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EXECUTIVE DIRECTOR

THE DIVISION OF PROCUREMENT SERVICES

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DIVISION DIRECTOR
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MICHAEL B. SPICER
INFORMATION TECHNOLOGY MANAGEMENT OFFICER
(803) 737-0600
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Protest Decision

Matter of: JNS Foods, LLC

Case No.: 2018-132

Posting Date: March 7, 2018

Contracting Entity: South Carolina Department of Corrections

Solicitation No.: 5400014811

Description: Peanut Butter, Individual, 2 oz.

DIGEST

Protest of a responsibility determination is dismissed for lack of jurisdiction. JNS Foods' (JNS) 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 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

<i>Event</i>	<i>Date</i>
Solicitation Issued	01/02/2018
Protest Received	01/12/2018

ANALYSIS

The South Carolina Department of Corrections (DOC) issued this Request for Quotes (RfQ) on January 1, 2018, to acquire 1191 cases of Individual-2 oz. squeeze packs of peanut butter. JNS protests that DOC has declared JNS a non-responsible bidder for failure to pay certain invoices for product that DOC had to source from a third-party vendor because JNS could not fulfill a previous contract for mechanically separated chicken attributable to force majeure, oversized chicken breasts developed a cartilage which made the breast unsaleable.²

According to the Procurement Director at DOC, the budget for this procurement is \$35,730.00.
[Attachment 3]

Section 11-35-4210(1)(d) provides that:

The rights and remedies granted by subsection (1) and Section 11-35-4410(1)(b) are not available for contracts with an actual or potential value of up to fifty thousand dollars.

The Chief Procurement Officer lacks jurisdiction to address this protest.

DECISION

For the reasons stated above, the protest of JNS Foods, LLC is dismissed.

² DOC also alleges that JNS has defaulted on numerous contracts including: failed to deliver 3,000 pounds of beef patties; delivered late ground chicken six times; failed to deliver ground chicken eleven times; delivered late mustard; delivered late powdered bread mix; delivered defective lima beans; failed to deliver dry cake mix; and failed to deliver saltine crackers. In accordance with the various contracts, DOC has invoiced JNS the \$60,629.10 it incurred in acquiring the missing or defective products and JNS has failed to pay those invoices. [Attachment 2]

Protest Decision, page 3

Case No. 2018-132

March 7, 2018

For the Materials Management Office

A handwritten signature in cursive script that reads "Michael B. Spicer".

Michael B. Spicer

Chief Procurement Officer

Attachment 1

LAW OFFICES
LERMAN & WHITEBOOK, P.A.
2611 HOLLYWOOD BOULEVARD
HOLLYWOOD, FLORIDA 33020

CARLOS D. LERMAN
JODI W. LERMAN
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BROWARD: (954) 922-2811
DADE: (305) 539-0011
FACSIMILE: (954) 922-2841

DANIEL S. WHITEBOOK, OF COUNSEL

January 12, 2018

**NOTICE OF PROTEST PURSUANT TO S.C. CODE ANN. § 11-35-4210, THE SOUTH
CAROLINA PROCUREMENT CODE**

VIA FEDEX AND PROTEST-MMO@MMO.STATE.SC.US

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

RE: Solicitation 5400014811; Peanut Butter, Individual, 2 oz.

Dear Sir or Madam:

The undersigned represents JNS Foods, LLC (“JNS”) with respect to the above referenced matter. The South Carolina Department of Corrections (“SCDC”) has deemed JNS a “non-responsible” vendor, which has precluded JNS from having the opportunity to bid on potential contracts. The SCDC has labeled JNS a “non-responsible” vendor because of the SCDC’s position that JNS has failed to pay certain invoices for product that SCDC had to source from a third party vendor to effect cover because JNS could not fulfill Purchase Order 5400010231 (“PO”), Item 140380. The cause of JNS inability to fully perform under the referenced PO order was as a result of certain *force majeure* events as more particularly set forth below.

The product which was the subject of the PO, was Mechanically Separated Chicken (“MSC”). JNS was precluded from delivering the MSC due to the shortage of chicken frames necessary to produce MSC. The shortage of adequate chickens arose from a phenomenon in the chicken industry wherein oversized chicken breasts developed a cartilage, which in turn made the chicken breasts non-saleable. This condition resulted in an unprecedented demand for smaller chickens and a subsequent lack of supply. JNS’ approved supplier pursuant to the solicitation award, Gold Creek, had no product available for sale to JNS as a result of the market conditions.

