

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

In the Matter of Protest of:

Bluestein Wholesale Co., Inc.

SC Department of Corrections  
Reverse Auction IFB No. 5400004708

Rubber Boots

**BEFORE THE CHIEF PROCUREMENT OFFICER**

DECISION

CASE NO.: 2012-143

POSTING DATE: November 19, 2012  
MAILING DATE: November 19, 2012

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest dated September 14, 2012, from Bluestein Wholesale Co., Inc. (Bluestein). With this reverse auction invitations for bids (IFB), the South Carolina Department of Corrections (SCDC) attempts to procure rubber boots. Bluestein protested SCDC's use of competitive online bidding, in a reverse auction format. As the controlling issues in this case are a matter of law, this decision is prepared without the benefit of a hearing.

**NATURE OF PROTEST**

Bluestein cited the following grounds for its protest:

First, the procurement code in section 11 does not allow a state agency to use a third party to administer a bid. Section 11-35-1520 is specific on the bid procedure for such procurement. It does not allow for other types of solicitations, particularly the use of a reverse auction.

Second, it was the legislature's intent to favor South Carolina, tax paying businesses in solicitations for state contracts. Section 11-35-1524 specifically makes reference to several preferences which must apply to all bids. Bids must allow a 2% South Carolina resident vender preference and a 2% made in the USA preference. These preferences cannot be negated by use of a third party surrogate (E-Bridge).

Third, the 7% resident vender preference should apply to this bid. My company has been supplying these boots under a contract award for the past 10 years. The total purchases for the 5 year term of this contract is under the \$50,000 threshold.

Fourth, the required payment of a 3% fee of the entire value of the bid to a third party is not allowed under the procurement code. This is tantamount to the procuring agency levying a fee upon the winning bidder through its agent.

My objection to this type of reverse auction format not only applies to this boot bid but to all South Carolina departments who now or in the future use the E-bridges auction format.

### **FINDINGS OF FACT**

The following dates are relevant to the protest:

1. On August 31, 2012, SCDC issued its "Reverse Auction" IFB No. 5400004708. (Ex. 1) Ruthie Bishop, SCDC Procurement Director, invited bidders to participate in the reverse auction writing, "You are invited to participate in an Electronic Sealed Bidding Event for Rubber Boots 5400004708 for South Carolina Department of Corrections. South Carolina Department of Corrections has partnered with eBridge to host this bidding event on its Web-Based Bidding Event Platform." (p.26)

On pages 26-35, the IFB included complete instructions to bidder regarding how to submit their bid and identifying eBridge as the state's reverse auction contractor, as follows:

#### **WHO IS EBRIDGE AND WHAT IS ELECTRONIC SEALED BIDDING**

eBridge is a service provider contracted by South Carolina Department of Corrections to facilitate the bidding process with online tools and a team of knowledgeable professionals. You may find additional information about eBridge by visiting our website at [www.ebridgeglobal.com](http://www.ebridgeglobal.com). If you have not already registered with eBridge, then it is important that an authorized representative do so. The registration process is free and you may register with eBridge by navigating to our website, then clicking "Register for a Reverse Auction Event" on the right under Quick Links. If you are unsure as to whether or not your organization is registered with eBridge, please contact us at (502) 491-1980.

2. On September 5, 2012, SCDC issued Amendment 1 to the IFB changing the due date for responses and the on-line auction event date. (Ex. 2)
3. On September 11, 2012, SCDC issued Amendment 2 to the IFB changing the on-line auction event date.
4. On September 14, 2012, Bluestein filed its protest with the CPO. SCDC issued Amendment 3 to the IFB suspending the IFB due to Bluestein's protest.

