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CHAIRMAN, HOUSE WAYS AND MEANS

## Protest Decision

**Matter of:** Clemson Sports Medicine and Rehabilitation

**Case No.:** 2016-130

**Posting Date:** March 3, 2016

**Contracting Entity:** Clemson University

**Solicitation No.:** 68159531

**Contract No.:** 4400012280

**Description:** On-Campus Physical Therapy Services

### DIGEST

Protest of the intended award of a contract alleging an inappropriate scoring system denied as untimely protest of the solicitation.

### AUTHORITY

The Chief Procurement Officer<sup>1</sup> conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on the evidence and applicable law and precedents.

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

## **BACKGROUND**

Solicitation Issued	November 17, 2015
Intent to Award Issued	January 29, 2016
Protest Received	February 8, 2016
Award Suspended	February 10, 2016
Protest Amended	February 11, 2016

## **DISCUSSION**

Clemson University (CU) issued this Request for Proposals to acquire On-Campus Physical Therapy Services. Proposals were received from four (4) offerors including Clemson Sports Medicine and Rehabilitation (CSMR) and Palm Beach Institute of Sports Medicine (PBI). CU posted its Intent to Award a contract to PBI as the highest ranked offeror. CSMR protested, claiming that the scoring system described in the RFP did not accurately reflect the overall ability of the offeror. CSMR's letter of protest and amendment are incorporated by reference. [Attachment 1]

CSMR raises three issues in its protest:

1. The scoring system utilized cannot accurately reflect the overall ability of the organization to provide On-Campus Physical Therapy services. Much of the bid focused on the "principal manager" but, did not account for the necessary organizational support and structure the "principal manager" will require to operate the clinic on a daily, weekly and monthly basis. The bid states the university is seeking bids from a qualified organization. Not a qualified individual. The scoring system and the academic history/curriculum relationship criteria is overtly weighted to an individual and not an organization. The scoring system is not consistent with the stated scope of solicitation.

The South Carolina Consolidated Procurement Code (the Code) grants any actual bidder the right to protest the award or intended award of a contract, except that a matter that could have been raised as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract. S.C. Code Ann. § 11-35-4210(1)(b). CSMR protests that the solicitation was focused on the "principal manager," not the overall capabilities of the offeror. The focus on the "principal manager" and the evaluation criteria were published in the original solicitation and

could have been timely protested within 15 days of the posting of the solicitation. These issues cannot be raised as a protest of the award. This issue of protest is denied.

CSMR's second issue of protest is as follows:

2. The scoring system inappropriately weighted emphasis on an unnecessary MBA credential to operate a successful Physical Therapy clinic while the support structure of a local accounting/financial firm was not provided the same level of consideration in scoring.

This requirement is found in the solicitation as follows:

The principle [*sic*] manager of this venture should hold an academic degree in business, preference to those with an MBA.

[Solicitation, Scope of Work, Page 3]

In addition, the issue of credentials was addressed in Amendment 1 in response to a potential bidder's question:

QUESTION 9: We don't have an individual with all the note credential requirements, but our managing team in combination does. Based on this, would it be worth our time to submit a bid?

ANSWER 1: Yes, I would submit but how they plan to strategically manage various aspects of the operation for consistency and service to all relationships will need to be considered.

[Amendment 1, Page 2]

This information was known at the time the solicitation was posted and could have been timely protested within 15 days of the posting of the solicitation. In addition, the issue was raised in response to questions from potential bidders in Amendment 1 and could have been timely protested within 15 days of the posting of the Amendment. Because CSMR did not file its protest until nearly three months after the RFP was issued, this issue of protest is denied.

CSMR's third issue of protest is as follows:

3. Every contract or duty within the Procurement Code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty in fact in the

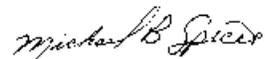
conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing. S.C. Code Ann. § 11-35-30. In addition to the concerns already expressed, we have a concern that this statutory provision was violated in that the RFP was specifically formulated for the party to which the contract was granted. Specifically, the criteria defined in the Scope of Work heading, Academic History/Curriculum Relationships, seems suspect in meeting the commercial standards of fair dealing.

Again, this information was available to the protestant at the time the original solicitation was posted and cannot be raised as a protest of the award. This issue of protest is denied.

### **DECISION**

For the reasons stated above, the protest is denied.

For the Materials Management Office



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Michael B. Spicer  
Chief Procurement Officer

# Attachment 1

2/8/2016

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

Solicitation #: 68159531 Addendum 1

Description: On-Campus Physical Therapy Services Contract

To Whom it may Concern,

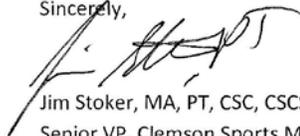
Please accept this letter as formal protest to the Intent to Award regarding the above named Solicitation. Our grounds for the protest are:

1. The scoring system utilized cannot accurately reflect the overall ability of the organization to provide On-Campus Physical Therapy services. Much of the bid focused on the "principal manager" but, did not account for the necessary organizational support and structure the "principal manager" will require to operate the clinic on a daily, weekly and monthly basis. The bid states the university is seeking bids from a qualified organization. Not a qualified individual. The scoring system and the academic history/curriculum relationship criteria is overtly weighted to an individual and not an organization. The scoring system is not consistent with the stated scope of solicitation.
2. The scoring system inappropriately weighted emphasis on an unnecessary MBA credential to operate a successful Physical Therapy clinic while the support structure of a local accounting/financial firm was not provided the same level of consideration in scoring.

The relief requested is an opportunity for the designated committee to conduct interviews with the highest two offerers in an attempt to determine the most appropriate organization, as stated in the scope of solicitation.

Thank you for your consideration.

Sincerely,



Jim Stoker, MA, PT, CSC, CSCS  
Senior VP, Clemson Sports Medicine and Rehabilitation



**ANDERSON**  
Physical Therapy

10626 Clemson Blvd.  
Seneca, SC 29678

**Mailing Address**  
P.O. Box 1844  
Clemson, SC 29633

**Telephone**  
864 482-0064

**Administration Fax**  
864 482-0081

**Billing Fax**  
864 482-0074

[www.csmr.org](http://www.csmr.org)



**ANDERSON**  
Physical Therapy

2/8/2016

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

Solicitation #: 68159531 Addendum 1

Description: On-Campus Physical Therapy Services Contract  
Amendment to the Letter of Protest filed 2/8/2016

To Whom it may Concern,

Please accept this amendment to the letter of protest referenced above. Every contract or duty within the Procurement Code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing. S.C. Code Ann. § 11-35-30.

In addition to the concerns already expressed, we have a concern that this statutory provision was violated in that the RFP was specifically formulated for the party to which the contract was granted. Specifically, the criteria defined in the Scope of Work heading, Academic History/Curriculum Relationships, seems suspect in meeting the commercial standards of fair dealing.

As an alternative to providing interviews as requested in the original letter of 2/8/2016, we would request the current award be rescinded and the bid process be reopened.

Respectfully,

A handwritten signature in black ink, appearing to read "Jim Stoker".

Jim Stoker, PT, MA, SCS, CSCS  
Senior VP

Clemson Sports Medicine and Rehabilitation

10626 Clemson Blvd.  
Seneca, SC 29678

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**STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW**

*Protest Appeal Notice (Revised September 2015)*

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 111.1 of the 2015 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 209, Columbia, SC 29201**

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\_\_\_\_\_  
Name of Requestor

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip

\_\_\_\_\_  
Business Phone

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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.**