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Protest Decision

Matter of: Advanced Imaging Systems, Inc.

Case No.: 2021-204

Posting Date: October 28, 2020

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400019274

Description: STC Records Conversion - Paper

DIGEST

Protest of apparent successful bidder's ability to perform the contract and unbalanced bidding are denied. The protest letter of Advanced Imaging Systems (AIS) 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 materials in the procurement file and applicable law and precedents.

BACKGROUND

Solicitation Issued:	02/28/2020
Amendment 1 Issued	03/23/2020
Amendment 2 Issued	04/10/2020
Amendment 3 Issued	04/30/2020
Amendment 4 Issued	06/05/2020
Amendment 5 Issued	07/20/2020
Amendment 6 Issued	08/10/2020
Amendment 7 Issued	08/28/2020
Intent to Award Posted	09/24/2020
Intent to Protest Received	10/01/2020
Protest Received	10/08/2020

The State Fiscal Accountability Authority (SFAA) issued this Invitation for Bids to establish a state term contract for the conversion of paper records on February 28, 2020. An Intent to Award was posted to Palmetto Microfilm Systems, Inc. (PM) on September 24, 2020. AIS filed a protest of the award on September 25, 2020.

ANALYSIS

AIS's first issue of protest questions PM's certification of independent price determination:

The Intent to Award Vendor could not have independently arrived at their bid pricing as is a requirement as stated in the IFB on page 7 referencing certification of independent price determination... Both bidders Palmetto Microfilm Systems, Inc. and Team IA are represented by Lorri Yarborough and the Yarborough family (See referenced info below regarding shared leadership between the 2 companies.) Considering Ms. Yarborough's executive level positions at both companies it is difficult to conclude that she does not have a significant role in determining pricing for both companies, as they have partnered in projects in the past. In addition, having shared executive leadership makes it impossible to conclude that no communicating and/or consulting occurred. Both companies are relatively small local businesses. It appears to be an effort to restrict competition and secure a second contract in the event of a multiple award.

By submitting a bid, the bidder certifies independent price determination under penalty of law:

CERTIFICATE OF INDEPENDENT PRICE DETERMINATION (MAY 2008)

GIVING FALSE, MISLEADING, OR INCOMPLETE INFORMATION ON THIS CERTIFICATION MAY RENDER YOU SUBJECT TO

**PROSECUTION UNDER SECTION 16-9-10 OF THE SOUTH CAROLINA
CODE OF LAWS AND OTHER APPLICABLE LAWS.**

(a) By submitting an offer, the offeror certifies that-

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to-

(i) Those prices;

(ii) The intention to submit an offer; or

(iii) The methods or factors used to calculate the prices offered.

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory-

(1) Is the person in the offeror's organization responsible for determining the prices being offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this certification; or

(2)(i) Has been authorized, in writing, to act as agent for the offeror's principals in certifying that those principals have not participated, and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this certification [As used in this subdivision (b)(2)(i), the term "principals" means the person(s) in the offeror's organization responsible for determining the prices offered in this bid or proposal];

(ii) As an authorized agent, does certify that the principals referenced in subdivision (b)(2)(i) of this certification have not participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this certification; and

(iii) As an agent, has not personally participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this certification.

(c) If the offeror deletes or modifies paragraph (a)(2) of this certification, the offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure. [02-2A032-1]

The PM bid was submitted by Maree Gilliam, president of the corporation. The Team IA bid was submitted by Brent Yarborough, president of the corporation. The State is aware of the fact that Lori Yarborough is Maree Gilliam's daughter, Brent Yarborough's wife, and is associated with both PM and Team IA. Pricing was submitted on a spreadsheet attached to the solicitation. Prices were applied to a blind market basket to determine the evaluated price:

CALCULATING THE LOW BID

To prevent unbalanced bidding, the Procurement Officer has selected a representative sample from the services included on Attachment A to use in calculating an "Evaluated Price" for each Bidder. The bid with the lowest Evaluated Price will be considered the low bid.

Bidders must respond to every line item on Attachment A. The Procurement Officer will calculate the Evaluated Price as the weighted sum total of the prices of each line item in the representative sample.

[Amendment 7, Page 32]

PM had the lowest evaluated price at \$212,575, Team IA had the second lowest evaluated price at \$319,614, and AIS had the third lowest evaluated price at \$365,418. AIS provides no evidence that Ms. Yarborough was involved in submitting the bids of either bidder and no evidence of collusion between the two bidders. A review and comparison of the PM and Team IA bids by the CPO revealed no indication of collusion. The bid tabulation provides no evidence of collusion. It is not a violation of the Code for two companies with common ownership to bid against each other; other competitors were not denied the opportunity to bid a lower price. Indeed, the solicitation allows a single bidder to submit more than one bid. [Amendment 7, Page 11]. This issue of protest is denied.

