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Written Determination

Matter of: MSS Solutions, LLC
File No.: 2023-113
Date: January 23, 2023
Contracting Entity: Adjutant Generals Office
Solicitation No.: 5400024024
Description: HVAC Maintenance Services Re-Bid

DISCUSSION

This matter comes before the CPO through a request from the State Fiscal Accountability Authority (SFAA) to cancel the award of a contract after award but prior to performance because of an administrative error under S.C. Code Ann. § 11-35-1520(7) and Regulation 19-445.2085. (Attachment 1)

The Procurement Services Division of the SFAA issued this Invitation for Bids on behalf of the South Carolina Adjutant Generals Office (AG) to acquire HVAC maintenance and repair services to include preventative maintenance (PM), emergency and routine repairs at numerous facilities on October 11, 2022. Amendment 1 was issued on October 28, 2022, answering bidders' questions, making modifications to the solicitation, and revising Attachment A. Responses were received from MSS Solutions, LLC; Trane US, Inc.; Carolina Chillers, Inc.; and Cayce Company, Inc.

The procurement officer determined that the bid from Carolina Chillers (CC) was unbalanced under Regulation 19-445.2122(C) and the following instructions to bidders published in the solicitation:

(e) Unbalanced Bidding. The State may reject an Offer as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the State even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

[Amendment 1, Page 10]

CC submitted an Intent to Protest on November 22, 2022, followed by its formal protest on December 7, 2022.

The bid from Cayce was deemed nonresponsive with the following explanation:

Cayce Company did not submit a complete bid form. In accordance with Regulation 19-445.2070 & 19-445.2130, because the offer from Cayce Company did not conform to the essential requirements of the invitation for bid, it must be rejected and deemed nonresponsive.

Cayce filed an intent to protest this decision on November 28, 2022, followed by its formal protest on December 1, 2022. (Attachment 2) Cayce is the incumbent provider of these services and argued:

Cayce Company disagrees and contends our bid form, as submitted, is complete.

It is our belief our submission was deemed incomplete due to “-“(dashes) in some cells. The cells in question were filled out with the number 0. The zero was entered due to the equipment list attachment A tabs 1, 2 not shown at these sites. There are a total of (73) cells in the bid form that a 0 was input but shows as a “-“(dashes) due to the excel document format...

In the solicitation “equipment list”, (attachment A, tab 1 and tab 2), there were discrepancies as to where some equipment should be priced....

There are multiple examples of Equipment being listed on Attachment A tabs 1,2 with no designated cells to input the value....

Two examples are Newberry armory and North Charleston armory....

The cells for boiler pricing (in tab C) is highlighted yellow but there is no boiler listed for these sites....

Newberry armory shows a 400kbtu/hr furnace but no boiler. North Charleston shows nothing even remotely related to a boiler to be priced. Cayce Company entered a zero in this field resulting in a dash.

The bids from MSS Solutions, LLC and Trane US, Inc. were deemed responsive. An Intent to Award was posted to MSS Solutions as the lowest responsible bidder on November 22, 2022.

After reviewing the Cayce protest, the AG agreed that there are multiple discrepancies between the equipment and pricing tabs in Attachment 1:

I reviewed the protest letter from Cayce Company, and agree that there is a discrepancy between the tabs listing equipment and pricing tab. The methodology for pricing as presented by Cayce Company, in effect, truly addresses conditions, with a few exceptions, at the locations noted.

My conclusion is that the protest is warranted and that the Agency will need to review the equipment tab versus the pricing tab, to delete or add items to both as warranted.

I apologize that our data to some degree is not correct, but we were using data collected by contractors for the Agency, that it turns out is not consistent with actual equipment at all locations.

(Attachment 3)

SFAA requests cancellation of the award prior to performance under Regulation 19-445.2085(C) which provides:

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:

7. Administrative error of the purchasing agency discovered prior to performance, or
8. For other reasons, cancellation is clearly in the best interest of the State.

