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Protest Decision

Matter of: National Food Group

Case No.: 2022-120

Posting Date: January 11, 2022

Contracting Entity: South Carolina Department of Corrections

Solicitation No.: 5400022131

Description: Meats

DIGEST

Protest alleging award to other than the low bidder is granted. The protest letter of National Food Group (NFG) is included by reference. (Attachments 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.

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

BACKGROUND

Solicitation Issued:	10/12/2021
Amendment 1 Issued	10/27/2021
Amendment 2 Issued	11/08/2021
Amendment 3 Issued	11/19/2021
Intent to Award Posted	12/03/2021
Protest Received	12/07/2021

The Department of Corrections (DOC) issued this Invitation for Bids (IFB) on October 12, 2021, to establish a one-year contract for meats. Amendment 1 was issued on October 27, 2021. Amendment 2 was issued on November 8, 2021. Amendment 3 was issued on November 19, 2021. The solicitation requested pricing for seven line items and award to be made by line item. An Intent to Award to Clark's Trading Company (CTC) for line items one and seven was posted on December 3, 2021. NFG filed a protest on November 18, 2021, alleging that it, not CTC, was the low bidder for line-item seven.

ANALYSIS

NFG protests:

This is a protest related to Solicitation 5400022131 for line item 7 "Ground Beef".

Clarks Trading was at a price of \$2.49/lb.

National Food Group at a price of \$2.4469/lb. Our price is lower.

Our price saves the state \$5,172 on the contract. Our item, that is an approved brand, was awarded with a contract 4400024910 last year. We had no delivery issues to the DOC warehouse, no product issues, and no vendor issues during one of the worst pandemics in recent history.

It seems that we should have been awarded this item since there are no underlying issues and since we were lowest bidder.

Looking forward to a resolution or an explanation or both.

Line-item seven requested a price per pound for 120,000 pounds of ground beef. There were three bids received. Advanced Commodities, Inc. bid \$3.63 per pound for a total of \$435,600. It requested application of the US End Product Preference (USEPP) (2%) as provided for in Section 11-35-1524(B)(2) which reduced its bid for evaluation purposes to \$426,888. NFG bid \$2.4469 per pound for a total of \$293,628. It requested no preferences. CTC bid \$2.49 per pound for a total of \$298,800. CTC requested the South Carolina Resident Vendor Preference

(RVP) (7%) as provided for in Section 11-35-1524(C)(1), the South Carolina End Product Preference (SCEPP) (7%) as provided for in Section 11-35-1524(B)(1), and the USEPP (2%).

By submitting a bid, the bidder is certifying that it is qualified for the requested preferences:

On June 16, 2009, the South Carolina General Assembly rewrote the law governing preferences available to in-state vendors, vendors using in-state subcontractors, and vendors selling in-state or US end products. This law appears in Section 11-35-1524 of the South Carolina Code of Laws. A summary of the new preferences is available at www.procurement.sc.gov/preferences. *ALL THE PREFERENCES MUST BE CLAIMED AND ARE APPLIED BY LINE ITEM, REGARDLESS OF WHETHER AWARD IS MADE BY ITEM OR LOT. VENDORS ARE CAUTIONED TO CAREFULLY REVIEW THE STATUTE BEFORE CLAIMING ANY PREFERENCES. THE REQUIREMENTS TO QUALIFY HAVE CHANGED. IF YOU REQUEST A PREFERENCE, YOU ARE CERTIFYING THAT YOUR OFFER QUALIFIES FOR THE PREFERENCE YOU'VE CLAIMED. IMPROPERLY REQUESTING A PREFERENCE CAN HAVE SERIOUS CONSEQUENCES.* [11-35-1524(E)(4)&(6)] [02-2B111-1]

[Solicitation, Page 12]

The procurement officer did not question CTC's qualifications and, consequently, reduced CTC's bid of \$298,800 by 9%² for an evaluated amount of \$271,908. CTC was determined the low bidder based on the application of the preferences and was awarded the contract.

