacks standing to protest, and its protest is dismissed.

Protest by IPS

IPS protests:

The "Scope of Work/Specifications" section of the bid gives detailed requirements as to what is being requested: "Remanufactured" toner cartridges with specific manufacturing and testing specifications and requirements. To meet the bid requirements and include shipping (F.O.B.), the awarded costs appear to be in line with imported "compatible" toner cartridges. We can prove that the costs involved with producing remanufactured toner cartridges with new components as outlined in III.1.b of the bid, with all the proper new components, testing processes, and certifications, will greatly exceed \$6 per unit with the cost of shipping.

Prior to making the award to TOP, the procurement officer was required by Section 11-35-1810 to determine that TOP 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.

TOP was determined to be a responsible bidder and has agreed to perform in accordance with the contract at the price bid. IPS's allegation that TOP will not be able to fully perform the contract at the price bid is based upon speculation and conjecture. Contractor performance is a matter of contract administration and there is no basis for rejecting TOP's 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 for failure to state a claim.

Intent to Protest by OTN


OTN filed an intent to protest within seven days of award posting as required by the Code. Section 11-35-4210(1)(b) allows for the filing of an actual protest within fifteen days of the date award or notification of intent to award, whichever is earlier. The CPO did not receive a protest from OTN.

DECISION

For the reasons stated above, the protests of Clover Imaging Group, Identico Print Services, and OTN Solutions are dismissed.

Protest Decision, page 5
Case No. 2020-210, 211, 212
January 8, 2020

For the Materials Management Office

A handwritten signature in cursive script that reads "Michael B. Spicer".

Michael B. Spicer
Chief Procurement Officer

Attachment 1

From: [Noyes, Steve](#)
To: [ltmo_protest](#)
Subject: [External] Clover: Protest of Solicitation 5400018519 for STC TONER CARTRIDGES - REMANU
Date: Tuesday, December 24, 2019 10:11:27 AM
Attachments: [Welcome to the Karole II 10.03.2019.pdf](#)
[Intent to Award.pdf](#)
[CIG vs clone products, 12-24-19.pdf](#)

Good morning Chief Procurement Officer, Information Technology Management Office,

In accordance with Section 11-35-310(13), this email is a formal protest of the award to the Office Pal located in New Jersey for:

Solicitation: 5400018519
Description: STC TONER CARTRIDGES - REMANU (DELL, HP)
Agency: Statewide Term Contract

1. From the attached **Intent to Award** document, the description suggests this statewide contract is for: STC TONER CARTRIDGES - **REMANU** (DELL, HP). A reader could assume that the term REMANU is an abbreviation for Remanufactured Toner Cartridges. From the prices listed on pages 2 and 3, a reader would identify these costs as either heavily subsidized, Non-OEM new build alternatives, non-Trade Agreement Act (TAA) compliant imports. As interpreted by the Fair Market range, these may not be environmentally sustainable remanufactured cartridges.
2. We applaud the State of South Carolina for supporting the Executive Order [Executive Order 13834](#), signed by President Trump on May 17, 2018. This attendant link, www.sustainability.gov provides operational guidelines.
3. There is a great deal of misinformation and misinterpretation surrounding the non OEM new build alternatives, also known as - counterfeit clone compatibles, and the Remanufactured imaging supply category. Therefore, we welcome the opportunity to partner with the Procurement Officer, William Butler, and his team to confirm market standards to validate consumer expectations. For example please watch [Clover Remanufactured vs Clones](#)
4. This confusion can be attributed to the evolving legal and Environmental Health & Safety (EH&S) parameters that are in the process of being codified and defined.
5. In the context of previous litigation, precedents have been established by HP, Canon, EPSON, Xerox, Lexmark. Two cases from Canon and Brother are currently working through the courts that will further define OEM Intellectual Property (IP).
 - a. These cases could result in consequences to both the consumer and the dealer with possible restitution up to treble damages, court and legal fees, and destruction of inventory. As a warning, Canon and HP have been sending **Cease and Desist** letters to certain consumers.
 - b. The State of South Carolina may be at risk.
6. Due to the use of sub grade plastic used by some importers, the empty clone cartridges cannot be recycled or remanufactured. Consequently, many are dumped into US landfills. Clover is the largest collector and broker of empties in the world, [Read about our impact](#). We receive many clones through our collection solutions. We have few environmental options for clones. In Europe, they have identified toxic carcinogens in certain clones. To combat this malady, Europeans have established Eco Labels such as Nordic Swann, Blue Angel, and Rhineland TUV. The American EH&S experts are just beginning to investigate and decide how to contend with these hazards.
7. Grave concerns over cancer causing substances in certain new build alternatives have the focused attention of Environmental, Health and Safety experts. The EPA is about to draft a new rule banning DecaBDE, https://www.rtmworld.com/news/usa-takes-decabde-action-to-reduce-toxic-cartridges/?utm_source=2D-international-新&utm_campaign=666abab8f8-EMAIL_CAMPAIGN_2018_03_09_COPY_01&utm_medium=email&utm_term=0_8c3b94671f-666abab8f8-12509333
8. Until the regulations and consequences are defined, the market will contend with: drastic changes in the competitive landscape, confusing e-commerce misrepresentation, and unrealistically low priced options.