Clearly there was an administrative error in constructing the bid schedule. There is a \$1,435,628.90 difference between Cayce, that bid \$0.00 for the 73 discrepancies, and the next lowest bidder, MSS, that provided a price for all 73 items. While this difference may not be entirely attributable to the 73 discrepancies, it is apparent that the administrative error had a significant impact on the competition and an intended award more than twice what it might be.

DETERMINATION

For these reasons the Chief Procurement Officer finds that there was a significant administrative error with significant pricing implications, and it is in the best interest of the State to cancel the award to MSS Solutions, LLC prior to performance in accordance with the Regulations cited above.

The procurement is remanded to the State for processing in accordance with the Code with the following considerations.

Similar discrepancies were identified during the question-and-answer period and that should have prompted a more thorough review by the State that would have allowed correction in Amendment 1 and avoidance of this cancellation and resolicitation. It is noted that this will be the third attempt to award a contract for these services.

As the incumbent, Cayce was in the best position to recognize the discrepancies in the bid schedule and get them corrected prior to bid opening, but it chose to bid \$0.00 and a \$1,435,628.90 competitive advantage. This afforded Cayce an unfair competitive advantage that in other circumstances could have resulted in its disqualification.¹

This solicitation asked for pricing for preventative maintenance for all its HVAC equipment, a markup percentage for repair/install parts², an hourly labor rate for repairs/install (normal hours), an hourly labor rate for repairs/install (after hours/emergency), and a mileage rate for unplanned repairs/installs. However, the award was based only on the cost of the preventative maintenance. The State is reminded that, irrespective of the level of effort required to determine significance, the determination of the lowest priced responsive and responsible bidder must include all substantial elements of cost.

¹ The incumbent, Cayce, had information that was not available to the other bidders. Rather than inform the State of the 73 discrepancies in the bid schedule during the question-and-answer period, allowing the State to amend the bid schedule and conduct a fair and open competition, Cayce choose to use this privileged information to gain an unfair competitive advantage. The solicitation required a disclosure of conflicts of interest and unfair competitive advantage. Further, the Code imposes an obligation of good faith and fair dealing on all who participate in the in the public procurement process. Although determining that issue is not necessary for this cancellation, arguably Cayce's failure to disclose its competitive advantage and participate fairly and in good faith raises questions about its integrity and consequently its responsibility.

² A percentage markup is the same as a cost plus a percentage of cost and is governed by Section 11-35-2010(1)

For the Materials Management Officer:



Michael B. Spicer
Chief Procurement Officer

Columbia, South Carolina

Attachment 1

Request to Cancel an Award Prior to Performance

Solicitation #: 5400024024

Solicitation Title: HVAC Maintenance Services for the Adjutant General

Award Posting Date: November 22, 2022

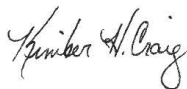
The Office of State Procurement is requesting permission to cancel an awarded contract prior to performance in accordance with SC Procurement Regulation 19-445.2085 (C) (2).

The Office of State Procurement issued IFB 5400024024 on October 11, 2022. The solicitation included Attachment A which consisted of an Excel spreadsheet with two tabs providing the equipment listing (equipment for McCrady Training Center was on Tab B and equipment for all other facilities was on Tab A) and bidding schedule by facility on Tab C. The bidding schedule was broken out by facility and type of equipment (HVAC, Air Handlers, Exhaust Fans, Chiller & Pumps, Boiler & Pumps, Radiant Heaters, De-Stratification Fans, and Mini-split Indoor units). "NA" was entered in the cells for facilities which did not contain a specific type of equipment. Based on questions from vendors, Amendment 1 was published on October 28, 2022, which provided a revised Attachment A with a revised equipment list/bidding schedule.

