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Protest Decision

Matter of: R&R Technologies, Inc. dba VehicleCounts.com

Case No.: 2017-116

Posting Date: November 1, 2016

Contracting Entity: Department of Transportation

Solicitation No.: 5400012266

Description: MetroCount 5600 Traffic Counters

DIGEST

Protest of a solicitation alleging specifications are unduly restrictive is denied. R&R Technologies' (R&R) letter of protest is included by reference. [Attachment 1]

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.

BACKGROUND

<i>Event</i>	<i>Date</i>
Solicitation Issued	10/18/2016
Protest Received	10/20/2016

ANALYSIS

DOT issued this Invitation for Bids (IFB) to acquire MetroCount 5600 PlusB Portable Automatic Traffic Recorders and USB cables. R&R protests this brand name solicitation as unduly restrictive:

My problem with this bid is that it is brand-specific. The title of the bid even specifies the brand (MetroCount). That is such a narrow description that it hardly qualifies as an open bid. There are several competitors of MetroCount (myself being co-owner of one of those) located in the United States with products that would work just as well, if not better. MetroCount (while they do have a US office) is actually an Australian company.

My company (R&R Technologies, Inc DBA VechicleCounts.com) is a very small manufacturer of traffic counters located in Oregon. Our counters beat most every spec of the MetroCount 5600 at a fraction of the cost. In this bid alone I would imagine you would easily save \$100,000 with what our bid would be (not an exaggeration -- our prices are published on our website).

A brand name specification is defined in Regulation 19-445.2140(A)(1) as:

(1) "Brand Name Specification" means a specification limited to one or more items by manufacturers' names or catalogue number.

Regulation 19-445.2140(B) set forth the requirements for issuing specifications as follows:

The purpose of a specification is to serve as a basis for obtaining a supply, service, information technology, or construction item adequate and suitable for the State's needs in a cost effective manner, taking into account, to the extent practicable, the cost of ownership and operation as well as initial acquisition costs. It is the policy of the State that specifications permit maximum practicable competition consistent with this purpose. Specification shall be drafted with the objective of clearly describing the State's requirements. All specifications shall be written in a non restrictive manner as to describe the requirements to be met.

The South Carolina Procurement Review Panel addressed the issuance of brand name specification in *Appeal by Cambex Corporation*, Case No. 1992-7 as follows:

Section 11-35-2730 of the Consolidated Procurement Code provides that “all specifications shall be drafted so as to assure cost effective procurement of the State’s actual need and shall not be unduly restrictive.”

Regulation 19-445.2140 allows brand name specifications but explains:

The purpose of a specification is to serve as a basis for obtaining a supply, service, or construction item adequate and suitable for the State’s needs in a cost effective manner, taking into account, to the extent practicable, the cost of ownership and operation as well as initial acquisition costs. It is the policy of the State that specifications permit maximum practicable competition consistent with this purpose.

Specifications shall be drafted with the objective of clearly describing the State’s requirements. All specifications shall be written in a nonrestrictive manner as to describe the requirements to be met.

To summarize, a specification can be restrictive so long as it is not “unduly” so - in other words, it must be written in such a manner as to balance the reasonable, objective needs of the State against the goal of obtaining maximum practicable competition.

In analyzing whether a specification meets the requirement that it not be unduly restrictive, the Panel will not substitute its judgment for the judgment of the using and procuring agencies so long as the choice of specification is not unreasonable, arbitrary, capricious or contrary to the Procurement Code.

Accord, Appeal of METS Corporation, Panel Case No. 2003-9. The Chief Procurement Officer adopts the Panel’s guidance in determining whether the brand name specification in the present case is unduly restrictive.

Prior to issuance of the solicitation, DOT prepared a written justification for the brand name specification which states in part:

Our staff is currently trained to use two different classification counters. They are the Peak ADR counters and the Metrocount 5600 counters. These two type counters are used for different purposes and we need more of the Metrocount 5600 counters. We do not have the time and resources needed to learn how to use another type of classification counter....