9. In an effort to educate their dealer membership, the National Office Products Alliance, www.NOPA.net.org hosted two webinars on June 25 and Oct. 3 featuring industry expert, Tricia Judge, Executive Director of the www.I-ITC.org. See attached "Welcome to the Jungle" presentation.
 - a. She explained how to: avoid selling product that could contain cancer causing toxins, and mitigate the risky liability associated with selling certain Asian imported, counterfeit done compatibles.
 - b. Continued OEM litigation has progressed through four key challenges that concern specific patents for a family of cartridges relative to the:
 - A. Twisted projection
 - B. Dongle coupling
 - C. Kostland sliding coupling
 - D. The lever that flips a tab
10. Key Takeaways -
 - a. Canon, and other OEM's, will continue to protect their IP. Clones will continue to be contested in the courts. Resellers and consumers must contend with uncertainties and liability.
11. There is a growing concern for Supply Chain Risk Management and Cyber Security. The OEMs have been sounding the alarm over the risk that a network can be attacked through the printer by the encrypted chip on the clone cartridge. A network could be infected with malware and/or a virus through the printers. After the fact, the importing company would disappear (as many have), to avoid prosecution concerning OEM IP infringements. The US Customs and Border Patrol (CBP) have referenced a "wack-a-mole" import predicament.

A suggestion is to reference a best practice employed by the Federal Government, Department of Energy (DOE):

Through this DOE program, most of the agency's departments have at times achieved high purchasing rates, 80 percent or higher, towards their environmental purchasing goals. Departments that demonstrate the highest level of sustainable purchasing compete for and win GreenBuy awards.

The purchasing criteria are not arbitrary. They have been researched and well developed. In the toner cartridge arena, purchasing requirements are established as follows:

Requirement:	Remanufactured
Designation:	Toner cartridges are the only cartridges designated-both black & white and color. Neither ink jet cartridges nor plotter cartridges nor copy machine cartridges are designated.
Availability:	Quality remanufactured cartridges are available and being used at numerous DOE sites daily. At all times, we will have new printers for which spent parts for remanufacture of the cartridges are not available. Just list the printers affected when reporting availability as a justified exception so we can let you know as soon as remanufactured cartridges for those printers become available.
Price:	All remanufactured cartridges are 1/3-1/2 the price of virgin cartridges. Price is not a justified exception so far as remanufactured toner cartridges are concerned.
Performance:	The "performance not good enough" is also not a valid reason for not purchasing remanufactured cartridges. We have been testing manufactured cartridges since 1997 and have yet to find a printer for which we cannot find a quality remanufactured cartridge PROVIDED the cartridges are available. To find quality cartridges, use the protocol for selecting quality remanufactured cartridges and list of suppliers other DOE sites and Federal agencies have found carry quality cartridges .
Timely Manner:	Best practice is to have a replacement cartridge on hand at all times because no one knows when a cartridge--be it virgin or remanufactured--will become spent.
Warranty:	In general, warranties cover virgin and remanufactured cartridges equally.