Bids were opened on November 14, 2022 and 4 bids were received. Two bidders did not completely fill out the bidding schedule (by inserting \$0 or leaving cells blank) and were deemed non-responsive by the procurement officer. After the award was posted on November 22, 2022, one of the bidders deemed non-responsive filed a protest. The protest cited discrepancies between the equipment lists and the bidding schedule. The protestant alleged that several cells should have been marked as "NA" due to those facilities not having that type of equipment included on the equipment list. As a result, the Adjutant General reviewed the information and found that some, but not all, of the discrepancies identified by the protesting vendor were in fact discrepancies.

The Office of State Procurement is requesting that this contract be cancelled to allow the Adjutant General to inventory the equipment and develop an accurate equipment listing. After the inventory is completed and new solicitation with correct specifications can be issued.

Submitted by:



Kimber Craig, CPM, CPPO

Deputy CPO/Procurement Director



**Chief Procurement Officer
Materials Management Office
1201 Main Street suite 600
Columbia, SC 29201**

December 1, 2022

RE: Solicitation# 5400024024 (HVAC Maintenance Services) Bid Award Protest

Gentlemen,
Please be advised this document is a formal protest to this above-noted solicitation.

Background: November 23rd Cayce Company was notified our submitted maintenance proposal was considered by Ms. Sloan as “non-responsive” due to bid form being deemed “incomplete”.

Cayce Company disagrees and contends our bid form, as submitted, is complete.

It is our belief our submission was deemed incomplete due to “-“(dashes) in some cells.
The cells in question were filled out with the number 0.

The zero was entered due to the equipment list attachment A tabs 1,2 not shown at these sites.
There are a total of (73) cells in the bid form that a 0 was input but shows as a “-“(dashes) due to the excel document format.

Section IV reads as follows:

IV. EQUIPMENT COVERED:

See Table 2. **See Attachment A, Tabs 1 and 2.**

The solicitation details what equipment is to be covered under this contract, specifically as listed on **Attachment A, Tabs 1 and 2.**

The “incomplete” cells referenced, have a zero entered. This accurately reflects equipment not listed in Attachment A, Tabs 1 and 2. No equipment is listed yet cells are designated to input a value.

Assuming Cayce did not input a 0 in the cells (due to that equipment not being listed), we would be calculating equipment the owner does not possess.
In fact, to designate a value for maintenance of non-existing equipment is simply not an honest representation of cost.

In the solicitation “equipment list”, (attachment A, tab 1 and tab 2), there were discrepancies as to where some equipment should be priced.
There are multiple examples of Equipment being listed on Attachment A tabs 1,2 with no designated cells to input the value

Cayce submission considered the following response to question asked during the question period for this solicitation.

1. If any piece of equipment doesn't fall into one of the specific categories listed on table 3, the pricing table, I'm assuming it falls into the HVAC categories?

State's Response: Correct.

This is an example of why and where we included pricing for items not listed with a clear definition.

Two examples are Newberry armory and North Charleston armory. The cells for boiler pricing (in tab C) is highlighted yellow but there is no boiler listed for these sites.

Newberry armory shows a 400kbtu/hr furnace but no boiler. North Charleston shows nothing even remotely related to a boiler to be priced. Cayce Company entered a zero in this field resulting in a dash.

Additional questions from offerors, the following were asked:

1. Attachment A, Tab C, line 9 states: "Prices are to be based on equipment listed/identified in tables 2 and 2A". Where are tables 2 and 2A?

State's Response: Please see the revised solicitation attached herein.

The revised solicitation clearly states that prices are only to be based on equipment listed/identified in tables 2 and 2A. With equipment not listed on the spreadsheet a price is not requested.

We gave those cells a price of \$0.

Additionally, the following question were asked:

1. On the solicitation page 15, paragraph 4, (Equipment covered) solicitation states to "see table 2", where is table 2?

State's Response: Please see the revised solicitation attached herein.

In consideration of this matter the revised solicitation attached reads
See Table 2. **See Attachment A, Tabs 1 and 2.**

This again clarified during the questions/answers period that the equipment to be bid on is in Attachment A, Tabs 1 and 2.

All cells in our bid form where there are 0's input (shown as dashes due to excel spreadsheet format) are for equipment not listed in Attachment A, Tabs 1 and 2.