However, a cursory review of CTC's bid document gives cause to question CTC's qualifications for the RVP. Bidders requesting the RVP are to provide their in-state business address and phone number on the second cover page of the bid:

PREFERENCES - ADDRESS AND PHONE OF IN-STATE OFFICE: Please provide the address and phone number for your in-state office in the space provided below. An in-state office is necessary to claim either the Resident Vendor Preference (11-35-1524(C)(1)(i)&(ii)) or the Resident Contractor Preference (11-35-1524(C)(1)(iii)). Accordingly, you must provide this information to qualify for the preference. An in-state office is not required, but

² Preferences can be combined but the total cannot exceed 10%. S.C. Code § 11-35-1524(E)(7). A bidder requesting both the SCEPP (7%) and USEPP (2%) preferences is only entitled to application of the SCEPP. If qualified, CTC should have received the benefit of both the RVP and SCEPP for a reduction of 10% for evaluation purposes. However, the USEPP was mistakenly combined with the RVP for a 9% reduction.

can be beneficial, if you are claiming the Resident Subcontractor Preference (11-35-1524(D)).

CTC indicated that its in-state address was the same as its home address which is also requested on the second cover page. CTC indicated that all three addresses were the same:

Clark's Trading Company
Box 328
Wales, WI 53183

[CTC Bid Cover Page 2]

Dun and Bradstreet lists CTC's physical address as:

Clark's Trading Co.
W312S5745 Dable Rd
Mukwonago, WI, 53149-9773

This discrepancy prompted an inquiry by the CPO as to CTC's in-state business address and in-state manufacturing source. (Attachment 2) CTC replied:

We made a mistake. We claim no preference. The only thing we were trying to indicate was that the product was made in the United States. We got carried away checking "yes" boxes on the bid.

Sorry for the bother.

Guidance for claiming each preference was included in the solicitation:

PREFERENCES - SC/US END-PRODUCT (SEP 2009)

Section 11-35-1524 provides a preference to vendors offering South Carolina end-products or US end-products, if those products are made, manufactured, or grown in SC or the US, respectively. An end-product is the tangible project identified for acquisition in this solicitation, including all component parts in final form and ready for the use intended. The terms "made," "manufactured," and "grown" are defined by Section 11-35-1524(A). By signing your offer and checking the appropriate space(s) provided and identified on the bid schedule, you certify that the end-product(s) is either made, manufactured or grown in South Carolina, or other states of the United States, as applicable. Preference will be applied as required by law. Post award substitutions are prohibited. See "Substitutions Prohibited - End Product Preferences (Sep 2009)" provision. [02-2B112-1]

PREFERENCES - RESIDENT VENDOR PREFERENCE (SEP 2009)

To qualify for the RVP, you must maintain an office in this state. An office is a nonmobile place for the regular transaction of business or performance of a particular service which has been operated as such by the bidder for at least one year before the bid opening and during that year the place has been staffed for at least fifty weeks by at least two employees for at least thirty five hours a week each. In addition, you must either: (1) maintain at a location in South Carolina at the time of the bid an inventory of expendable items which are representative of the general type of commodities for which the award will be made and which have a minimum total value, based on the bid price, equal to the lesser of fifty thousand dollars [\$50,000] or the annual amount of the contract; or (2) be a manufacturer headquartered and having an annual payroll of at least one million dollars in South Carolina and the end product being sold is either made or processed from raw materials into a finished end product by that manufacturer or its affiliate (as defined in Section 1563 of the Internal Revenue Code). [02-2B114-1]

[Amendment 3, Page 20]

The solicitation put bidders on notice that by claiming a preference that they are certifying their qualification and cautioned bidders about serious consequences for improperly requesting a preference.

Section 11-35-1524(E)(6) provides the following consequences for invalid certification of a bidder's qualifications when applying for these preferences:

Pursuant to Section 11-35-4220, a business may be debarred if (i) the business certified that it qualified for a preference, (ii) the business is not qualified for the preference claimed, and (iii) the certification was made in bad faith or under false pretenses. If a contractor has invalidly certified that a preference is applicable, the chief procurement officer may terminate the contract for cause, and the chief procurement officer may require the contractor to pay the State an amount equal to twice the difference between the price paid by the State and the price offered by the next lowest bidder.

