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## Protest Decision

**Matter of:** Cumulus Radio LLC  
**Case No.:** 2023-132  
**Posting Date:** July 10, 2023  
**Contracting Entity:** The Citadel  
**Solicitation No.:** 5400025215  
**Description:** Digital and Video Advertising

### DIGEST

Protest rejection of late bid is denied. The protest by Cumulus Radio LLC (CR) is attached and included by reference. (Attachment 1)

### AUTHORITY

The Chief Procurement Officer<sup>1</sup> (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.

### BACKGROUND

Solicitation Issued	05/09/2023
Amendment 1 Issued	06/01/2023
Protest Received	07/05/2023

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

The State Fiscal Accountability Authority (SFAA) issued this Request for Proposals on behalf of the Citadel to acquire digital and video advertising on May 9, 2023. Amendment 1 was issued on June 1, 2023, answering vendor questions, and establishing 11:00 AM, June 9, 2023, as the time and date for submission of proposals. Eight proposals were received. An award has not been posted at this time. CR submitted a protest on July 5, 2023, alleging problems with the South Carolina Enterprise Information System prevented it from submitting its proposal online and acknowledging that it submitted a physical copy of its proposal three (3) minutes after the designated time. CR's late proposal was rejected in accordance with Regulation 19-445.2070(G):

Any bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected unless the bid had been delivered to the location specified in the solicitation or the governmental bodies' mail room which services that location prior to the bid opening.

## **DISCUSSION**

The Code authorizes the CPO to review protests from Offerors and potential Offerors at two junctures during a procurement. Section 11-35-4210(1)(a) grants potential Offerors the opportunity to protest issues related to the solicitation within 15 days of the issuance of the relevant document:

A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with a solicitation shall protest to the appropriate chief procurement officer in the manner stated in subsection (2) within fifteen days of the date of issuance of the Invitation For Bids Request for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue.

Amendment 1 was the last solicitation document issued and was published on June 1, 2023. CR's protest was received on July 5, 2023, thirty-four (34) days after Amendment 1 was published. To the extent this is a protest of the solicitation, it is untimely filed.

The second opportunity is found in Section 11-35-4210(1)(b) which grants actual Offerors the opportunity to protest the award of a contract within seven business days of the posting of an award or intent to award:

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall notify the

appropriate chief procurement officer in writing of its intent to protest within seven business days of the date that award or notification of intent to award, whichever is earlier, is posted and sent in accordance with this code.

No award or intent to award has been posted at this time, this opportunity is not yet available, and the CPO lacks jurisdiction to review the merits of this protest.

Even if this were a protest of the award, filed within the statutory time, this protest would fail. CR argues that the deadline for submission of proposals should be waived as a minor informality or irregularity.

Three (3) minutes is a minor increment of time, and Cumulus' submission of its offer a mere three (3) minutes after the deadline has no effect on the performance of the contract, especially when Ms. Perry knew it was coming and the issues Cumulus had with electronic submission. The waiver of the exact time deadline for submission under these circumstances to accept Cumulus' offer would not be prejudicial to bidders because the delay in submission was caused by issues with the Division's website and failure of the Division's procurement team to provide assistance and approve Cumulus' new account.

However, the South Carolina Procurement Review Panel has advised:

The Panel has consistently held the timelines established by section 11-35-4210(1) are jurisdictional and cannot be waived by the parties.

See *In Re: Protest of Oakland Janitorial Services, Inc.*, Panel Case 1988-13.

Finally, bid transmission errors, or the inability to upload an electronic bid, generally do not give rise to a protest issue, as the error could be caused by several issues, including user error, CR's computer system or internet provider, or other unknown issues. Further, even if it were a government error—which is speculative—this still would not state a valid protest ground. See *American Material Holding, Inc.*, B-2811556 (Comp. Gen. 1999) (holding government's computer malfunction in accepting bid does not sustain a protest where the malfunction was isolated and not part of a deliberate effort to exclude vendor or the rest of agency's failure to have adequate procedures in place).

Since the CR proposal cannot be accepted, CR cannot be an actual offeror, and would not have standing to protest the award.

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Case No. 2023-132  
July 10, 2023

## DECISION

For the reasons stated above, the protest of Cumulus Radio LLC is denied.



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Michael B. Spicer  
Chief Procurement Officer

Columbia, South Carolina

AMBER HODGSON  
VICE PRESIDENT & ASSISTANT GENERAL COUNSEL  
(404) 260-6692  
AMBER.HODGSON@CUMULUS.COM



JUL 5 '23 WE 10:11AM

REC'D BIO CONTROL

June 23, 2023

*Sent via email* – protest-mmo@mmo.state.sc.us

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

**Re:** Protest and Request re: Solicitation 5400025215

Dear Chief Procurement Officer:

As counsel to Cumulus Radio LLC (“Cumulus”) in Charleston, SC, I write to formally protest the rejection of Cumulus’ offer submission for the above referenced solicitation under South Carolina Code Section 11-35-4210 and am requesting the Division of Procurement Services (“Division”) accept Cumulus’ offer pursuant to South Carolina Code Section 11-35-1520(13).