The second issue raised by AIS is a suggestion that the State make multiple awards. This is not an issue of protest to be addressed by the CPO.

The third issue of AIS's protest questions PM's ability to fulfill the contract at the price it bid:

The Intent to Award vendor demonstrates a lack of understanding of the bid requirements and the nature of South Carolina government business operations. The Intent to Award vendor is unfamiliar with the needs and requirements of the State of South Carolina based on pricing submitted for line items 20 and 21.

Since 2016, AIS provided 22,751,613 'sFTP' units and 67,872,858 'Indexing' units to the State of South Carolina under contract 4400010342. The Intent to

Award vendor demonstrates a lack of understanding with the requirements for line items 20 & 21 by offering the service at no cost. Based on historical utilization data and the State's requirements for this line item, not charging for this line item will have a significantly unsustainable negative financial impact. This typically leads to disruption in service in our industry.

Section 11-35-1810(1)¹ requires the procurement officer to assess a bidder's ability to perform, or its responsibility, as defined in Section 11-35-1410(8)², prior to making an award. The South Carolina Procurement Review Panel set the standard for review of a bidder's responsibility as follows:

Catamaran argues that ESI is not a responsible offeror because its "commercially unreasonable" price will prevent it from establishing a robust pharmacy network as required by the RFP. The Procurement Code requires that responsibility be determined prior to making an award. S.C. Code Ann. § 11-35-1810(1) (2011). An inquiry into responsibility considers an offeror's ability to perform the contract requirements and "may be substantiated by past performance." S.C. Code Ann. § 11-35-1410(6) (2011). As noted by the CPO in his written determination, PEBA's action in making the award to ESI indicates that PEBA found ESI to be a responsible offeror. Under the Procurement Code, a procurement officer's finding of responsibility is a matter of discretion that should not be overturned absent proof that it is "clearly erroneous, arbitrary, capricious, or contrary to law." S.C. Code Ann. § 11-35-2410(A) (2011); *Protest of CollegeSource, Inc.*, Panel Case No. 2008-4 (January 8, 2009). As the party challenging the responsibility determination, Catamaran must demonstrate that the responsibility determination lacks a reasonable or rational basis. *Protest of Value Options*, Panel Case No. 2001-7 (August 3, 2001) (citing *Robert E. Derektor of Rhode Island v. Goldschmidt*, 516 F.Supp. 1085 (D.R.I. 1981)).

Catamaran's claim regarding ESI's responsibility is based upon speculation and conjecture that ESI will not be able to fully perform the contract because of its pricing proposal. The Panel finds such a claim is a matter of contract administration and does not state a proper challenge to responsibility. *See, e.g., ASC Medistar Service, Inc.*, B-213724 (Comp.Gen.), 84-1 CPD P 45, 1983 WL 27814 (1983); *Kitco, Inc.*, B-221386 (Comp. Gen.), 86-1 CPD P 321, 1986 WL 63328 (1986). Moreover, Catamaran does not allege any facts tending to show

¹ "Determination of Responsibility. 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 contracts and based upon past record of performance for similar contracts. The board shall by regulation establish standards of responsibility that shall be enforced in all state contracts."

² "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."

that PEBA's responsibility determination lacked a reasonable or rational basis. Therefore, the Panel finds has failed to state a claim upon which relief can be granted and hereby dismisses the portion of Catamaran's protest alleging that ESI is not a responsible offeror.

See In Re: *Appeal by Catamaran, LLC*, Panel Case 2015-2

AIS's protest is based on speculation and conjecture that PM will not be able to fully perform the contract at the price it bid. AIS does not argue and offers no proof that the procurement officer's determination that PM is a responsible bidder was clearly erroneous, arbitrary, capricious, or contrary to law.³ This issue of protest is denied.

AIS's fourth issue alleges that PM's bid should be rejected because it is materially unbalanced:

The Intent to Award Vendor submitted a materially unbalanced bid. The solicitation warns bidders that their bids could be rejected if they appeared to take advantage of the bid schedule to artificially create a "winning" offer. The Intent to Award Vendor bid "No Charge" for line items 20 and 21 which drastically skewed the tabulation.