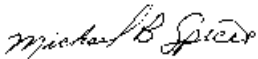
CTC certified that it was qualified for the RVP, SCEPP, and USEPP. By its own admission, CTC is not qualified for either the RVP or SCEPP, attributing the invalid certifications to an unintentional administrative error. However, there is insufficient evidence that the invalid certifications were made in bad faith or under false pretenses, and therefore debarment is not warranted.

A bid must be accepted unconditionally and without alteration or correction. S.C. Code § 11-35-1520(6). An invalid preference certification has a direct effect on the evaluated price, is not immaterial, and cannot be corrected or waived as a minor informality or irregularity. S.C. Code § 11-35-1520(13). Consequently, an invalid preference certification renders the bid non-responsive and cannot be considered for award.³

DECISION

For the reasons stated above the award to Clark's Trading Company is canceled. This procurement is remanded to the Department of Corrections for award in accordance with the Code.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

³ Even if it were possible under the Code to remove CTC's claimed preferences, it would no longer be the low bidder.

Attachment 1

From: [Beth Buckland](#)
To: [Protest-MMO](#)
Cc: [Jon M. Kabel](#)
Subject: [External] Protest SC DOC solicitation 540022131 line 7
Date: Tuesday, December 7, 2021 12:40:36 PM
Attachments: [image002.png](#)
[image003.png](#)
[image006.png](#)
[image007.png](#)
[image001.png](#)
[SC DOC Bid Letter amendment 3.docx](#)
[SC DOC Bid Letter amendment 3.docx](#)
[South Carolina meats 540022131.pdf](#)
[SC DOC Bid Intert to Award - protest.docx](#)

Hi

This is a protest related to Solicitation 5400022131 for line item 7 "Ground Beef".

Clarks Trading was at a price of \$2.49/lb.

National Food Group at a price of \$2.4469/lb. Our price is lower.

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Looking forward to a resolution or an explanation or both.

Thanks



Beth Buckland 
National
food group
Corrections Team Leader
VegHead | 248.560.2450

 WATCH OUR VIDEO PLAYLIST  

Attachment 2

From: cbeirr@aol.com
To: Spicer, Michael
Subject: [External] Re: In the Matter of the Protest of National Food Group, Case 2022-120
Date: Wednesday, December 8, 2021 3:45:46 PM

Mr. Spicer,

We made a mistake. We claim no preference. The only thing we were trying to indicate was that the product was made in the United States. We got carried away checking "yes" boxes on the bid.

Sorry for the bother.

Clark Beier
Clark's Trading Co.

-----Original Message-----

From: Spicer, Michael <mspicer@mmo.sc.gov>
To: CBEIERR@AOL.COM <CBEIERR@AOL.COM>
Cc: Grier, Manton <mgrier@gc.sc.gov>
Sent: Wed, Dec 8, 2021 2:17 pm
Subject: In the Matter of the Protest of National Food Group, Case 2022-120

Mr. Beier,

I am the Chief Procurement Officer assigned to review a protest of the award of a contract to Clark's Trading Company by the South Carolina Department of Corrections. This award was for line item 7 of solicitation 5400022131 120,000 pounds of ground beef. The award to your company was determined by the application of preferences authorized by the Procurement Code that were requested by your company. In order to complete my review of the protest, I need to verify the following information.

On you bid you requested application of the South Carolina Resident Vendor preference. In order to qualify for the SC Resident Vendor Preference you must have a physical office in South Carolina. Does your company have a physical office in South Carolina and if so, what is the South Carolina address?

You also requested the South Carolina End Product preference. To qualify for this preference, the product bid must be made, manufactured, or grown in South Carolina. Your bid indicates that you are supplying Circle A brand beef. Is Circle A brand beef manufactured in South Carolina and if so, where?

Your prompt response is appreciated.



Michael B. Spicer | Information Technology Management Officer

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised May 2020)

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 2020 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.