

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

**BEFORE THE CHIEF PROCUREMENT OFFICER**

**DECISION**

In Re: Protest of Palmetto Bus Sales

CASE NO.: 2014-123

Protest of Solicitation No. 5400007587  
for Spare Parts for School Bus Fleet

POSTING DATE: October 7, 2014

MAILING DATE: October 7, 2014

The South Carolina Consolidated Procurement Code (the Code) grants the right to protest to any actual bidder who is aggrieved in connection with the intended award of a contract. S.C. Code Ann. § 11-35-4210(1)(b). This solicitation is for Spare Parts for School Bus Fleet for the South Carolina Department of Education. (DOE) Palmetto Bus Sales protests this solicitation [Attachment 1] The Chief Procurement Officer<sup>1</sup> held a hearing of this matter on August 21, 2014. Present at the hearing were Palmetto Bus Sales represented by Robert Y. Knowlton, Esquire; South Carolina Department of Education represented by Shelly Kelly, Esquire, and the State Procurement Office. The Chief Procurement Officer was represented by William Dixon Robertson III, Esquire.

**Findings of Fact**

Invitation For Bids Published:	04/07/2014
Palmetto Protest	04/22/2014
Amendment 1 Published:	05/01/2014
Amendment 2 Published:	05/22/2014
Amendment 3 Published:	06/30/2014
Protest Clarification:	07/21/2014
Amendment 4 Published:	07/28/2014

**Background**

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

This is an Invitation For Bids for bus parts for use in the repair of approximately 5,500 state-owned school buses. The school bus fleet is comprised of buses manufactured by Bluebird, Thomas, International, Freightliner, and Caterpillar. The solicitation is divided into two major sections. Lots 1 through 42 are comprised of lists of specific parts and quantities for which the bidder is to provide list price, discount, discounted price, extended price, and total price for the lot. Award is to be made by lot based on the total price for the lot. Lots A1 through A5 will be awarded to dealers for each of the 5 manufacturers and are to be used for parts not awarded in lots 1 through 42. Award is to be based on a percentage discount off the dealer's cost for parts from the specific manufacturer identified by that lot: Lot A1, Bluebird; Lot A2, Thomas; Lot A3, International; Lot A4, Freightliner; and Lot A5, Caterpillar. The solicitation states that:

It is the intent of the State that it will order parts primarily through the contracts awarded for Lots 1 through 42, and only if those parts are not on contract, or not available for an extended amount of time, order under the Lots A1 through A5 contracts. ... It is the intent of these awards that the State will purchase parts based on the type of bus (manufacturer) that is under repair.

Palmetto protests that limiting the award for Lots A1 through A5 to the dealers of the specific manufacturer listed for that lot is unduly restrictive and a violation of the Code. Palmetto also protests that the solicitation is vague. Section 2 provides that awards under that section will be based on "dealer costs plus or minus (+/-)% and will be awarded based on lowest percentage." The solicitation does not explain how dealer cost will be determined.

### **Discussion**

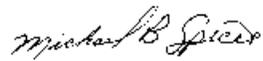
The Invitation for Bids was published on April 7, 2014. Section 11-35-4210(1)(a) grants a prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents. The deadline for submission of a protest of the solicitation was the close-of-business on April 22, 2014. The close-of-business for the Materials Management Office is 5:00 P.M. Palmetto's protest was not received by the Chief Procurement Officer until 6:52 P.M. [Attachment 2] In Protest of Palmetto Unilect, LLC, Case No. 2004-6, the Procurement Review Panel dismissed an appeal as untimely filed because it was submitted to the CPO after 5:00 p.m. on the date of the appeal deadline. In that case, the appeal was received by the CPO by electronic mail at 5:28 p.m. on the day of the deadline. Palmetto filed an additional protest on July 21, 2014, after the publication of Amendment 3 on June 30, 2014. [Attachment 2] Section 11-35-4210(1)(a) requires that a protest be filed within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation

documents, whichever is applicable, or any amendment to it, if the amendment is at issue. Palmetto's second protest was not received within 15 days of the issuance of Amendment 3.