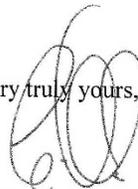
Chief Procurement Officer
Materials Management Office
January 12, 2018
Page 2

Further, there was no alternative supplier through which JNS could effect cover. Because of the market conditions, JNS could not perform under the contract and JNS was excused from performance due to the *force majeure* events describe herein. Article VII [Default (Jan 2006)] of the Terms and Conditions contained in the Invitation for Bid giving rise to the PO provides in pertinent part, “(c) Except for defaults of subcontractors in any tier, [JNS] shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of [JNS].” Although, the SCDC was able to source the MSC, it was only able to do so from a specific vendor who had stockpiled the product prior to the *force majeure* events. Per Article VII, JNS would not be liable for the excess costs incurred by the SCDC as a result of the *force majeure* events. Moreover, it appears that the MSC being purchased by SCDC from third party vendors is not in compliance with the USDA due to the lack of a Lethality certificate.

JNS has been an approved vendor for government agencies such as the SCDC throughout the country for over a decade. In particular JNS has fulfilled contracts for the SCDC for meats, dry goods, dry milk, cereal, breakfast items, canned goods and bread mix to name a few. JNS has been awarded these contracts as a result of its successful business model of keeping its costs and bids low to the advantage of the government entities. The result of this business model has been to provide the SCDC with the best pricing available in the industry and has also pushed other vendors to similarly provide more competitive pricing.

As set forth above, the SCDC’s refusal to allow JNS to participate in the referenced bid, and the labeling of JNS as a “non-responsible” bidder, is improper. Pursuant to S.C.Code Ann. § 11-35-4210 (2017), the South Carolina Consolidated Procurement Code, JNS hereby files this Notice of Protest to Solicitation 5400014811, issued on January 2, 2018, for Peanut Butter, Individual, 2 oz. JNS requests to be removed from the non-responsible vendor list and that JNS be permitted to bid per the Solicitation

Very truly yours,



Carlos D. Lerman, Esquire

cc: Client

Attachment 2

MICHAEL C. TANNER, L. L. C.
ATTORNEYS AT LAW
Post Office Box 1061
392 Second Street
Bamberg, South Carolina 29003

Michael C. Tanner

Joseph R. Shakibanasab

803-245-9153
Fax: 803-245-9154

January 16, 2018

(via e-mail carlos@lwlawfla.com and U. S. Mail)

Carlos D. Lerman, Esquire
Lerman & Whitebook, P.A.
2611 Hollywood Boulevard
Hollywood, Florida 33020

Re: JNS Foods LLC

FOR SETTLEMENT PURPOSES ONLY AND NOT ADMISSIBLE UNDER SCRE

Dear Mr. Lerman:

This will follow-up our recent discussion. Please be advised our firm has been retained to represent the South Carolina Department of Corrections (hereinafter "SCDC") in this matter. As prior correspondence between you and Kensey Barrett, Esquire, of SCDC reveals, JNS Foods, LLC, made several offers to SCDC's Solicitations and Invitations to bid. JNS Foods, LLC, (hereinafter JNS), was the awarded bidder and vendor for a number of goods. JNS has had a myriad of delivery and default issues. As you are aware, based upon these issues, JNS has been declared a non-responsible bidder. SCDC believes JNS is in default as defined by the Solicitations. The following facts illustrate how JNS is in default.

In Solicitation number 5400010231, Fresh Meats, JNS failed to deliver three thousand (3,000) pounds of beef patties which were due August 14, 2017. It is my understanding these beef patties were delivered several months later. JNS was also the successful bidder and was awarded the bid for ground turkey or chicken (Line 5). JNS was late on its deliveries for April and May 2017. JNS did not deliver the ground chicken to SCDC for its July and August delivery schedule, missing six delivery dates. SCDC was forced to procure the Gold Creek chicken from another vendor for July and August deliveries of forty thousand (40,000) pounds per delivery, at \$0.3239 per pound, as opposed to the contract price of \$0.2790 per pound. JNS also failed to deliver the ground chicken eleven times between September and December 2017. SCDC has invoiced JNS Foods in the amount of \$7,184.00 on August 21, 2017, and \$25,828.00 on October 3, 2017, which remain outstanding. Attached, please find additional copies of these invoices.

