

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

In the Matter of Protest of:

MarketSearch

Materials Management Office  
RFP No. 5400005840  
Market Research for the South Carolina  
Department of Parks, Recreation and  
Tourism

**BEFORE THE CHIEF PROCUREMENT OFFICER**

DECISION

CASE NO.: 2013-127

POSTING DATE: October 15, 2013

MAILING DATE: October 15, 2013

This matter is before the Chief Procurement Officer (CPO) pursuant to an emailed letter of protest dated August 23, 2013, from MarketSearch. With this Request for Proposals (RFP), the South Carolina Materials Management Office (MMO) attempts to procure Market Research for the South Carolina Department of Parks, Recreation and Tourism (SCPRT). Following the evaluation of the proposals received, MMO posted its intent to award to Strategic Marketing & Research, Inc. MarketSearch protested the award, alleging

As directed in the RFP, MarketSearch submitted our proposal electronically through the SCEIS system. To ensure that everything was on time and properly done, we submitted the proposal on June 20<sup>th</sup> (5 days prior to the submission deadline) and enlisted the assistance of the SCEIS *Help Desk*. We followed their instruction and received the "bid submitted" confirmation --- this was our assurance, according to the *Help Desk*, that everything was complete.

Upon receiving notification of contract award and reviewing the competitive scoring of offeror proposals, we were shocked and confused to find that our proposal was not among those considered and scored.

In order to resolve the matter, the CPO conducted a hearing October 11, 2013. Appearing before the CPO were MarketSearch, represented by Frank Brown; SCPRT, represented by James Jackson, Procurement Manager; and MMO, represented by John Stevens, State Procurement Officer.

## NATURE OF PROTEST

The emailed letter of protest is attached and incorporated herein by reference

## FINDINGS OF FACT

The following dates are relevant to the protest:

1. On April 22, 2013, MMO issued the RFP. (Ex. 1)
2. On April 22, 2013, MMO issued Amendment #1. (Ex. 2)
3. On May 16, 2013, MMO issued Amendment #2. (Ex. 3).
4. On May 24, 2013, MMO issued Amendment #3. (Ex. 4)
5. On June 7, 2013, MMO issued Amendment #4. (Ex. 5)
6. On June 25, 2013, MMO opened the seven proposals received. MarketSearch's proposal was not among the proposals actually received.
7. On August 20, 2013, following evaluation of the proposals, MMO posted its Intent to Award to Strategic Marketing & Research, Inc. (Ex. 7)
8. On August 23, 2014, MarketSearch filed its protest with the CPO.
9. On August 30, 2013, MMO suspended its intent to Award. (Ex. 8)

## DISCUSSION

MMO solicited proposals on behalf of SCPRT "to perform marketing research studies related to tourism advertising and public relations campaigns conducted by SCPRT." [Ex. 1, Scope of Solicitation, p. 4] The offerors were allowed to submit their proposals on-line or in hardcopy. MarketSearch chose to submit its proposal on-line via the South Carolina Enterprise Information System (SCEIS), the state's enterprise reporting system for budgets, human resources, accounting and procurement. At the time for opening proposals, MMO had not received MarketSearch's on-line submittal.

Offerors submitting on-line were advised to "Follow the general user instructions posted at <http://www.procurement.sc.gov> under the heading 'Submitting Offers On-Line'." [Ex. 1, On-

Line Bidding Instructions, pp. 13-14] The RFP provided links to tutorials to assist offerors with their submittals and advised, “OFFERORS ENCOUNTERING PROBLEMS SUBMITTING A BID ONLINE SHOULD CALL (803) 896-0001.” [Ex. 1, p. 14] [Emphasis per the original] Further, the RFP instructed offerors in how to verify that their on-line submittals had been received reading:

**OFFEROR VERIFICATION OF SUBMITTED RESPONSES**

After submitting an online response to a solicitation, Offeror may validate their submission with the following steps:

1. Go back to the initial screen
2. Select Start by clicking the Start button
3. Bid Submitted will appear in the Bid Status Column as seen below

[Ex. 1, p. 14]

Kathy Harsey submitted MarketSearch’s proposal on-line on June 20, 2013. She stated that she read the instructions for on-line bidding, but still faced with uncertainty, she called the SCEIS Help Desk for assistance, speaking with the SCEIS staff. She stated she followed the instructions given and submitted MarketSearch’s on-line proposal. Afterward Ms. Harsey printed the “Output Preview” screen, which confirmed the bid status as “Bid Submitted.” [Ex. 13, 3<sup>rd</sup> page]

At the request of the State Procurement Office, the SCEIS team investigated the incident.

In its “Close Notification” the team concluded:

After some research into the issue, it appears that the vendor (MarketSearch Corporation) initially submitted the bid using the vn.search ID on 6/20/2013 at 2:57pm and received a confirmation that the bid had been submitted. At 3:59pm, they went back into the bid in change mode and left it idle until it timed out 4 hours later at 7:59pm. The timeout caused the bid to go into a hold status and it never got submitted to SCEIS.

