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Protest Decision

Matter of: Weyerhaeuser NR Company
Case No.: 2018-119
Posting Date: October 12, 2017
Contracting Entity: South Carolina Department of Transportation
Solicitation No.: 5400013743
Description: Mitigation Bank Credits

DIGEST

Untimely protest is denied. Weyerhaeuser NR Company's (WNR) letter of protest is included by reference. [Attachment 1]

AUTHORITY

The Chief Procurement Officer¹ conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on the evidence 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

<i>Event</i>	<i>Date</i>
Solicitation Issued	07/06/2017
Amendment One Issued	07/20/2017
Amendment Two Issued	08/14/2017
Amendment Three Issued	08/15/2017
Amendment Four Issued	08/22/2017
Amendment Five Issued	08/23/2017
Intent to Award Issued	09/25/2017
Protest Received	10/06/2017

ANALYSIS

The South Carolina Department of Transportation (DOT) issued this Invitation For Bids (IFB) for Mitigation Bank Credits on July 16, 2017 and posted an Intent to Award to Carter Stilley SC, LLC on September 25, 2017. [Attachment 2] WNR protested the award on October 6, 2017. The South Carolina Consolidated Procurement Code authorizes the Chief Procurement Officer to conduct an administrative review of the protest of any actual bidder, offeror, contractor, or subcontractor in accordance with Section 11-35-4210(1)(b) as follows:

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (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) In this case, the Intent to Award was posted on September 25, 2017. Protests must be received by the Chief Procurement Officer no later than the close of business on the tenth day or, in this case, October 5, 2017. WNR's protest was not received until October 6, 2017 and consequently the Chief Procurement Officer lacks jurisdiction to review WNR's issues of protest.

DECISION

For the reasons stated above, the protest of Weyerhaeuser NR Company is dismissed as untimely.

For the Materials Management Office

A handwritten signature in cursive script, appearing to read "Michael B. Spicer".

Michael B. Spicer
Chief Procurement Officer

Attachment 1

From: [Hughes, Doug](#)
To: [Protest-MMO](#)
Cc: tara.allden@kimley-horn.com
Subject: Protest of SCDOT Solicitation 5400013743
Date: Friday, October 06, 2017 11:28:08 AM

To: Chief Procurement Officer, Materials Management Office

(1) Protest made by Weyerhaeuser NR Company, October 6, 2017.

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(2) Grounds of Protest

Based on the specifications contained in SCDOT Solicitation 5400013743, the awarded offer, which is comprised of existing mitigation bank credits from the Carter Stilley Wetland and Stream Mitigation Bank, does not comply with the express terms of Solicitation and should have been deemed nonresponsive.

Specifically, the Solicitation states that the mitigation bank (from which compensatory mitigation credits would be purchased) shall comply with U.S. Army Corps of Engineers (USACE) Service Area Maps and Service Area Guidance (Solicitation, page 17). For the Andrews Bypass project, the Solicitation (page 17) states the following:

The purpose of this request for bids is to provide compensatory wetland and stream mitigation banking credits for the construction of the Andrews Bypass, Phase II Project. The Project Corridor is located within the Hydrologic Unit (HUC) 03040205 (Black River). The Project Corridor is located within the United States Environmental Protection Agency (EPA) Level III Middle Atlantic Coastal Plain. SCDOT has reviewed the United States Army Corps of Engineers (USACE) Regulatory In-Lieu Fee Banking and Tracking System (RIBITS) and no private commercial mitigation banks currently service the project impacts. SCDOT has identified a need to establish this request for bids to offset the anticipated adverse impacts to wetlands and streams associated with the Andrews Bypass, Phase II Project.

The USACE Service Area maps and guidance indicate that mitigation for the Andrews Bypass shall come from within the HUC 03040205 and the Middle Atlantic Coastal Plain. The Carter Stilley bank is located in the Waccamaw River Basin. On its face, the Carter Stilley offer does not comply with the Solicitation terms.

The Carter Stilley offer document provides a purported justification for the use of the credits outside of the Bank's approved service area. This justification is improperly made as the appropriateness of mitigation may only be determined by the USACE and South Carolina Department of Health and Environmental Control, in coordination with other state and federal agencies as well as public comment and review, during project

permitting. The offeror's justification does not demonstrate compliance with the Solicitation's terms. The offer is nonresponsive.

(3) Relief Requested

The awarded offer should be rescinded on the grounds stated above and the lowest responsive offer should be awarded.

Thank you for your consideration on this matter

Doug Hughes
Weyerhaeuser NR Company
Mobile 601 341 6054
doug.hughes@weyerhaeuser.com

Attachment 2

STATE OF SOUTH CAROLINA
SCDOT PROCUREMENT OFFICE
955 PARK STREET ROOM 101
COLUMBIA SC 29201-3959

Intent to Award

Posting Date: September 25, 2017

Solicitation: 5400013743

Description: MITIGATION BANK CREDITS

Agency: SC Department of Transportation

The State intends to award contract(s) noted below. Unless otherwise suspended or canceled, this document becomes the final Statement of Award effective **08:00:00, October 06, 2017**. Unless otherwise provided in the solicitation, the final statement of award serves as acceptance of your offer.

Contractor should not perform work on or incur any costs associated with the contract prior to the effective date of the contract. Contractor should not perform any work prior to the receipt of a purchase order from the using governmental unit. The State assumes no liability for any expenses incurred prior to the effective date of the contract and issuance of a purchase order.

CERTIFICATES OF INSURANCE COVERAGE TO BE FURNISHED PRIOR TO COMMENCEMENT OF SERVICES UNDER CONTRACT.

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest within ten days of the date notification of award is posted in accordance with this code. A protest shall be in writing, shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided, and must be received by the appropriate Chief Procurement Officer within the time provided. [Section 11-35- 4210]

PROTEST - CPO ADDRESS - MMO: Any protest must be addressed to the Chief Procurement Officer, Materials Management Office, and submitted in writing

(a) by email to protest-mmo@mmo.sc.gov.

(b) by facsimile at 803-737-0639, or

(c) by post or delivery to 1201 Main Street, Suite 600, Columbia, SC 29201.

Contract Number: 4400017180

Awarded To: CARTER STILLEY SC LLC (7000216591)
98 CENTERMARSH LANE
PAWLEYS ISLAND SC 29585

Total Potential Value: \$ 1,972,250.00

Maximum Contract Period: October 03, 2017 through October 02, 2022

Item	Description	Unit Price	Total
00001	Wetland mitigation (266 credits)	\$ 6,790.00	\$ 1,806,140.00
00002	Stream mitigation (1130 credits)	\$ 147.00	\$ 166,110.00

Procurement Officer



EMMETT I. KIRWAN

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised September 2015)

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>

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 111.1 of the 2015 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.