Testing: Consider overcoming cultural resistance by asking staff who have concerns to conduct a test ([see protocol for details](#)).

This information can be found at:
<https://www.fedcenter.gov/members/workgroups/sustainableacquisition/recycledproducts/recycledproductsfacts/cartridges/>

To ensure quality performance, the DOE has a list of requirements of its cartridge suppliers that include:

- "STMC certification, see standards and guidelines on www.I-ITC.org/stmc-guide.html
- Prices must be competitive.
- A stringent warranty and cancellation of contracts for poor quality and performance.
- Service availability.
- Have an established spent cartridge recovery system in place. "

I would welcome the opportunity to visit either by phone, and/or in person. I can expand on the guidelines and policies that will deliver environmental sustainability and the best value to the State of South Carolina.

Best,

	Steve Noyes SVP Global Accounts & Public Sector Sales w: 301.215.9241 m: 240.460.5280 e: Steve.Noyes@cloverimaging.com	
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This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this message in error, please destroy it (and any attachments) and notify the sender immediately. The recipient should check the email and any attachments for the presence of viruses. The company accepts no liability for any damage caused by any virus transmitted by this email.



From: tkinard@otnsolutions.com
To: [itnc_protest](#)
Subject: [External] Notice of Intent to Protest Solicitation 5400018519 Award 4400023185
Date: Friday, December 20, 2019 5:26:57 PM
Importance: High

Dear CPO,

I would like to make notice of my intent to protest the award listed below with posting date December 20, 2019. I will be submitting my actual protest within the 15 days of posted award notice.

Solicitation Number: 5400018519
Description: STC TONER CARTRIDGES - REMANU (DELL, HP)
Contract Number: 4400023185
Awarded To:

THE OFFICE PAL INC (7000158249)
922 HIGHWAY 33 BUILDING 8, SUITE 801
FREEHOLD NJ 07728

Thanks,
Trevor Kinard *President*, OTN Solutions
Office: (803) 269-8759
Fax: (866) 203-9548
Email: tkinard@otnsolutions.com

SERVICE DISABLED VETERAN OWNED SMALL BUSINESS

Please visit us on the web at www.otnsolutions.com



1428 W San Pedro St
Gilbert, AZ 85233

T 480.463.4548
F 480.463.4571

www.PrintSaveRepeat.com

RE: Letter of Protest

Bid# 5400018519 DESCRIPTION: STC Toner Cartridges – Remanufactured (HP, Dell)

To Whom it May Concern:

The “Scope of Work/Specifications” section of the bid gives detailed requirements as to what is being requested: “Remanufactured” toner cartridges with specific manufacturing and testing specifications and requirements. To meet the bid requirements and include shipping (F.O.B.), the awarded costs appear to be in line with imported “compatible” toner cartridges. We can prove that the costs involved with producing remanufactured toner cartridges with new components as outlined in III.1.b of the bid, with all the proper new components, testing processes, and certifications, will greatly exceed \$6 per unit with the cost of shipping.

I have included a copy of the Scope of Work/Specifications to this letter for reference.

Sincerely,

Arnett Ford IV

Identico Print Services LLC dba Print.Save.Repeat.

aford@printsaverepeat.com

Attachment 2

From: [Noyes, Steve](#)
To: [lmo_protest](#)
Subject: [External] Clover: Protest of Solicitation 5400018519 for STC TONER CARTRIDGES - REMANU
Date: Tuesday, December 24, 2019 10:41:27 AM
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Best,

	Steve Noyes SVP Global Accounts & Public Sector Sales w: 301.215.9241 m: 240.460.5280 e: Steve.Noyes@cloverimaging.com	
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STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2019)

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>

FILING FEE: Pursuant to Proviso 111.1 of the 2019 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.