### **Determination**

The initial and subsequent protests were untimely filed and are dismissed.

For the Information Technology Management Office

A handwritten signature in black ink that reads "Michael B. Spicer". The signature is written in a cursive style with a large initial "M".

Michael B. Spicer  
Chief Procurement Officer

**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 2014 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.**

Haynsworth  
Sinkler Boyd, P.A.  
ATTORNEYS AND COUNSELORS AT LAW

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ROBERT Y. KNOWLTON  
DIRECT DIAL NUMBER 803 540 7843  
EMAIL [rknowlton@hsblawfirm.com](mailto:rknowlton@hsblawfirm.com)

April 22, 2014

**Via E-mail [protest-mmo@mmo.state.sc.us](mailto:protest-mmo@mmo.state.sc.us)**

Mr. Voight Shealy  
Chief Procurement Officer  
Materials Management Office  
1201 Main Street, Suite 600  
Columbia, SC 29201

Re: Protest of specifications for Solicitation No. 5400007587 for Spare Parts for School Bus Fleet

Dear Mr. Shealy:

This law firm represents Palmetto Bus Sales, a prospective bidder for the above procurement. As discussed at the prebid conference, my client has concerns and objections to certain specifications in the Invitation for Bids. In light of the conversations at the prebid conference, some or all of my client's concerns may be addressed in a future amendment. Unfortunately, the deadline for protesting the specifications comes before the amendment will be issued, thus, we are constrained to submit this protest to preserve our client's rights. We would very much like to attempt to resolve the issues addressed in this letter without the necessity of a hearing on the protest, and we will promptly pursue such a resolution.

My client's concerns and objections are addressed below.

The Invitation for Bids is divided into two major sections. Section 1 solicits bids for 35 lots. Section 2 (lots A1 through A5) solicits bids for parts from dealers for specific manufacturers. At page 15, that section states that "[i]t is the intent of these awards that the SCDE will purchase parts based on the type of bus (manufacturer) that is under repair." The section continues by saying that SCDE is not prohibited from using parts from another manufacturer. This specification is not drafted so as to assure cost effective procurement for SCDE's needs and is unnecessarily and unduly restrictive in contravention of S.C. Code Section 11-35-2730. In addition to the items in lots 1-35, buses have many, many parts that are made by third party vendors. Moreover, even parts made by the specific bus manufacturing companies are available through vendors other than dealers for the sale of those buses. For example, a panel for a specific bus can be sold by dealers for each of the bus manufacturers. We assume that SCDE would prefer to purchase the identical part from whichever vendor offers the lowest price, and we request that the specifications be revised to require that.

Chief Procurement Officer  
April 22, 2014  
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Section 2 also provides that awards under that section will be based on "dealer costs plus or minus (+/-)% and will be awarded based on lowest percentage." The solicitation does not explain how dealer cost will be determined. We request that the solicitation be revised to clarify that the awards will be based on prices derived from public, published, and confirmable manufacturer pricing and that SCDE will purchase parts at the lowest price available from any vendor awarded a contract. In addition, the solicitation should be revised to clarify how future price adjustments for awards under this section will be handled after the awards are made. The specifications should also be revised to confirm that all prices for awarded contracts, including any prices adjusted after the initial contract awards, will be publicly available from the SCDE website or other source.

Yours very truly,



Robert Y. Knowlton

RYK/lhg

DM: 3107234 V.2

Attachment 2

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**From:** Knowlton, Bob  
**Sent:** Tuesday, April 22, 2014 6:52:19 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** Protest-MMO  
**Subject:** Protest of specifications re Solicitation No. 5400007587 for spare parts for school bus fleet

Attached please find the protest on behalf of Palmetto Bus Sales regarding the above Invitation for Bids. We hope we will be able to resolve this matter without the necessity of a hearing.