Our Traffic Analysis software currently only accepts classification and speed data from the Peak ADR counters and the MetroCount 5600 counters. These two counters are used for different purposes and we need more of the MetroCount 5600 counters. Purchasing any other brand counter will not help us right now since we would not be able to load the data into our software.

(Attachment 2)

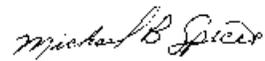
DOT indicates that competition is available through a distribution network format least three sources of supply - Urban Traffic Accessories, MetroCount USA, and Cedar Signs. (Attachment 3)

The CPO finds that there is a logical basis for this specification, and although limited, there is competition for the MetroCount 5600 counter. The CPO finds that this specification is not unreasonable, arbitrary, capricious or contrary to the Procurement Code.

DECISION

For the reasons stated above, the protest of R&R Technologies, Inc. dba VehicleCounts.com is denied.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1

From: [Jan Rochat](#)
To: [Protest-MMQ](#)
Cc: [Bill Rochat](#)
Subject: Protest of Solicitation Number: 5400012266
Date: Thursday, October 20, 2016 5:00:06 PM

Dear Chief Procurement Officer,

I would like to protest solicitation number 5400012266 (description: "METROCOUNT 5600 TRAFFIC COUNTERS").

I have not protested anything before, so I'm not entirely familiar with this process. I have read the introduction to protests and referenced other materials I have found online before deciding to address this issue. I was unable to determine if I needed to find specific references to procedures, policies, and/or laws before doing so. If that is the case, perhaps you could direct me to a resource to do further research on competitive bids and the official guidelines on the selection of specifications/products, if there is such a thing.

My problem with this bid is that it is brand-specific. The title of the bid even specifies the brand (MetroCount). That is such a narrow description that it hardly qualifies as an open bid. There are several competitors of MetroCount (myself being co-owner of one of those) located in the United States with products that would work just as well, if not better. MetroCount (while they do have a US office) is actually an Australian company.

My company (R&R Technologies, Inc DBA VechicleCounts.com) is a very small manufacturer of traffic counters located in Oregon. Our counters beat most every spec of the MetroCount 5600 at a fraction of the cost. In this bid alone I would imagine you would easily save \$100,000 with what our bid would be (not an exaggeration -- our prices are published on our website).

The first paragraph of the "INTRODUCTION TO PROTESTS" document states:

We are dedicated to the maintenance of a procurement system of quality and integrity. Our goals include the fair and equitable treatment of all persons who deal with the procurement system, promoting public confidence in the procedures we follow, and **maximizing competition by using the least restrictive specifications possible.**

This is exactly what I would like to protest with this bid. It is entirely too specific to only accept bids for one type of counter; in fact, it restricts competition entirely.

This solicitation is actually a re-post (because of no bids) from just a few weeks ago. Oddly, MetroCount didn't even bid. That now gives me a chance to protest this new solicitation.

With that previous solicitation I did attempt to contact Laura Bagwell, who is listed as the Procurement Officer for that bid. I got a less-than-satisfactory response to my initial email: a statement about software only working with MetroCount counters... but if that's MetroCount's own software it will only work with their counters, as that's the industry standard. (Each counter company has their own counters and their own software specifically for use with their counters.) But most of those software's can export data in different formats to allow that data to be used in various systems/databases. This reply just seemed to me like an attempt to shut down competition.

Her response to my initial inquiry about alternative brands was:

|

We are not taking alternate brands at this time. Our current software would not accept data from other counters. These are to replace MetroCount counters that have been damaged or need replacement.

Please let me know if you have any questions.

I followed up, but got no response to my second email, asking how I could have a chance to do business with you in the future. My follow up email that received no response:

Well, that's unfortunate that software is locking you into that brand. Is the software you are referring to is custom software or are you saying that since you use the MetroCount software, you won't use other brands, because they don't use the MetroCount software? If it's a custom database that you're importing data into we can probably create an export for that.