JNS was the awarded bidder for mustard in Solicitation number 5400010334, (Line 5) which specified a delivery date of July 19, 2017. JNS failed to deliver the mustard by the contracted delivery date. JNS' proposed delivery date of September 1, 2017, was deemed

unacceptable by SCDC's Food Services and turned over to the Division of Procurement, which then placed it on the open market. Estes Trucking attempted to deliver this mustard recently without a scheduled delivery. You were advised SCDC would not accept the mustard as it well outside the delivery date and cure period.

JNS was the awarded bidder for lima beans, Solicitation number 4500063789 (Line 1), which were delivered on March 16, 2017, and these beans received numerous complaints after cooking. SCDC food inspectors were able to verify these complaints. SCDC advised JNS of these complaints and JNS picked up 178 bags to test and replace on November 18, 2017. To date, JNS has not replaced these bags, for which SCDC has previously paid JNS. As SCDC did not have any non-defective lima beans, the agency had to purchase 478 bags on the open market. Enclosed, please find invoices to JNS in the amount of \$16,647.00 and \$10,970.00 for the lima beans which remain outstanding.

JNS shipment of powdered bread mix, Solicitation number 4500063835, was due on December 7, 2017, and was not delivered on time, but was delivered late on December 12, 2017. JNS failed to deliver dry cake mix referenced in PO4500063836, Line 6, which was due on October 3, 2017, and was forced to be purchased on the open market. JNS still owes SCDC five cases of saltine crackers due on August 31, 2017, which were shorted in delivery and were to be replaced by JNS in a delivery on December 21, 2017, but were not delivered.

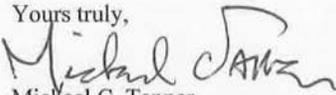
In regards to the chicken, JNS has advised it does not plan to pay the invoices based upon the doctrine of force majeure. JNS's inability to produce the chicken is not force majeure. The Official Comment to S. C. Code Ann. § 36-2-615 states, "[i]n creased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover." Not only did Gold Creek have available product, Gold Creek ultimately supplied the chickens your client was contracted to supply to SCDC. Gold Creek told SCDC representatives they had the chickens available when due from JNS. JNS's claim that it was unable to produce the chickens due to force majeure is not a tenable legal position. JNS's failure to ask for a timely price increase from SCDC is not force majeure.

JNS is routinely late/absent on deliveries and owes SCDC \$60,629.10 to date. SCDC reserves all rights to pursue any and all legal or equitable remedies, including submitting a request for resolution through the appropriate chief procurement officer unless JNS remits payment within 10 days of this letter.

Pursuant to the clause titled "PAYMENT and INTEREST (FEB 2015)" contained within the Invitation for Bid which states, "[a]mounts due to the State shall bear interest at the rate of interest established by the South Carolina Comptroller General pursuant to Section 11-35-45," SCDC will seek to recover interest on the money owed by JNS. The current annual percentage rate established by the Comptroller General is 6.25%. If these amounts are not paid as set forth above, SCDC shall seek the CPO to award it contractual interest as well.

Based on the foregoing, pursuant to the terms of the contracts, SCDC hereby provides written notice to JNS that it is in default for failing to deliver the above-described goods or to perform the services within the time specified within the contracts and the failure to perform other material provisions of the contract. JNS' time for the right to cure has expired.

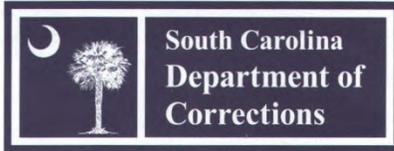
Please contact me if you wish to discuss these matters further.

Yours truly,

Michael C. Tanner

MCT/lis

cc: Kensey Barrett, Esquire (via e-mail Barrett.kensey@doc.sc.gov)

Attachment 3



HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

January 16, 2018

Michael B. Spicer
Information Technology Management Officer
Division of Procurement Services
SC State Fiscal Accountability Authority
1201 Main Street, Suite 600
Columbia, SC 29201

Subject: Protest of JNS Foods, LLC, Case 2018-132

Mr. Spicer,

The above referenced Protest is for a Request for Quotation Number 5400014811 for Peanut Butter that opens January 17, 2018. The estimated budget about for this request was estimated at \$35,730.00 by our Food Service Branch.

Please see attached Requisition and copy of quote for your review.

Thanks,

A handwritten signature in blue ink that reads "Ruthie H. Bishop".

Ruthie H. Bishop, CPPPB
Procurement Director
SC Department of Corrections

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2017)

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 2016 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.