

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of:
Request for Cancellation of Award Prior
to Performance

South Carolina
Forestry Commission

IFB No. 5400006705
Uniform Jackets

BEFORE THE CHIEF PROCUREMENT OFFICER

WRITTEN DETERMINATION

POSTING DATE: December 9, 2013

MAILING DATE: December 9, 2013

This matter comes before the Chief Procurement Officer (CPO) pursuant to an email dated November 11, 2013, from Melissa Fleming, Forestry Commission (Forestry) Procurement Manager, asking the CPO to cancel Forestry's award of IFB #5400006705 for uniform jackets to The Liberty Company prior to performance under authority of S.C. Code Ann. Reg. 19-445.2085(C)(7), administrative error of the purchasing agency discovered prior to performance. A copy of her email is attached.

As justification for Forestry's request, Ms. Fleming wrote, "Forestry issued solicitation 5400006705 for Carhartt J97 jackets in moss color or an equivalent color. I have discovered the jacket is no longer available in the color requested. Therefore, I am requesting that you cancel the award to The Liberty Company due to an administrative error."

S.C. Code Ann. § 11-35-1520(10) requires award of a contract must be made to the lowest responsive and responsible bidder "[u]nless there is a compelling reason to reject bids as prescribed by regulation of the board..." The Code's requirement to award to the lowest responsive and responsible bidder has not been met in this case because the jacket specified is not commercially available. Ms. Fleming asks the CPO to rectify that error.

Section 11-35-1520(7) provides "Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts, after

award but before performance, must be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency.” Supporting Regulation 19-445.2085(C) authorizes cancellation of an award prior to performance reading:

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:

- (1) Inadequate or ambiguous specifications were cited in the invitation;
- (2) Specifications have been revised;
- (3) The supplies, services, information technology, or construction being procured are no longer required;
- (4) The invitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidders' plants;
- (5) Bids received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;
- (6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;
- (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.

Taken together, these provisions authorize the Chief Procurement Officer to cancel an award of a contract before performance begins, when a compelling reason exists and one or more of the grounds listed in the Regulation are present.

DISCUSSION

Forestry issued solicitation 5400006705 for Carhartt J97 jackets in moss color or an equivalent color. Forestry received numerous bids, none of which annotated an exception to the IFB. Following evaluation of the bids, Forestry posted its award to The Liberty Company. Tyler Brothers filed protested the award writing:

Tyler Brothers would like to address the solicitation #5400006705 for uniform jackets for the SC Forestry Commission. The bid was for a Carhartt J97 jacket in moss or army green. This J97 Jacket is not made in these colors therefore we bid the next closet style jacket in the allowed colors. I would like to have the opportunity to bid on the J97 since it is a cheaper jacket. Also, I am curious to know how the bid winner can be awarded a bid on a jacket that is not made.

Following receipt of the protest, Ms. Fleming contacted the awarded bidder, The Liberty Company, to inquire about the jacket Liberty actually bid. She relayed Liberty's answer to the CPO writing:

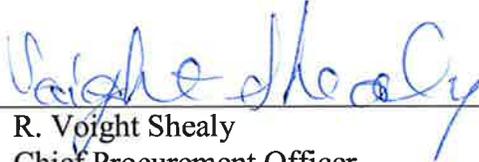
The award was issued based on the offers that were submitted. No exceptions were noted on any offers received. Local vendor preferences for companies located in South Carolina were applied. This resulted in the award going to the Liberty Company. However, in conversation with the Liberty Company concerning the award, I have discovered their bid was not for the colors specified although they noted no exceptions. Therefore, I am cancelling the award to the Liberty Company and the agency will look for a different style jacket in the near future.

Ms. Fleming followed that email with a request to cancel her award to Liberty writing, "I have discovered the jacket is no longer available in the color requested. Therefore, I am requesting that you cancel the award to The Liberty Company due to an administrative error."

These factors combine to furnish a compelling reason not to award the contract. Consequently, the CPO finds that Forestry's request to cancel the award prior to performance should be granted.