Regards,

**Haynsworth  
Sinkler Boyd, P.A.**

ATTORNEYS AND COUNSELORS AT LAW

**Robert Y. Knowlton** | Attorney | Haynsworth Sinkler Boyd, P.A.

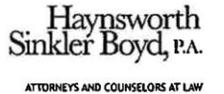
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July 21, 2014

**Via E-mail**

Mr. Allen Register  
Deputy State Procurement Officer  
South Carolina Budget & Control Board  
Division of Procurement Services  
1201 Main Street, Suite 600  
Columbia, SC 29201

Re: Protest regarding Specifications of Solicitation No. 5400007587 ("the Procurement") for Spare Parts for School Bus Fleet

Dear Mr. Register:

This letter responds to your email dated July 10, 2014 in which you request more detail regarding Palmetto Bus Sales' ("Palmetto Bus") protest regarding the specifications for the above Procurement set forth in my letter dated April 22, 2014.

The South Carolina Procurement Code's fundamental purposes and underlying goals are:

(a) to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the State and in compliance with the provisions of the Ethics Government Accountability and Campaign Reform Act;

(b) to foster effective broad-based competition for public procurement within the free enterprise system;

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(d) to consolidate, clarify, and modernize the law governing procurement in this State and permit the continued development of explicit and thoroughly considered procurement policies and practices;

(e) to require the adoption of competitive procurement laws and practices by units of state and local governments;

(f) to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement; [and]

(g) to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process.<sup>1</sup>

Palmetto Bus' protest seeks to achieve these purposes by revising the specifications to allow appropriate and robust competition for this significant procurement and to provide for transparent and cost effective pricing and purchasing practices by the South Carolina Department of Education ("SCDE").

The amounts involved in the Procurement and the protest, and the potential savings to the State, are significant. The Procurement calls for the supply of replacement parts for the SCDE's school bus fleet consisting of 5,605 buses.<sup>2</sup> As Superintendent Zais recently told the State House Ways and Means Committee, SCDE expects to spend an astounding \$66 million next fiscal year for school bus maintenance. Replacement parts are a large part of that expense. Although the Procurement does not provide an estimate of the annual purchases expected, including those under Lots A1 through A5 described in the Procurement, based on prior practices and publicly reported information, the amount will be many millions of dollars each year for a contract that may last up to 5 years.

The structure of the proposed Procurement sets forth 42 lots for certain parts. School buses have thousands of other parts. Those other parts are to be provided pursuant to Lots A1 through A5 by dealers for 5 different bus manufacturers: Bluebird, Thomas, International, Freightliner, and Caterpillar.<sup>3</sup> The vast majority of those parts are not made by those bus manufacturers -- they are made by third parties. For example, if DOE needs a new roof hatch, each of the dealers for those bus manufacturers would buy THE EXACT SAME PART from the third party and then resell it to SCDE. Even with regard to the minority of the parts made by these bus manufacturers, dealers for each of them maintain inventory of and can and do sell parts for multiple bus manufactures, not just the manufacturer for whom they are a dealer (again, the exact same parts).

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<sup>1</sup> S.C. Code Ann § 11-35-20.

<sup>2</sup> See Amendment 3 at pp. 23-24.

<sup>3</sup> See Amendment 3 at p. 20.

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The Procurement indicates that approximately 90% of the buses in SCDE's current fleet were made by one manufacturer.<sup>4</sup> (Also not a pattern seen in any other state in this country or province in Canada.) Despite repeated complaint and without foundation in the current bus parts contracts, SCDE currently insists that it buy a replacement part from the dealer of the manufacturer of the bus under repair, EVEN THOUGH THE IDENTICAL PART CAN BE PURCHASED FOR SUBSTANTIALLY LESS FROM OTHER DEALERS CURRENTLY UNDER CONTRACT. As a result of that practice, DOE currently and intentionally spends significantly more than it needs to purchase school bus parts.

