

NIKKI R. HALEY, CHAIR
GOVERNOR

CURTIS M. LOFTIS, JR.
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL



THE DIVISION OF PROCUREMENT SERVICES
DELBERT H. SINGLETON, JR.
DIVISION DIRECTOR
(803) 734-8018

MICHAEL B. SPICER
INFORMATION TECHNOLOGY MANAGEMENT OFFICER
(803) 737-0600
FAX: (803) 737-0639

HUGH K. LEATHERMAN, SR.
CHAIRMAN, SENATE FINANCE COMMITTEE

W. BRIAN WHITE
CHAIRMAN, HOUSE WAYS AND MEANS

Protest Decision

Matter of: NaturChem, Inc.

Case No.: 2016-148

Posting Date: June 13, 2016

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400010778

Description: Airport Vegetation Management

DIGEST

Protest received after close of business on final day is dismissed as untimely, pursuant to Procurement Review Panel precedent.

AUTHORITY

The Chief Procurement Officer¹ 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.

¹ The Materials Management Officer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

DISCUSSION

NaturChem, Inc., as the third lowest price offeror alleges that the apparent successful offeror, Merciers, Inc., and the second lowest priced offeror, Sage Right of Way Management, Inc. are not responsible offerors. NaturChem's letter of protest is included by reference. [Attachment 1]

ANALYSIS

Section 11-35-4210(1)(b) of the South Carolina Consolidated Procurement Code grants any actual bidder the right to protest the intended award of a contract as follows:

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

Days are defined in Section 11-35-310(13) as:

(13) "Days" means calendar days. In computing any period of time prescribed by this code or the ensuing regulations, or by any order of the Procurement Review Panel, the day of the event from which the designated period of time begins to run is not included. If the final day of the designated period falls on a Saturday, Sunday, or a legal holiday for the state or federal government, then the period shall run to the end of the next business day.

The Intent to Award was issued to Merciers on May 19, 2016. Since the tenth day fell on Sunday, May 29th and National Memorial Day was observed on Monday, May 30th, the deadline for filing a timely protest fell to the close of business on Tuesday May 31st. The close of business for state government is 5:00 PM. The Panel has repeatedly ruled that the time for filing a protest is jurisdictional and cannot be waived by the conduct or consent of the parties. *See, e.g., In re: Protest of Oakland Janitorial Services, Inc.*, Case No. 1988-13; *In re: Protest of National Cosmetology Ass'n*, Case No. 1996-17; *In re: Protest of Jones Engineering Sales, Inc.*, Case No. 2001-8.

Protest Decision, page 3

Case No. 2016-148

June 13, 2016

NatureChem's protest was received by the CPO at 5:04:34 P.M. on May 31, 2016. [Attachment 2] In *In Re: Protest of Palmetto Unilect, LLC*, Case No. 2004-6 the Procurement Review Panel dismissed as untimely an appeal emailed prior to 5:00 P.M. but not received until after 5:00 P.M., and in *In Re: Appeal of Pee Dee Regional Transportation Services and Senior Solutions*, Case No. 2007-1 dismissed as untimely an appeal faxed to the CPO at 6:59 P.M. Consequently, the CPO lacks jurisdiction to consider the merits of NaturChem's protest.

DECISION

For the reasons stated above, the protest is dismissed.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1



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

Date: 5/31/16

RE: NaturChem Inc. Protest of Intent to Award to Solicitation 5400010778,
Posting May 19, 2016 to Merciers Inc. and the bid submitted by Sage Right of Way
Management, Inc.

To Whom It May Concern:

As an actual bidder, the undersigned grounds of protest and request for relief constitutes a bid protest pursuant to SC Code of Laws (Section 11-35-4210) on behalf of NaturChem Inc., a South Carolina Corporation, in opposition of SFAA Division of Procurement Services (MMO) intent to award Solicitation: 5400010778 to Merciers Inc. and also the bid submitted by Sage Right of Way Management Inc.

Grounds of the Protest

Merciers Inc.

1) Qualifications

A. Qualifications- Special Standards of Responsibility (MAR 2015)

- Page 28 Section V. Qualifications (a) #4
 - The offeror/company applying herbicides must be licensed and possess a South Carolina Commercial Pesticide Applicators License and also be certified in the following sub-categories:
 - Category 3 Turf and Ornamental
 - Category 5 Aquatic
 - Category 6 Rights-of-Way

NaturChem, Inc., 270 Bruner Road, Lexington, South Carolina 29072

- These public records can be found at:
<http://regfocus.clemson.edu/dpr/commercial.htm>

or by calling Clemson Regulatory Services Pesticide Regulation
864-646-2150

- **Merciers Inc. does not possess two of the required qualifications (Category 3 Turf and Ornamental or Category 5 Aquatics).**