## EXPLANATION OF ON-LINE BIDDING

SCDC conducted the procurement as a competitive online bid, in a reverse auction format, under authority of S.C. Code Section 11-35-1529. In reverse auctions bidders compete on-line and in the same time-frame with other potential suppliers to become the lowest priced vendor chosen to supply the goods or services required by the State. Subsection (2) allows, “The State may require bidders to register before the Opening Date and Time and, as a part of that registration, to agree to any terms, conditions, or other requirements of the solicitation.” Relative to the protest, the Code provides the following regarding the auction process:

The solicitation must designate both an Opening Date and Time and a Closing Date and Time. The Closing Date and Time need not be a fixed point in time, but may remain dependent on a variable specified in the solicitation. At the Opening Date and Time, the State must begin accepting real-time electronic bids. The solicitation must remain open until the Closing Date and Time . . . Following receipt of the first bid after the Opening Date and Time, the lowest bid price must be posted electronically to the Internet and updated on a real- time basis. At any time before the Closing Date and Time, a bidder may lower the price of its bid, except that after Opening Date and Time, a bidder may not lower its price unless that price is below the then lowest bid. Bid prices may not be increased after Opening Date and Time. Except for bid prices, bids may be modified only as otherwise allowed by this code.

All other requirements of the Code regarding invitations for bids (11-35-1520) apply to on-line bidding.

The State does not possess a functioning system capable of facilitating on-line bidding so the State has contracted with *eBridge* as its on-line bidding contractor. For each auction, *eBridge* provides its on-line bidding system, assists the procurement officer and the bidders to facilitate the on-line bid, and conducts the auction. For its services, the State allows *eBridge* to charge the successful bidder a fee of three percent (3.0%) of the value of any agency contract awarded pursuant to the on-line auction.

## CONCLUSIONS OF LAW

Bluestein protested SCDC's use of competitive on-line bidding (reverse auction). In its first protest ground, Bluestein alleged, "the procurement code in section 11 does not allow a state agency to use a third party to administer a bid." Bluestein clarified this protest ground writing, "Section 11-35-1520 is specific on the bid procedure for such procurement. It does not allow for other types of solicitations, particularly the use of a reverse auction."

The use of competitive on-line bidding is authorized under the South Carolina Consolidated Procurement Code (Code). Section 11-35-1510, Methods of source selection, reads, in part, "Unless otherwise provided by law, all state contracts must be awarded by competitive sealed bidding, pursuant to Section 11-35-1520, except as provided in: (5) Section 11-35-1529 (Competitive Online Bidding)." (Emphasis added) Section 11-35-1529 reads, in part, "When a purchasing agency determines that on-line bidding is more advantageous than other procurement methods provided by this code, a contract may be entered into by competitive on-line bidding, subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section." Section 11-35-1529 authorizes specific exceptions to Section 11-35-1520 necessary to customize the bidding process to on-line bidding. Clearly, on-line bidding is authorized by the Code.

As noted above, the State has contracted with eBridge to assist in the conduct of on-line bidding. The State has not relinquished authority to administer the bidding process to eBridge. For on-line bidding, the State administers the bidding process. Agency officials write the specifications; develop the solicitation; advertise the solicitation; qualify bidders, including determining their responsiveness and responsibility; and determine the awards. eBridge merely assists with the on-line bidding process. Contrary to Bluestein's assertion, the Code does not

prohibit the State from seeking assistance with the on-line bidding process. Therefore, this ground of Bluestein's protest is denied.

In its second and third grounds of protest, Bluestein alleged:

Second, it was the legislature's intent to favor South Carolina, tax paying businesses in solicitations for state contracts. Section 11-35-1524 specifically makes reference to several preferences which must apply to all bids. Bids must allow a 2% South Carolina resident vender preference and a 2% made in the USA preference. These preferences cannot be negated by use of a third party surrogate (E-Bridge).

Third, the 7% resident vender preference should apply to this bid. My company has been supplying these boots under a contract award for the past 10 years. The total purchases for the 5 year term of this contract is under the \$50,000 threshold.

Since both grounds two and three assert violations of the South Carolina Resident Vendor Preferences of the Code, they are addressed collectively herein.

The Code does provide significant preferences for bidders of products who are resident to South Carolina or offer the State products made, manufactured, or grown in South Carolina. (S.C. Code 11-35-1524) However, Section 11-35-1529 of the Code, Competitive On-Line Bidding, excludes these procurements from the application of the preferences. It reads, "(4) Provisions Not to Apply. Section 11-35-1524 and paragraph (5) (Bid Opening) of Section 11-35-1520 do not apply to solicitations issued pursuant to this section." Therefore, grounds two and three of Bluestein's protest are denied.