Since 2016, AIS provided 22,751,613 'sFTP' units and 67,872,858 'Indexing' units to the State of South Carolina under contract 4400010342. The Intent to Award vendor demonstrates a lack of understanding with the requirements for line items 20 & 21 by offering the service at no cost. Based on historical utilization data and the State's requirements for this line item, not charging for this line item will have a significant negative financial impact. This typically leads to disruption in service in our industry. Intent to Award vendor will either

³ The Panel also offered a cautionary footnote to its decision that is worthy of reproduction in this case:

Nonetheless, the Panel takes this opportunity to encourage procurement officers to take extra care in making a responsibility determination where an offeror's price is significantly lower than the next offeror's price. While in this case Catamaran acknowledged that ESI could likely absorb any potential loss, the Panel is concerned that some bidders or offerors may bid an extremely low price in order to win a contract, but not have the financial reserves to enable them to sustain the bid price over the term of the contract. *See, e.g., Appeal by Trinity 7 Security, LLC*, Panel Case No. 2012-8 (March 11, 2013) (wherein the Panel upheld a finding of non-responsibility based in part on a balance sheet indicating liabilities exceeding the vendor's assets).

attempt to recover this cost by concealing it in another line item charge or have an unsustainable financial burden.

Regulation 19-445.2122 requires the procurement officer evaluate the reasonableness of the offered prices. Regulation 19-445.2122(C) establishes a two-part test for the disqualification of unbalanced bids:

All offers with separately priced line items or subline items shall be analyzed to determine if the prices are unbalanced. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more line items is significantly over or understated as indicated by the application of cost or price analysis techniques. If the responsible procurement officer determines that unbalanced pricing may increase performance risk (e.g., it is so unbalanced as to be tantamount to allowing an advance payment) or could result in payment of unreasonably high prices, she may conclude that the offer is unreasonable as to price.

A number of no-cost line items in PM's bid make its bid unbalanced. However, bidding \$0.00 for a number of line items is not disqualifying unless the unbalanced bidding increases performance risk that could result in payment of unreasonably high prices. PM's bid does not include any overstated line items that might result in the State paying unreasonably high prices. As stated above, it is speculation that PM will not be able to preform the contract at the price bid. The procurement officer determined PM to be a responsible bidder, and AIS makes no argument that the procurement officer's determination was clearly erroneous, arbitrary, capricious, or contrary to law. Consequently, PM's bid fails to meet the second part of the test for disqualification—namely that it increases performance risk (e.g., it is so unbalanced as to be tantamount to allowing an advance payment) or could result in payment of unreasonably high prices. This issue of protest is denied.

AIS's last issue argues that the solicitation lacked clarity and should be rebid:

Lack of Clarity from the State regarding line items 20 and 21. The State made a total of seven amendments to the solicitation, extended the bid opening date seven times and changed the Price Schedule (Exhibit A) three times....

The estimated quantity for line Item 20 for 'sFTP' was removed from the original price schedule. The most recent version three of Exhibit A (the price schedule) reflected a volume range of N/A. Since 2016, AIS provided 22,751,613 'sFTP' units to the State of South Carolina under contract 4400010342.

The estimated quantity for line Item 21 for 'Indexing' was removed from the original price schedule. The most recent version three of Exhibit A (the price schedule) reflected a volume range of N/A. Since 2016, AIS provided 67,872,858 'Indexing' units to the State of South Carolina under contract 4400010342.

The issue raised was evident to all bidders when Amendment 7 was published on August 28, 2020. Section 11-35-4210(1)(b) provides that an issue which could have been raised as a protest of the solicitation cannot be raised as a protest of the award:

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.

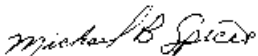
(emphasis added)

This issue of protest is denied.

DECISION

For the reasons stated above, the protest of Advanced Imaging Systems, Inc. is denied.

For the Information Technology Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1



10/8/2020

Mr. Mike Spicer
Chief Procurement Officer
SFAA – Procurement Services
1201 Main Street, Suite 600
Columbia, SC 29201

Re: Advanced Imaging System, Inc. IFB Solicitation Number 5400019274 STC Records Conversion - Paper to encompass Conversion, Imaging, Retrieval, Storage, and Destruction

Sir:

AIS Inc. is a submitting bidder for the IFB Solicitation Number 5400019274 STC Records Conversion – paper to encompass Conversion, Imaging, Retrieval, Storage, and Destruction. It is our contention that the Solicitation and its subsequent Intent to Award is flawed and we are submitting the following Protest.

If you have any questions, please do not hesitate to contact me at (704) 998-6555 and matts@aisimc.com.

Sincerely,

A handwritten signature in blue ink that reads "Matt Solomon".

Matt Solomon
CEO, Managing Partner
AIS Inc.