[Ex. 14, 3<sup>rd</sup> page]

MarketSearch denies re-entering the system to change their proposal. Ms. Harsey recalled that she had been working in one window, attempting to submit MarketSearch’s proposal, when

she encountered uncertainty that caused her to call the SCEIS Help Desk for assistance. She said she was advised by Help Desk personnel to open a second window, which she did. She completed MarketSearch's on-line proposal using the second window, received confirmation, and logged off. Later, she realized the first window was still open, so she closed it without logging off.

Robert Looney and Wanda Dixon, SCEIS MMO Team Lead, attended the hearing and participated in discussions regarding the possible reasons for MarketSearch's bid to be placed in "held" status. They hypothesized that by closing the first window without logging off, Ms. Harsey may have caused the system to "Hold" MarketSearch's proposal.

#### **FINDINGS OF FACT**

The CPO finds the evidence regarding what actually happened inconclusive.

If someone at MarketSearch re-entered the system to amend its proposal, the SCEIS system is designed to hold the proposal until the change is completed. If the vendor never completes the change operation, its proposal remains in held status, as if no bid was ever submitted. This behavior is expected, and the instructions are clear that the bid will not be sent to the State unless the bid status indicates "submitted." [Exhibit 3, page 15]

If MarketSearch's closing the first SCEIS window without logging off caused the system to hold the proposal, the result is the same. Ms. Harsey acknowledged she did not log off the system. The CPO notes that all tutorials regarding submitting bids and changing bids submitted in SCEIS require bidders to "log off" the system as the final step. Failing to log off means MarketSearch did not follow the instructions in the tutorials. [Exhibit 3, page 15; Exhibit 4, page 36]

MarketSearch's protest rests in part on conjecture that some flaw in SCEIS caused its proposal status to change from "submitted" to "held." The CPO notes that since the SCEIS

system was first instituted, there has been no protest making such a claim. Whatever complaints exist about SCEIS—it’s complicated, its interface is not intuitive, it’s difficult to learn—the CPO is unaware of an instance where SCEIS has somehow swallowed a bid after its submittal. If that is what happened here (there has been no testimony or other evidence to that effect), then it is the equivalent of the State’s losing MarketSearch’s proposal.

The CPO finds that three possibilities exist for what happened. The first two, supported at least in part by testimony and computer logs, suggest an unfortunate and unintended operator error on MarketSearch’s part caused SCEIS to place its proposal in held status. The third possibility, for which there is not a scintilla of evidence, is that the State’s computer system “lost” MarketSearch’s proposal.

### **CONCLUSIONS OF LAW**

Section 11-35-1530 of the Consolidated Procurement Code (Code) governs the processing of RFPs. Regarding award, the Code reads, “Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State.” [11-35-1530(9) Award] Section 11-35-1530 incorporates requirements of Section 11-35-1520, Competitive Sealed Bidding, unless expressly amended. Regarding receipt of bids, Section 11-35-1520 reads, “All bids, including modifications, received before the time of opening must be kept secure and unopened” [11-35-1520(4) Receipt and Safeguarding of Bids.] [Emphasis added]

The supporting regulations add, “The procurement officer of the governmental body or his designee shall decide when the time set for bid opening has arrived, and shall so declare to those present.” [19-445.2050. Bid Opening. A. Procedures] Regulation 19-445.2095, C. Receipt of Proposals, reads,

The provisions of Regulation 19-445.2050(B) shall apply to the receipt and safeguarding of proposals. For the purposes of implementing Section 11-35-1530

(3), Receipt of Proposals, the following requirements shall be followed. (1) Proposals shall be opened publicly by the procurement officer or his designee in the presence of one or more witnesses at the time and place designated in the request for proposals.

When a proposal is in “held” status, it is unavailable to procurement – it cannot be opened. At the time for opening, MMO did not have a proposal from MarketSearch. Section 11-35-4210(1)(b) limits the right to protest to “actual...offeror[s].” I find MarketSearch was not an actual offeror and thus lacks standing to protest the award. *E.g., Appeal by Price Waterhouse, LLP*, Panel Case No. 1995-15(II).

Even if the SCEIS system somehow lost MarketSearch’s proposal, I cannot grant relief. A search of decisions of the Procurement Review Panel revealed no cases involving lost bids. Decisions of the U.S. Comptroller General have dealt with the issue.<sup>1</sup> Under the federal scheme there are three principles at work. First, the government may sometimes lose or misplace a bid. Without evidence that the mistake was intentional and deliberately aimed at depriving the protester of a contract, though, the procurement will not be disturbed. *Rodeo Road Equipment, Inc.*, B-242093, 91-1 CPD ¶256, 1991 WL 73115 (citations omitted).

Second, even where a vendor has complied with all the rules governing a procurement, but its bid has been lost after being received at the procuring activity prior to bid opening, the vendor cannot be permitted to resubmit its bid since there is no certainty that a subsequently submitted copy would in fact be identical to the original that was received and lost. Displacing an otherwise successful bidder on the basis of a bid provided after the opening date would not be consistent with maintaining the integrity of the competitive system. *Id.*; *Watson Industries, Inc.*, B- 238309, 90-1 CPD ¶371, 1990 WL 277916 (citations omitted).