In its fourth ground of protest, Bluestein alleged, "The required payment of a 3% fee of the entire value of the bid to a third party is not allowed under the procurement code. This is tantamount to the procuring agency levying a fee upon the winning bidder through its agent."

As noted above in the explanation of On-Line Bidding, the State does not possess a functioning system capable of facilitating on-line bidding so the State has contracted with eBridge as its on-line bidding contractor. For each auction, eBridge provides its on-line bidding

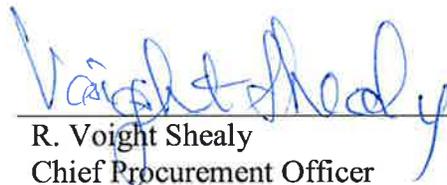
system, assists the procurement officer and the bidders to facilitate the on-line bid, and conducts the bidding auction. For its services, the State allows eBridge to charge the successful bidder a fee of three percent (3.0%) of the value of any contract awarded pursuant to the on-line auction.

The same requirement was imposed equally upon all bidders, not just Bluestein. Presumably, all bidders simply add the eBridge fee into their bids and pass that additional cost onto the State. Therefore, Bluestein is not aggrieved by the imposition of the eBridge fee.

Again, Bluestein asserts no specific violation of law, only a bald assertion of a violation of the Code – one not supported by law. Therefore, this ground of protest is denied.

**DETERMINATION**

For the foregoing reasons the protest is denied.

  
\_\_\_\_\_  
R. Voight Shealy  
Chief Procurement Officer  
For Supplies and Services

  
\_\_\_\_\_  
Date

Columbia, S.C.

**STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW**  
*Protest Appeal Notice (Revised July 2012)*

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>

**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 83.1 of the 2012 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, an incorporated business must retain 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).

**South Carolina Procurement Review Panel  
Request for Filing Fee Waiver  
1105 Pendleton Street, Suite 202, 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.**

## Skinner, Gail

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**From:** Shealy, Voight  
**Sent:** Friday, September 14, 2012 10:15 AM  
**To:** Robertson, Dixon; Skinner, Gail  
**Subject:** Fw: SC DOC boot bid protest

We have a protest on a SCDC reverse auction. Please advise Ruthie.

Thanks

*Sent via DroidX2 on Verizon Wireless™*

-----Original message-----

**From:** Bryan H Bluestein <bbluestein@sc.rr.com>  
**To:** "Shealy, Voight" <VShealy@mmo.sc.gov>  
**Sent:** Fri, Sep 14, 2012 00:59:24 GMT+00:00  
**Subject:** SC DOC boot bid protest

Dear Mr. Shealy,

This letter is to protest both the format and administering of the Department of Correction's boot bid #540004708 dated August 31, 2012.

First, the procurement code in section 11 does not allow a state agency to use a third party to administer a bid. Section 11-35-1520 is specific on the bid procedure for such procurement. It does not allow for other types of solicitations, particularly the use of a reverse auction.

Second, it was the legislature's intent to favor South Carolina, tax paying businesses in solicitations for state contracts. Section 11-35-1524 specifically makes reference to several preferences which must apply to all bids. Bids must allow a 2% South Carolina resident vender preference and a 2% made in the USA preference. These preferences cannot be negated by use of a third party surrogate (E-Bridge).

Third, the 7% resident vender preference should apply to this bid. My company has been supplying these boots under a contract award for the past 10 years. The total purchases for the 5 year term of this contract is under the \$50,000 threshold.

Fourth, The required payment of a 3% fee of the entire value of the bid to a third party is not allowed under the procurement code. This is tantamount to the procuring agency levying a fee upon the winning bidder through its agent.

My objection to this type of reverse auction format not only applies to this boot bid but to all South Carolina

departments who now or in the future use the E-bridges auction format.

This correspondence is my formal objection to the new bidding format. I would ask that the agencies be instructed to follow the applicable bidding format that is mandated by statute. I look forward to seeing your decision to these objections in the near future.

Please feel free to contact me if you have questions or wish to speak with me.

With kind regards,

Bryan Bluestein, President  
Bluestein Wholesale Company  
933 Gervais Street  
Columbia, S.C. 29201  
803-779-2244