According to the solicitation document, offers were due from bidders on June 9, 2023 at 11:00am ET. On June 9, 2023, Cumulus attempted to submit its offer, but encountered issues with the Division’s bid submission website and did not receive timely support from the Division to resolve those issues. In attempting to login to its account, Cumulus received notifications that its password had expired, yet the system/website would not allow Cumulus to reset the password. After several unsuccessful attempts to access its account and because time was of the essence, at approximately 9:20am ET, Cumulus contacted the Division’s technical support team. The Division’s technical support representative (Lucas) advised Cumulus to create a new account and contact procurement services once completed as the new account would need to be approved before it could be linked to the existing account.

Cumulus created the new account, and at approximately 10:00am ET called the Division’s procurement services as instructed, but nobody answered. Cumulus called the Division’s technical support team back to let them know that nobody in procurement services could be reached. The technical support representative advised that only procurement services could approve the new

account. Cumulus attempted multiple calls between 10:00am and 10:35am ET, and all were unanswered.

In the meantime, at approximately 10:10am ET, Cumulus contacted Procurement Manager Ms. Nakendra Perry regarding the website and account issues. Cumulus explained to Ms. Perry that the company needed to submit its offer by the 11:00am ET deadline, so approval of the new account was urgent and critical. Ms. Perry informed Cumulus that if it was not possible to get the new account approved prior to the deadline the company could submit a physical copy at the Division's office in Columbia, SC. Cumulus told Ms. Perry that this offer was being submitted from the Charleston market, but Cumulus would contact the market in Columbia to have a representative from that office submit the bid in person as soon as possible. Cumulus continued to pursue both options for submission until approximately 10:45am ET when it became clear that the Division would not approve the new account before the submission deadline. At that point, Cumulus abandoned its efforts to submit the offer online and focused solely on coordinating with representatives in the Columbia market to submit a physical copy of the offer at the Division's offices.

At 11:03am ET, the Cumulus representative from the Columbia market arrived at the Division's office with the physical copy of the offer, and Ms. Perry refused to accept it despite knowing the circumstances. Cumulus contacted Ms. Perry later that day by phone and email explaining again that the delay in submission of its offer was due to issues with the Division's website and approval of its new account, but Ms. Perry continued to refuse to accept Cumulus' offer.

In the "RESPONSIVENESS/IMPROPER OFFERS" section of the solicitation, subsection (c) states, "[a]ny deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer" pursuant to South Carolina Code Section 11-35-1520(13). Section 11-35-1520(13) states,

[A] minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on . . . performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State.

Three (3) minutes is a minor increment of time, and Cumulus' submission of its offer a mere three (3) minutes after the deadline has no effect on the performance of the contract, especially when Ms. Perry knew it was coming and the issues Cumulus had with electronic submission. The waiver of the exact time deadline for submission under these circumstances to accept Cumulus' offer would not be prejudicial to bidders because the delay in submission was caused by issues with the Division's website and failure of the Division's procurement team to provide assistance and approve Cumulus' new account. After Cumulus could not reach anyone in procurement services to assist to allow the company to submit its offer online through the Division's website, Cumulus was forced to pivot to submitting a physical copy at the Division's office, which required coordination with the Columbia market due to the offer originating from Charleston, with little

time remaining before the deadline. In fact, the Division's failure to aid in timely resolving the issues with its website and Cumulus' account to allow Cumulus to submit its offer online and subsequent rejection of the offer because it was three (3) minutes late was prejudicial to Cumulus. But for the technical issues with the website and the subsequent delayed assistance from the Division in getting those issues resolved, Cumulus' offer would have been submitted well in advance of the deadline either online or via physical copy.

Further, waiving the three (3) minute time deficiency is to the advantage of the State of South Carolina. Not only does reviewing more bids allow the State to potentially receive services at a lower cost to save funds, Cumulus has provided these services to the State in response to similar solicitations for the same governmental unit (The Citadel) for the past five (5) years, and thus, has the experience, knowledge, and ability to be efficient in providing services to save taxpayers money. Additionally, the State could potentially lose the five (5) years of data Cumulus acquired in providing the services.

Finally, S.C. Code Regs. § 19-445.2070.G states, "[a]ny bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected unless the bid had been delivered to the location specified in the solicitation . . . prior to the bid opening." Cumulus' offer was delivered to the location specified in the solicitation prior to the bid opening and was not required by law to be rejected. The Division could have exercised discretion to accept Cumulus' offer. Given the circumstances here, Cumulus believes it is appropriate for the Division to do now. Accordingly, Cumulus respectfully requests that its offer for the solicitation be accepted for consideration.

I appreciate your attention to this important matter and look forward to hearing from you.

Sincerely,



Amber Hodgson  
Vice President & Assistant General Counsel

cc: Kimber Craig, Director of Agency Sourcing; Deputy Chief Procurement Officer  
Eric Mastel, VP/Market Manager

## 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.

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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**

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\_\_\_\_\_  
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: \_\_\_\_\_

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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.**