

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

Coastal Carolina University

Department of Health & Environmental
Control

RFP No. 5400005036

Collection of Beach Erosion Monitoring
Data

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2013-109

POSTING DATE: May 28, 2013

MAILING DATE: May 28, 2013

This matter is before the Chief Procurement Officer (CPO) pursuant to a protest filed by Coastal Carolina University (CCU) under authority of South Carolina Code Section 11-35-4210. With this solicitation, the Department of Health and Environmental Control (DHEC) attempts to procure services for collection of beach erosion monitoring data for its Office of Coastal Resource Management (OCRM). Following evaluation of the proposals, DHEC posted an intent to award to Coastal Science and Engineering, LLC (CS&E). CCU protested DHEC's intent to award alleging (1) "Coastal Science and Engineering, LLC failed to disclose a conflict of interest as required by the solicitation. As a private entity, Coastal Science and Engineering, LLC has a financial interest in the outcome and associated rulings of the Office of Coastal Resource Management, in particular the permitting process" and (2) "Coastal Carolina University is the most qualified vendor to conduct the BERM project as it has conducted the project for the past thirteen (13) years. It was also the lowest bidder in this project."

In order to resolve the matter, the CPO conducted a hearing May 15, 2013. Appearing before the CPO were CCU, represented by Timothy Meacham, Esquire, University Counsel; CS&E, represented by Jean-Marie Edouard Mille, Esquire; and DHEC, represented by John Harleston, Esquire, Staff Attorney.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On December 5, 2012, DHEC issued the RFP. (Ex. 1)
2. On December 20, 2013, DHEC issued Amendment #1. (Ex. 2) It was not relevant here.
3. On January 4, 2013, DHEC issued Amendment #2. (Ex. 3) It was not recognized by the parties to be relevant here.
4. On January 15, 2013, DHEC opened the three proposals received.
5. On February 26, 2013, after evaluation of the proposals, DHEC posted its intent to award to CS&E. The cumulative scores awarded the three offerors by the evaluators were as follows:

<u>Offeror</u>	<u>Total Score</u>
1. CS&E	289.9
2. CCU	276.0
3. Atkins North America	229.4

6. On March 5, 2013, CCU filed its protest with the CPO.

DISCUSSION

DHEC attempts to procure, “services for the collection of beach erosion monitoring data at an existing network of 400 survey monuments located along the developed sections of South Carolina’s ocean coastline in accordance with all requirements set forth herein.” (Ex. 1, Scope of Solicitation, p. 5) The work consists of preparing cross-section profiles showing the elevations of beach and near shore land surfaces. For each of the 400 points to be surveyed, the profiles will begin at the survey monument. located on high and extend approximately 3,000 feet offshore. Elevations must be recorded at intervals no greater than twenty-five feet. These measurements require traditional land survey methods; wading into chest-deep water; and using underwater devices deployed from a boat. The awarded contractor will measure nearly 5000 discrete data

points. Other than determining the exact location of elevations, little judgment is required. The contract is to measure and report objective data.

The award criteria in their order of precedence were: Ability to Perform, Experience and Qualifications, References, and Cost. A panel of three experts evaluated the proposals and ranked CS&E's proposal most advantageous to the state.

MOTION TO DISMISS

At the beginning of the hearing, DHEC offered a motion asking the CPO to dismiss both grounds of the protest. (Copy attached) CS&E joined in DHEC's motion. The CPO granted the motion as to Protest Ground #2 for the reasons that follow; and held his ruling in abeyance as to Protest Ground #1.

Protest Ground #2 states:

Coastal Carolina University is the most qualified vendor to conduct the BERM project as it has conducted the project for the past thirteen (13) years. It was also the lowest bidder in this project.