AIS, Inc. a ScribSoft Holdings Company
10617 Southern Loop, Pineville, NC 28134
(704) 525-4392 (800) 365-1038 Fax: (704) 525-4393
www.aisimc.com



AIS Grounds for Protest

1. The Intent to Award Vendor could not have independently arrived at their bid pricing as is a requirement as stated in the IFB on page 7 referencing certification of independent price determination... Both bidders Palmetto Microfilm Systems, Inc. and Team IA are represented by Lorri Yarborough and the Yarborough family (See referenced info below regarding shared leadership between the 2 companies.) Considering Ms. Yarborough's executive level positions at both companies it is difficult to conclude that she does not have a significant role in determining pricing for both companies, as they have partnered in projects in the past. In addition, having shared executive leadership makes it impossible to conclude that no communicating and/or consulting occurred. Both companies are relatively small local businesses. It appears to be an effort to restrict competition and secure a second contract in the event of a multiple award.
 - a. <https://www.thestate.com/news/local/article16955570.html>
 - b. <https://www.facebook.com/lorri.yarborough>
 - c. <https://procurement.sc.gov/files/contracts/palmetto%20microfilm%20contract%20sheet%20aug%208%202019.pdf>
 - d. http://www.pmsimage.com/html/contact_us.html
 - e. <https://www.zoominfo.com/p/Lorri-Yarborough/1520416547>

Recommendation:

1. Reject Palmetto Microfilm Systems, Inc and Team IA bids for failing to independently determine pricing.
 2. Cancel The Intent to Award for IFB Solicitation Number 5400019274 STC Records Conversion – Paper due to submission of an inaccurate Certificate of Independent Price Determination (May 2008).
 3. Issue Intent to Award to AIS, the lowest responsive and responsible bidder
2. The State has the option to make 2 awards. In the past few contract cycles the record conversion contracts historically have been issued to multiple companies. Most recently 3. A single award puts State agencies at risk for interruptions to routine access to mission critical business data. Having multiple vendors provide options for agencies in the event a single vendor is unable to perform. This becomes critically important in the event of a contract containing unsustainable pricing components.

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Recommendation: Deem Palmetto Microfilm Systems, Inc. and Team IA a sole entity based on their comingled leadership and business practice. Issue Intent to Award to AIS the second contract as allowed.

3. The Intent to Award vendor demonstrates a lack of understanding of the bid requirements and the nature of South Carolina government business operations. The Intent to Award vendor is unfamiliar with the needs and requirements of the State of South Carolina based on pricing submitted for line items 20 and 21.

Since 2016, AIS provided 22,751,613 'sFTP' units and 67,872,858 'Indexing' units to the State of South Carolina under contract 4400010342. The Intent to Award vendor demonstrates a lack of understanding with the requirements for line items 20 & 21 by offering the service at no cost. Based on historical utilization data and the State's requirements for this line item, not charging for this line item will have a significantly unsustainable negative financial impact. This typically leads to disruption in service in our industry.

Recommendation: Reject apparent low bid. Cancel the Intent to Award due to a demonstrated lack of understanding of the State's requirements for line items 20 & 21 by bidding unsustainable zero cost pricing that is totally inconsistent with the industry.

4. The Intent to Award Vendor submitted a materially unbalanced bid. The solicitation warns bidders that their bids could be rejected if they appeared to take advantage of the bid schedule to artificially create a "winning" offer. The Intent to Award Vendor bid "No Charge" for line items 20 and 21 which drastically skewed the tabulation.

Since 2016, AIS provided 22,751,613 'sFTP' units and 67,872,858 'Indexing' units to the State of South Carolina under contract 4400010342. The Intent to Award vendor demonstrates a lack of understanding with the requirements for line items 20 & 21 by offering the service at no cost. Based on historical utilization data and the State's requirements for this line item, not charging for this line item will have a significant negative financial impact. This typically leads to disruption in service in our industry. Intent to Award vendor will either attempt to recover this cost by concealing it in another line item charge or have an unsustainable financial burden.

Recommendation: Reject the award vendor bid as being materially imbalanced.

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5. Lack of Clarity from the State regarding line items 20 and 21. The State made a total of seven amendments to the solicitation, extended the bid opening date seven times and changed the Price Schedule (Exhibit A) three times. Version one had estimated quantities while the third and final version of the price schedule (Exhibit A) did not include any of the estimated quantities leading to confusion and a lack of clarity. The State used the quantities from version one of Exhibit A (which were removed in version three of Exhibit A) in the representative sample to calculate the bid tabulation calculating the lowest bid to the awarded vendor. (see attachment 2)
As the incumbent vendor, AIS provided the State with historic quantities/volumes (see attachment 1).

The estimated quantity for line Item 20 for 'sFTP' was removed from the original price schedule. The most recent version three of Exhibit A (the price schedule) reflected a volume range of N/A. Since 2016, AIS provided 22,751,613 'sFTP' units to the State of South Carolina under contract 4400010342.

The estimated quantity for line Item 21 for 'Indexing' was removed from the original price schedule. The most recent version three of Exhibit A (the price schedule) reflected a volume range of N/A. Since 2016, AIS provided 67,872,858 'Indexing' units to the State of South Carolina under contract 4400010342.

Recommendation: Cancel IFB Solicitation Number 5400019274 STC Records Conversion – Paper for lack of clarity and reissues a new solicitation.

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.