In response to being considered non-responsive, the following is the definition of responsiveness as listed in this solicitation:

(c) Responsiveness. Any Offer which fails to conform to the material requirements of the Solicitation may be rejected as nonresponsive. Cayce did conform to the material requirements as stipulated in the bid documents.

Offers which impose conditions that modify material requirements of the Solicitation may be rejected. No material modifications were made. **If a fixed price is required, an Offer will be rejected if the total possible cost to the State cannot be determined.** Cayce did provide a fixed cost **Offerors will not be given an opportunity to correct any material nonconformity.** Cayce is making no changes, rather clarifying information previously submitted. **Any deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer. [R.19-445.2070 and Section 11-35-1520(13)]**

None of the statements listed in this definition apply to our bid.

I trust I have exemplified Cayce's commitment to properly ascertain cost and fairly access the value of each line item.

Below is a list of cells, on Attachment A Tab C, that do not have equipment associated

AIR HANDLERS' CATEGORY

- Cells: G14, H14, I14- No air handlers are listed for Beaufort NGA, so we input a 0.
- Cells: G24, H24, I24- No air handlers are listed at Records Holding Area, so we input a 0.
- Cells: G25, H25, I25- No air handlers are listed at Military Museum so we input a 0.
- Cells: G26, H26, I26- No air handlers are listed at USPFO so we input a 0.
- Cells: G29, H29, I29- No air handlers are listed for Edgefield FMS so we input a 0.
- Cells: G30, H30, I30- No air handlers are listed for Fountain Inn NGA, so we input a 0. Furnaces listed fell under the HVAC category due to question #8 in the question-and-answer session.
- Cells: G32, H32, I32- No air handlers are listed at Greenville RC so we input a 0. Fan coil units are the mini split indoor units which are addressed under mini split indoor unit pricing.
- Cells: G34, H34, I34- No air handlers are listed for Greenville JRC so we input a 0.
- Cells: G35, H35, I35- No air handlers are listed for Greenwood and shop so we input a 0. This equipment is shown as Daikin on the plans provided however, this is incorrect also as the VRF equipment at this site is LG. The one to one mini splits are Mitsubishi and LG.
- Cells: G37, H37, I37- No air handlers are listed for Hemmingway NGA so we input a 0.
- Cells: G38, H38, I38- No air handlers are listed for Hodges NGA so we input a 0.
- Cells: G40, H40, I40- No air handlers are listed for Lancaster NGA so we input a 0. The fan coil units listed are mini split indoor units which are addressed under the mini split indoor unit category. There is a boiler on the equipment list for Lancaster, however the cell to input pricing shows N/A.
- Cells: G41, H41, I41- No air handlers are listed for Congaree NGA so we input a 0.
- Cells: G46, H46, I46- No air handlers are listed for CSMS so we input a 0.
- Cells: G49, H49, I49- No air handler are listed for L Company so we input a 0.

EXHAUST FANS CATEGORY

- Cell: J18- No exhaust fans are listed at TMP Dispatch building so we input a 0.
- Cell J19- No exhaust fans are listed for JFHQ TAG so we input a 0.

Cell J24- No exhaust fans are listed for Records Holding Area so we input a 0.
Cell J55- No exhaust fans are listed for Pineridge JOC so we input a 0.
Cell J58- No exhaust fans are listed for FMS #5 Rock Hill so we input a 0.
Cell J167- No exhaust fans are listed for FMS #3 Hemmingway so we input a 0.
Cell J168- No exhaust fans are listed for FMS #8 Union so we input a 0.
Cell J169- No exhaust fans are listed for FMS #11 Hartsville so we input a 0.
Cell J171- No exhaust fans are listed for FMS #13 Summerville so we input a 0.
Cell J172- No exhaust fans are listed for FMS #14 Varnville so we input a 0.

BOILERS AND PUMPS CATEGORY

Cell N51- No boiler is listed for Newberry NGA so we input a 0.
Cell N52- No boiler is listed for North Charleston NGA so we input a 0.