In this protest ground CCU does no more than argue it was better than CS&E. CCU does not allege or identify any basis for finding the decision of the evaluators clearly erroneous, arbitrary, capricious, or contrary to law, the standard set by the Code (S.C. Code Ann. § 11-35-2410 (2011)). It merely disagrees with the decision of the evaluators. The Procurement Review Panel has dismissed numerous similar allegations writing, "The Panel will not re-evaluate and compare the professional qualifications of the offerors, and thus second guess the decision of the evaluators" (*In Re: Protest of First Sun EAP Alliance, Inc.*, Panel Case No. 1994-11) and "The determination of what is most advantageous to the State can only be determined by the State. An offeror's claim to be superior to other offerors is fruitless." (*In Re: Protest of Value Options, Magellan Behavioral Health & Blue Cross and Blue Shield*, Panel Case No. 2001-7, n.7.) Therefore, Protest Ground #2 is dismissed.

CCU's Protest Ground #1 states:

Coastal Science and Engineering, LLC failed to disclose a conflict of interest as required by the solicitation. As a private entity, Coastal Science and Engineering, LLC has a financial interest in the outcome and associated rulings of the Office of Coastal Resource Management, in particular the permitting process.

CCU argues that CS&E failed to report a conflict of interest, an error by omission, so egregious that CS&E's proposal should have been rejected as both nonresponsive and nonresponsible.¹

DHEC included a clause, standard to State of South Carolina solicitations, in its RFP that reads as follows:

DISCLOSURE OF CONFLICTS OF INTEREST OR UNFAIR COMPETITIVE ADVANTAGE (MAY 2011): You warrant and represent that your offer identifies and explains any unfair competitive advantage you may have in competing for the proposed contract and any actual or potential conflicts of interest that may arise from your participation in this competition or your receipt of an award. The two underlying principles are (a) preventing the existence of conflicting roles that might bias a contractor's judgment, and (b) preventing an unfair competitive advantage. If you have an unfair competitive advantage or a conflict of interest, the state may withhold award. Before withholding award on these grounds, an offeror will be notified of the concerns and provided a reasonable opportunity to respond. Efforts to avoid or mitigate such concerns, including restrictions on future activities, may be considered.

(Ex. 1, p. 9)²

¹ In its motion to dismiss DHEC argues this protest ground is vague in that CCU does not specify how CS&E has a conflict of interest, except to say that, as a "private entity" CS&E has "a financial interest in the outcome and associated rulings of the OCRM, in particular, the permitting process"; that the clause as written is a warranty and representation that any conflicts are identified and explained in the proposal, whether the offeror has identified any conflicts or not; and that any failure by CS&E to report a conflict of interest, should one actually exist, is a minor informality. Because CCU raises—barely—allegations of an organizational conflict of interest, the CPO denies the motion to dismiss.

² This clause apparently finds its genesis in the federal procurement rule against organizational conflicts of interest. Federal Acquisition Regulation 2.101 defines OCIs thusly:

"Organizational conflict of interest" means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government or the person's objectivity in performing the contract work is or might be other impaired, or a person has an unfair competitive advantage.

FAR 2.101, 48 CFR Ch. 1, §2.101 (66 FR 2118, Jan. 10, 2001).

Organizational conflicts of interest, or OCIs, can be broadly categorized in three groups: unequal access to information cases, biased ground rules cases, and impaired objectivity cases. *American Management Systems, Inc.*, B- 285645 (Comp. Gen.), 2000 CPD P 163, 2000 WL 1507307 (2000); *Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B- 254397 (Comp. Gen.), B- 254397.15, B- 254397.16, B- 254397.17, B- 254397.18, B- 254397.19, 95-2 CPD P 129 at 12-13, 1995 WL 449806. The specific claim CCU makes here is that CS&E's performance of beach renourishment work would impair its objectivity in surveying South Carolina's shoreline.

CCU presented testimony from Dr. Paul Gayes, a CCU professor who has overseen its performance of the beach erosion monitoring work in the past. Dr. Gayes testified that CS&E performs beach renourishment work, the adequacy of which is generally measured by surveying the coastline before and after the work is actually performed. He identified a project at Folly Beach where OCRM recently issued a permit to CS&E for a renourishment project. He also described his participation in an advisory committee to OCRM. Nearly three years ago the committee recommended to OCRM, among other things, that the same firm performing renourishment work not be awarded the surveying contract for determining the quality of that work. Dr. Gayes acknowledged that OCRM, DHEC, and the licensing authority for surveyors have taken no action on the recommendation.