DETERMINATION

For the foregoing reasons, Forestry's request to cancel the award of IFB #5400006705 to The Liberty Company is granted. The solicitation is remanded to Forestry to rebid in accordance with the Consolidated Procurement Code.



R. Voight Shealy
Chief Procurement Officer
For Supplies and Services



Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Written Determination Appeal Notice (Revised June 2013)

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.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 108.1 of the 2013 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 S.C. Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6), 11-35-4330, 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 202, 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.

Skinner, Gail

From: Melissa Fleming <MFleming@scfc.gov>
Sent: Wednesday, November 06, 2013 3:56 PM
To: Shealy, Voight
Subject: RE: Solicitation - Protest - withdrawal

Voight,

Forestry issued solicitation 5400006705 for Carhartt J97 jackets in moss color or an equivalent color. I have discovered the jacket is no longer available in the color requested. Therefore, I am requesting that you cancel the award to The Liberty Company due to an administrative error.

Thank you for your time and consideration.

Melissa Fleming
SC Forestry Commission
Procurement Manager
Phone: 896-8836

From: Shealy, Voight [<mailto:VShealy@mmo.sc.gov>]
Sent: Tuesday, November 05, 2013 4:20 PM
To: Melissa Fleming; Robertson, Dixon; Skinner, Gail
Subject: FW: Solicitation - Protest - withdrawal

Melissa,

I received the following withdrawal from Mr. Tyler today. As I understand it, Mr. Tyler withdrew his protest in response to your agreement to resolicit. That being the case, I still have to cancel your solicitation. The cancellation of the award will be for administrative error?

Call me. I left a message for you just a few minutes ago.

Voight

From: Morgan Tyler [<mailto:mttylerbrothers@yahoo.com>]
Sent: Tuesday, November 05, 2013 3:23 PM
To: Shealy, Voight
Subject: Re: Solicitation - Protest

No, we will not proceed with this protest. Thank you for your time!

John Tyler
Tyler Brothers
(803)564-3174 phone

On Monday, November 4, 2013 10:59 AM, "Shealy, Voight" <VShealy@mmo.sc.gov> wrote:
Mr. Tyler,

How does Ms. Fleming's response effect your protest. In light of her forthcoming request that I cancel the award, is it your intention to proceed with your protest?

Voight Shealy
Chief Procurement Officer

From: Melissa Fleming [<mailto:MFleming@scfc.gov>]
Sent: Thursday, October 31, 2013 4:24 PM
To: mttylerbrothers@yahoo.com
Cc: Shealy, Voight
Subject: FW: Solicitation

Mr. Tyler,

Thank you for your interest in the solicitation #5400006705 for the Carhartt J97 jacket. The award was issued based on the offers that were submitted. No exceptions were noted on any offers received. Local vendor preferences for companies located in South Carolina were applied. This resulted in the award going to the Liberty Company. However, in conversation with the Liberty Company concerning the award, I have discovered their bid was not for the colors specified although they noted no exceptions. Therefore, I am cancelling the award to the Liberty Company and the agency will look for a different style jacket in the near future. I look forward to your interest in this solicitation.

Regards,
Melissa Fleming
SC Forestry Commission
Procurement Manager
Phone: 803 896-8836

From: Morgan Tyler
Sent: Friday, October 25, 2013 1:54:54 PM (UTC-05:00) Eastern Time (US & Canada)
To: Protest-MMO
Subject: Solicitation

Chief Procurement Officer,

Tyler Brothers would like to address the solicitation #5400006705 for uniform jackets for the SC Forestry Commission. The bid was for a Carhartt J97 jacket in moss or army green. This J97 Jacket is not made in these colors therefore we bid the next closet style jacket in the allowed colors. I would like to have the opportunity to bid on the J97 since it is a cheaper jacket. Also, I am curious to know how the bid winner can be awarded a bid on a jacket that is not made. Lastly, was there consideration on local vendor preference for companies located in the state of South Carolina? I can be reached at (803)564-3174 or <mailto:sales@tylerbrothers.net> or this sending email address. Thank you for your time!

Thank you,
John Tyler