RADIANT HEATERS TUBE AND BOX CATEGORY

Cell O13- No radiant heaters are listed for Batesburg NGA so we input a 0.
Cell O14- No radiant heaters are listed at Beaufort NGA so we input a 0.
Cell O17- No radiant heaters are listed at Columbia NGA so we input a 0.
Cell O51- No radiant heaters are listed at Newberry NGA so we input a 0.
Cell O54- No radiant heaters are listed at Pineridge EMD so we input a 0.
Cell O55- No radiant heaters are listed at Pineridge JOC so we input a 0.

DESTRATIFICATION FANS CATEGORY

Cell P28- No destratification fans are listed at Edgefield and outbuildings so we input a 0.
Cell P35- No destratification fans listed at Greenwood and shop so we input a 0.
Cell P40- No destratification fans listed at Lancaster NGA so we input a 0. There are 2 unit ventilators listed, but unit ventilators are not destratification fans.
Cell P162- No destratification fans are listed at Sumter NGA so we input a 0. This armory we believe is missing a bunch of Lennox VRF equipment from the list as well.

HVAC CATEGORY

Cells: C91, D91, E91, C92, D92, D93- Buildings 3510 and 3511 at McCrady are listed as being torn down so no price was requested. We input a 0. This was actually one of the questions during the questions/answers session and Procurement answered to not include these in the bid, so everyone should have a – in these cells.

When taking into consideration the information submitted, Cayce Company does not understand how our submission may be deemed as “non-responsive”.

Furthermore, we contend that anyone who inputs pricing for equipment not shown in Attachment A, Tabs 1 and 2 would be inflating their bid by including equipment that is not covered under this this solicitation.

Thank you for taking this matter into consideration.

Respectfully submitted,

Pete Harbin.

Pete Harbin

Service Manager
Cayce Company Inc.

Attachment 3

From: [Sloan, Brittany](#)
To: [Spicer, Michael](#)
Subject: FW: [External] RE: HVAC Maintenance contract
Date: Thursday, December 8, 2022 8:33:08 AM
Attachments: [image007.png](#)
[image001.png](#)



Brittany Sloan | Procurement Manager II, Higher Education & Law Enforcement Team
Division of Procurement Services | SC State Fiscal Accountability Authority
1201 Main Street, Suite 600 | Columbia, SC 29201 | Office: (803) 737-3410 | bsloan@mso.sc.gov

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From: Young, Mike J <Mike.Young@scmd.sc.gov>
Sent: Thursday, December 8, 2022 8:19 AM
To: Sloan, Brittany <bsloan@mso.sc.gov>
Subject: RE: [External] RE: HVAC Maintenance contract

Brittany,

I reviewed the protest letter from Cayce Company, and agree that there is a discrepancy between the tabs listing equipment and pricing tab. The methodology for pricing as presented by Cayce Company, in effect, truly addresses conditions, with a few exceptions, at the locations noted.

My conclusion is that the protest is warranted and that the Agency will need to review the equipment tab versus the pricing tab, to delete or add items to both as warranted.

I apologize that our data to some degree is not correct, but we were using data collected by contractors for the Agency, that it turns out is not consistent with actual equipment at all locations.

Please call me, so we can discuss further, and we can make a final determination.

Respectively,

Michael J Young
TAG-CFMO
803-299-4305 (Desk)
803-667-2037 (Cell)

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Written Determinations Appeal Notice (Revised May 2020)

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b), states:

- (1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:
- (b) requests for review of other *written determinations*, decisions, *policies*, and *procedures* arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

(Emphasis added.) See generally *Protest of Three Rivers Solid Waste Authority by Chambers Development Co., Inc.*, Case Nos. 1996-4 & 1996-5, *Protest of Charleston County School District*, Case No. 1985-5, *Charleston County School Dist. v. Leatherman*, 295 S.C. 264, 368 S.E.2d 76 (Ct.App.1988).

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
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 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.