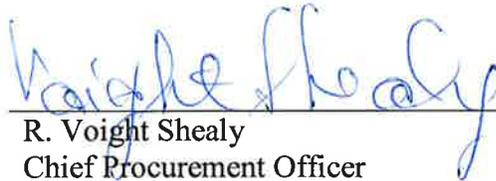
DETERMINATION

South Carolina has 187 miles of general shoreline.³ Folly Beach is about six miles long. Of the approximately 400 profile sites along South Carolina's coast, thirty-one are at Folly Beach. There was no testimony how many of these fall within the area where CS&E's

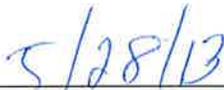
³ <http://www.sciway.net/facts/>, last viewed May 28, 2013.

renourishment contract is. Nor was there any evidence that the surveying to be performed under this RFP would be used as a baseline or otherwise to measure CS&E's renourishment work at Folly Beach. "Hard facts," not suspicion and innuendo, are required to establish existence of conflicts. *CACI, Inc.—Federal v. U.S.; Aetna Gov't Health Plans*, 719 F.2d 1567 (Fed. Cir. 1983). CCU simply failed to prove that the renourishment work CS&E will perform at Folly Beach has anything to do with judgment CS&E may exercise in connection with the surveying work under this RFP. Likewise, it did not show that CS&E's work under this contract will allow CS&E to evaluate its renourishment work at Folly Beach. Absent convincing evidence that a conflict exists, the CPO need not reach whether CS&E was bound to disclose it to DHEC.⁴ Therefore, Protest Ground #1 is denied.

For the foregoing reasons, the protest is dismissed.



R. Voight Shealy
Chief Procurement Officer
For Supplies and Services



Date

Columbia, S.C.

⁴ All beach restoration projects must be licensed by the OCRM, the very agency requesting proposals. DHEC and CS&E acknowledged that CS&E had conducted beach restoration projects permitted by the OCRM. Indeed, CS&E's proposal included a summary of its relevant project experience, including beach restoration projects. Therefore, even if an actual or potential conflict existed, which was not proven, OCRM already knew it AND CS&E reported it in its proposal.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised January 2013)

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 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, 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.



March 5, 2013

University Counsel

Chief Procurement Officer
Materials Management Office
1200 Main Street, Suite 600
Columbia, SC 29202

RE: BERM Project #5400005036-12/20/12

Dear Chief Procurement Officer:

Pursuant to the South Carolina Procurement Code, specifically South Carolina Code of Laws Section 11-35-4210, Coastal Carolina University protests the award of the above referenced project on the following grounds:

1. Coastal Science and Engineering, LLC failed to disclose a conflict of interest as required by the solicitation. As a private entity, Coastal Science and Engineering, LLC has a financial interest in the outcome and associated rulings of the Office of Coastal Resource Management, in particular the permitting process. Failure to disclose by the vendor to the buyer violates the specific terms and conditions of the solicitation thus rendering the vendor, Coastal Science and Engineering, LLC non-responsive and non-responsible.
2. Coastal Carolina University is the most qualified vendor to conduct the BERM project as it has conducted the project for the past thirteen (13) years. It was also the lowest bidder in this project. In fact, OCRM in 2010 found that Coastal Carolina University was more qualified than Coastal Science and Engineering, LLC in bid documents. Coastal Science and Engineering, LLC unsuccessfully protested that award. This protest ultimately resulted in litigation wherein OCRM took the position that Coastal Carolina University was qualified to conduct the work of tidal surveying. It conflicts with the general purpose of the Consolidated Procurement Code to award the project to a vendor at a higher cost that is no more qualified that Coastal Carolina University, the lowest bidder.

We would request that after an appropriate review and hearing the award be made to Coastal Carolina University as the most advantageous bidder for the State of South Carolina or, in the alternative, that the project be re-bid.

Sincerely,

Timothy E. Meacham
University Counsel

cc: Dr. Paul Gayes, Director/Palmetto Professor, CCU Burroughs & Chapin Center,
Marine & Wetland Studies