I would love the opportunity to do business with you, if not now at some point in the future. Just something to keep in mind ... an order of this size (I am only guessing on the pricing they give you) you would probably be saving a good \$100,000, probably a lot more, with our counters. The total order for 275 units, as you can see by our published pricing on our website, would be \$80,850 for our PicoCount 2500 units, probably significantly less than the price they give you for their units.

Is there any path to having our counters as an option in the future?

I would gladly send those original emails to you.

I also see that we're not alone regarding this as I found a solicitation from last year similarly titled (it was solicitation 5400009858) in which case there was a notice in the "Statement of Award" that "High Leah Electronics, Inc. dba Diamond Traffic Products" (another competitor of ours) were considered non-responsive because they did not meet the solicitation requirements. I'm guessing the requirements they did not meet was that they are not MetroCount.

Please let me know the next steps I should take in this process. Hopefully I have stated my case decently. But again if I need to reference some specific policies or laws perhaps you could direct to some material where I could try to find that information regarding the competitiveness of solicitations/bids.

Thank you for your time,
Ian

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Ian Roachat
VehicleCounts.com / R&R Technologies, Inc.
[+1-971-732-5075](tel:+19717325075)

Attachment 2

JUSTIFICATION FOR BRAND NAME SPECIFICATION

The agency understands that a "Brand Name" specification is the least preferred type to be used in state procurements. It limits responses to include **only** the make and model products specified. Potentially equivalent products are not considered for award. The agency offers the following justifications:

NOTE: Explanations will be provided for each brand name specification submitted. The products may be grouped when the explanation is the same for several products. The term "All" can be used if the same explanation applies to all items.

1. The agency cannot identify the salient characteristics of the products to be procured because it lacks sufficient:

Time: (explain)

Expertise: (explain)

Our staff is currently trained to use two different classification counters. They are the Peak ADR counters and the Metrocount 5600 counters. These two type counters are used for different purposes and we need more of the Metrocount 5600 counters. We do not have the time and resources needed to learn how to use another type of classification counter.

Continued

Attachment 3

From: [Bagwell, Laura B.](#)
To: [Spicer, Michael](#)
Cc: [Robertson, Dixon](#); [Hall, Norma J.](#); [Kirwan, Emmett J.](#); [Conner, Ron L.](#)
Subject: RE: In the Matter of the Protest of R&R Technologies, Inc. DBA VehicleCounts.com, Case 2017-116
Date: Monday, October 24, 2016 9:39:26 AM
Attachments: [Brand Name Specification.pdf](#)

Mr. Spicer,

Attached is SCDOT's Brand Name Justification for MetroCount 5600 counters.

I would note that Mr. Rochat points out in his own letter of protest in the last full paragraph on page one that "Each counter company has their own counters and their own software specifically for use with their counters." While he does indicate that the data can be exported in different formats to allow the data to be used in various systems/databases, our analysis software, per the end user, only accepts data from either Peak or MetroCount.

Mr. Rochat goes on to say, in an e-mail related to the previous solicitation I would point out, that they "...can **probably** create an export..." (emphasis added). SCDOT cannot purchase or solicit for counters that won't export data to our software and that an export may be created that might work.

We do have competition for the MetroCount counters as the end user has indicated that there are at least three sources of supply for them – Urban Traffic Accessories, MetroCount USA, and Cedar Signs.

SCDOT has not considered this an IT purchase as the counters themselves, which are placed in the field, are not connected to our network.

Please let me know if you need anything further.

Thank you,

*Laura Bagwell
SC Department of Transportation
Procurement
803.737.1013
803.737.2046 (Fax)*

From: Spicer, Michael [<mailto:mspicer@mmo.sc.gov>]
Sent: Friday, October 21, 2016 4:33 PM
To: Bagwell, Laura B.
Cc: Robertson, Dixon; Skinner, Gail; Vaughan, Letia
Subject: In the Matter of the Protest of R&R Technologies, Inc. DBA VehicleCounts.com, Case 2017-116

Please find attached a protest by R&R Technologies, Inc. DBA VehicleCounts.com and proceed in accordance with the Code.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised October 2016)

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 2016 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.