B. Office Location

- Page 28 Section V. Qualifications, Qualification of Offeror (MAR 2015) (1)
 - To be eligible for award, you must have the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance.
- **Merciers Inc. is located in South Point, OH. They currently do not have an office in South Carolina. This contract requires timely responses to small quantity services throughout the state. Merciers Inc. office is located approximately 427 miles from Columbia, SC (Central to SC).**

2) Pricing

A. Section III Scope of Work/Specifications #5 (Page 20 – 21)

- Specified in the Scope of Work grassing treatments shall consist of:
 - Mobilization
 - Equipment
 - Labor
 - Soil Testing
 - Wood Mulch
 - Grass Seed
 - Fertilizer
 - Lime

(ALL WHICH SHALL BE APPLIED BY COMMERCIAL SPRAY METHODS, ie. HYDRO-SEEDING)

B. Section VIII Bidding Schedule / Price-Business Proposal, Line Number 0007 (Grassing) (Page 43)

NaturChem, Inc., 270 Bruner Road, Lexington, South Carolina 29072

- The price proposed by Merciers, Inc. will not cover the Grassing component of this bid. The Industry standard for Grassing/Hydro-Seeding under normal specification similar as South Carolina Department of Transportation consist of minimal rates and poundage of approved seed, lime, fertilizer, and mulch. This standard is SCDOT Supplemental Technical Specification for SEEDING
- Reviewing this bid and historical quantities utilized by SC Aeronautics the Line Number 0007 quantities and unit of measure skew the bid schedule. SC Aeronautics utilized less than 50 acres of Grassing/Hydro-Seeding per year under this previous contract.
- Compiling all Services that are utilized under the Bid Schedule with the quantities accurate to previous years the Intent to Award would be offered to another company. SC Aeronautics continuing to proceed with the current Intent to Award will be spending more money than other offerors proposed Bid Schedule. This can be proven by making the quantities under "Grassing" 50 acres.

SAGE Right of Way Management Inc.

3) Qualifications

A. Qualifications- Special Standards of Responsibility (MAR 2015)

- Page 28 Section V. Qualifications (a) #4
 - The offeror/company applying herbicides must be licensed and possess a South Carolina Commercial Pesticide Applicators License and also be certified in the following sub-categories:
 - Category 3 Turf and Ornamental
 - Category 5 Aquatic
 - Category 6 Rights-of-Way
 - These public records can be found at:
<http://regfocus.clemson.edu/dpr/commercial.htm>

or by calling Clemson Regulatory Services Pesticide Regulation
864-646-2150

NaturChem, Inc., 270 Bruner Road, Lexington, South Carolina 29072

- **Sage Right of Way Management, Inc. does not possess two of the required qualifications (Category 3 Turf and Ornamental or Category 5 Aquatics).**

4) Pricing

A. Section III Scope of Work/Specifications #3 (Page 20)

- Specified in the Scope of Work the requirements consist of:
 - Mobilization
 - Tools
 - Equipment
 - Materials (Herbicides)
 - Labor

- **The price proposed by Sage Right of Way Management, Inc. at \$3.00 per acre is not sufficient to performing under Section V. Qualifications (1). To be eligible for award, you must have the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance.**

5) Qualifications

A. Qualifications – Special Standards of Responsibility (MAR 2015)

- Page 28 Section V. Qualifications (a) #1 and #2
 - The offeror must be familiar with the following FAA advisory Circulars.
 - AC 150/5370-2F Operational Safety on Airports during construction.
 - AC 150/5210-2D Ground Vehicle Operations on Airports
 - AC 150/5340-26A Maintenance of Airport Visual Aid Facilities

 - The offeror must have at least 5 years' experience operating in an Airport operation area (AOA).

- **Sage Right of Way Management, Inc. does not have the adequate FAA Advisory Circulars experience or the 5 years' of experience required for award of this contract.**

Please consider this protest before the final statement of award becomes effective. Thank you for your consideration and time.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "L. Daniel".

NaturChem, Inc.

Lance Daniel

Vice President Atlantic Region

ldaniel@naturchem.net

(803) 269-3670

Attachment 2

From: [Lance Daniel](#)
To: [Protest-MMQ](#)
Cc: [Nicholas Hook](#)
Subject: Protesting Intent to Award solicitation 5400010778 Airport Vegetation Management
Date: Tuesday, May 31, 2016 5:04:34 PM
Attachments: [sc Aeronautics protest 2016.pdf](#)

NaturChem, Inc.
Lance Daniel
Ldaniel@naturchem.net
803-269-3670

NaturChem, Inc.
Nick Hook
nhook@naturchem.net
803-518-4547

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.

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**

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.