The proposed Procurement would perpetuate this wasteful practice. The Procurement states,

**It is the intent of these awards that the State will purchase parts based on the type of bus (manufacturer) that is under repair.** However, the resulting contract in no way prohibits the State from using parts purchased from one dealer to be placed on a school bus by a different manufacturer, if those parts are interchangeable. Awarding the contract by school bus type is for the convenience of the State, not in any way a directive to use certain parts on certain buses.<sup>5</sup>

Palmetto Bus suggests deleting this language and adding language that would require SCDE to purchase parts at the lowest price available based on the contract prices for those parts awarded under Lots A1 through A5. That procedure is followed in almost all if not all states in this country and provinces in Canada for school bus parts, and in South Carolina in connection with replacement parts for other types of vehicles in state agency fleets. The task of ascertaining the lowest price for a given part is easily achieved by a parts clerk. There is no valid basis to give a dealer for Thomas Built Buses an exclusive right to supply the replacement parts for 90% of SCDE's school bus fleet without competition from dealers for other bus manufacturers.

The Procurement is also flawed because it lacks an appropriate mechanism to determine "dealer cost" or the net cost to SCDE for a given part or to compare prices for bids under Lots A1 through A5. For Lots 1-42, the Procurement provides specific part numbers, a specific volume of those parts, and a method to calculate the total bid for each lot.<sup>6</sup> Pricing for Lots A1 -A5 lacks a comparable procedure. The Procurement asks for a discount percentage off of "Dealer Cost."<sup>7</sup> It does not define how dealer cost will be computed. Each dealer will have a different "dealer cost," even if they are dealers for the same bus manufacturer. Of course, comparing "dealer cost" between dealers of different manufacturers will likely differ even more than

<sup>4</sup> See Amendment 3 at pp. 232-24; note that Freightliner owns Thomas Built Buses.

<sup>5</sup> See Amendment 3 p. 20; emphasis supplied.

<sup>6</sup> See Amendment 3 pp. 19-20, 28-30 and bid Worksheets.

<sup>7</sup> See Amendment 3 p.20.

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between dealers for the same company. At a minimum, the Procurement should require all bidders to submit a detailed price list for each part at issue with their bid, along with the proposed discount off of those prices and a computed net cost to SCDE for each part.<sup>8</sup> When the contracts are awarded for Lots A1-A5, this pricing information should be made public.<sup>9</sup> In that manner, a parts clerk could readily ascertain the lowest contract price for a given part under Lots A1-A5.

In order to encourage maximum bid competition under the Procurement, the contract prices as awarded should remain firm for the life of the contract. If any price adjustments are allowed during the term of the contracts, they should be based on verifiable pricing changes, for example a price list change on a national basis made by bus manufacturers. At all times, the price list and prices paid by SCDE should be publicly available. This would increase competition and transparency, two of the fundamental goals of the SC Procurement Code.

Yours very truly,



Robert Y. Knowlton

DM: 3759786 V.2

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<sup>8</sup> The Procurement does require bidders in Lots A1-A5 to “submit full list price catalogs” as part of the OIC (Open Information Catalog) process that is supposed to be completed and uploaded to the SCDE website within 60 days after the bids are awarded. See Amendment 3 p. 5. The Procurement states, “The OCI online catalog will only contain the items in a lot that has been awarded to a particular contractor. ...The contractors to whom contracts have been awarded to will THEN upload their prices into the OCI catalog for SCDE to view pricing and availability.” See Amendment 3 p. 21 (emphasis added). The OCI price catalog is NOT a part of the bid document that each bidder in Lots A1-A5 is required to submit as part of their bid package. The OCI price catalog is required after the award is made. It is much more transparent if the prices in the OCI catalog be public so all vendors can see what prices are being paid for specific parts from specific vendors.

<sup>9</sup> In response to a FOIA request, the SCDE could not identify its current price list, historic price lists, or provide a summary accounting of what it had purchased at what price.