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<sup>1</sup> Decisions of the U.S. Comptroller General are not controlling in S.C. State Government protests, but are quoted as enlightening.

Finally, the government cannot guarantee that mistakes will never occur, even when proper procedures are followed. Although purchasing agencies must take reasonable steps to ensure that bids from all responsible sources are considered, that requirement should not be read so broadly as to require an agency to resolicit whenever the agency contributes to a prospective contractor's failing to have its bid considered. *Antenna Products Corp.*, B- 223154, 86-2 CPD ¶176, 1986 WL 63832 (citations omitted).

Here there is no evidence that the system was deliberately “rigged” to deprive MarketSearch of the opportunity to compete for this contract. There is no certainty that any proposal MarketSearch would submit today would be the same as the one it uploaded on June 20. Finally, the CPO is unwilling to adopt a rule that requires resolicitation whenever the government makes a mistake—particularly where, as here, there is no evidence that SCEIS contributed to failing to consider MarketSearch's proposal.

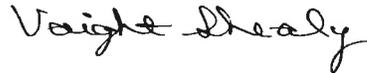
#### **DETERMINATION**

The Procurement Review Panel has maintained for years that the protestant bears the burden of proving its allegations reaffirming its position recently writing “Heritage bears the burden of proving its claims by the preponderance of the evidence. *In re: Protest by Blue Bird Corp.*, Panel Case No. 1994-15 (December 16, 1994).” [*In Re: Appeal by Heritage Community Services*, Panel Case No. 2013-01 (March 27, 2013)]

Regarding what actually happened after MarketSearch received a confirmation that its proposal was submitted, MarketSearch failed to prove by a preponderance of the evidence that

the SCEIS system, rather than operator error, caused its proposal to be held.<sup>2</sup> Even if the system itself were to blame, though, the CPO could not grant relief for the reasons enumerated above.

For the foregoing reasons the protest is denied.



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R. Voight Shealy  
Chief Procurement Officer  
For Supplies and Services

October 15, 2013

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Date

Columbia, S.C.

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<sup>2</sup> Ms. Harsey and the MarketSearch staff attending the hearing stated that notification by the SCEIS system that its proposal had been “Held” and not submitted could have prevented this unfortunate event. After his forensic review of the case, Mr. Looney wrote concerning this situation, “I spoke with the vendor by phone on 8/21/2013 and they understood what happened but wished there was a notification in the SRM system that would have alerted them in a situation like that but I am told by the MM team that there is no such mechanism in place at this time.” [Ex. 14, 3<sup>rd</sup> page] The SCEIS team should consider such an adjustment to the system to prevent recurrence of this event in the future.

**STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW**  
*Protest Appeal Notice (Revised June 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.

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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 108.1 of the 2013 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**

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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:** Protest-MMO  
**Sent:** Friday, August 23, 2013 12:03 PM  
**To:** \_MMO - Procurement; Shealy, Voight; Skinner, Gail  
**Subject:** FW: Protest of Solicitation 5400005840, Marketing Research for SC PRT

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**From:** Graceanne Cole  
**Sent:** Friday, August 23, 2013 12:02:59 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** Protest-MMO  
**Cc:** Stevens, John  
**Subject:** Protest of Solicitation 5400005840, Marketing Research for SC PRT

### Notice of Protest

**TO:** Chief Procurement Officer, Materials Management Office

**RE:** NOTICE OF PROTEST

**Solicitation:** 5400005840  
**Description:** Marketing Research for SC PRT  
**Agency:** SC Department of Parks, Recreation & Tourism

**DATE:** August 23, 2013

MarketSearch, as an unsuccessful bidder for this project, would like to protest the contract award and request consideration and scoring of our proposal.

As directed in the RFP, MarketSearch submitted our proposal electronically through the SCEIS system. To ensure that everything was on time and properly done, we submitted the proposal on June 20<sup>th</sup> (5 days prior to the submission deadline) and enlisted the assistance of the SCEIS *Help Desk*. We followed their instruction and received the "bid submitted" confirmation — this was our assurance, according to the *Help Desk*, that everything was complete.

Upon receiving notification of contract award and reviewing the competitive scoring of offerer proposals, we were shocked and confused to find that our proposal was not among those considered and scored and contacted Mr. John Stevens immediately.

We have learned through Mr. Stevens and his investigation through SCEIS that we apparently had two windows open during the submission process. While we successfully submitted the proposal in one window, the other remained open without our knowledge until it timed out four hours later. When it timed out, it overrode the submission and recategorized our proposal as "held." Unfortunately there was never notification of this to us and we continued to believe that our proposal was submitted.

Because we submitted the proposal in good faith, in accordance with instructions and assistance from the *Help Desk*, and received confirmation notification, we believe that our proposal should be considered prior to making an award of the contract. Therefore, we respectfully submit this protest and request that our proposal be considered and scored.

We also request your confirmation of receiving this protest.

Thank you,

Graceanne W Cole  
Vice President, Research  
803.254.6958  
[GACole@msearch.com](mailto:GACole@msearch.com)