

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

BEFORE THE CHIEF PROCUREMENT OFFICER

In the Matter of Protests of:

Econolite Group, Inc.
RAI Products
McCain, Inc.

SC Department of Transportation
IFB No. 5400004267
2070L Master and Local Controllers

DECISION

CASE NO.: 2012-116
CASE NO.: 2012-118
CASE NO.: 2012-119

POSTING DATE: August 13, 2012

MAILING DATE: August 13, 2012

This matter is before the Chief Procurement Officer (CPO) pursuant to three letters of protest from Econolite, RAI Products (RAI), and McCain, Inc. With this invitation for bids (IFB), the South Carolina Department of Transportation (SCDOT) attempts to procure 2070L Master and Local Controllers. These computerized traffic controllers and software operate signal lights at intersections across the state. In their letters, the three protested SCDOT's solicitation alleging that the specifications are proprietary.

In order to resolve the matter, the CPO conducted a hearing May 17, 2012. Appearing before the CPO were Econolite, represented by Jim Madden; RAI, represented by John Rosenblatt; and SCDOT, represented by Glennith Johnson, Esquire. McCain notified the CPO that it would not attend.

Prior to beginning the hearing, the CPO attempted to settle the matter by mutual consent under authority of S.C. Code 11-35-4210(3). All parties agreed to participate, asking the CPO to continue the hearing to allow them to negotiate a settlement. After a protracted attempt, the parties have advised the CPO that settlement will not be forthcoming. Therefore, this decision is prepared based upon the dialogue during the settlement conference and an administrative review of the procurement file.

NATURE OF PROTEST

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

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On April 12, 2012, SCDOT issued the IFB. (Ex. 1)
2. On April 26, 2012, Econolite, RAI, and McCain filed their protests with the CPO.
3. On April 30, 2012, SCDOT issued Amendment # 1, staying the solicitation due to the protests. (Ex. 2)

DISCUSSION

SCDOT's solicitation requested bids for 50 2070L Master Controllers and 200 2070L Local Controllers and asked bidders to "Furnish 2070 Controllers with Software." (Ex. 1, p. 22, Specifications) The IFB required "The software shall be compatible with the existing SCDOT central signal software." (Ex. 1, p.22, Specifications) (Emphasis added)

SCDOT maintains a statewide central software system that utilizes traffic controller software from NAZTEC. The solicitation requires that bidders offer traffic controller hardware as well as software compatible with its existing statewide NAZTEC network. According to SCDOT, they require controllers that operate the NAZTEC software until interface problems with traffic controllers made by other manufacturers can be resolved.

All three protestants contested SCDOT's requirement that the controllers be provided with software compatible with the existing SCDOT central signal system. They argue that all 2070 controllers manufactured to CALTRAN (California Department of Transportation) specifications, a requirement of the solicitation, are the same.

SCDOT officials responded that it is essential that these controllers operate seamlessly and communicate with its statewide NAZTEC network. They acknowledged that CALTRAN

specifications require 2070 controllers to be the same, but argue that the NAZTEC software is not proven to work on other manufacturers' controllers. Further, they stated the current statewide network of controllers has not been updated to models built to the CALTRAN 2070 controller specifications. According to SCDOT, its network statewide still utilizes Model 170 controllers, an older version. They estimated that 65% of the approximately 4,000 traffic controllers deployed in the field are 2070s, but 35% are still 170 models. Carol Jones, SCDOT Traffic Safety Engineer, expressed concern with problems in the field with compatibility. SCDOT officials acknowledged their controllers are outdated and expressed their desire to rebid the central controller software system, which hasn't been updated since 2004. However, they expressed concern that interface problems exist that must be resolved before SCDOT can alter its specifications.

CONCLUSIONS OF LAW

The protestants argued that SCDOT's specifications that require bidders to offer traffic controllers preloaded with software compatible with the NAZTEC software utilized by SCDOT's central software system are proprietary. They argue that the hardware and software should be unbundled and bid as separate line items. According to the protestants, software manufactured by Econolite, Siemens, and McCain are all interoperable with other vendors' 2070 controller hardware. None of the protestants, nor anyone from SCDOT, could say if NAZTEC software was compatible with controllers made by other companies, either the 2070 or the 170 model controllers.

Code Section 11-35-2730 requires, "All specifications shall be drafted so as to assure cost effective procurement of the state's actual needs and shall not be unduly restrictive." The Procurement Review Panel has interpreted this requirement: "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.” *Appeal by Cambex Corporation*, Panel Case No. 1992-7. Initially, SCDOT must determine if its specification is appropriate. So long as its choice of specification is not unreasonable, arbitrary, capricious or contrary to the Procurement Code, neither the CPO nor the Panel will second-guess the agency’s judgment. *Id.*

The specifications, in this case, are a matter of public safety; the safety of every driver on South Carolina streets and roads. The NAZTEC central software system requires the use of NAZTEC software on controllers. Therefore, the specifications do limit competition. However, that fact does not alter SCDOT’s need for a safe, integrated, traffic management system for the state. The NAZTEC software is not proven to work on other manufacturers’ controllers. When asked, none of the protestants could name other locations where states operate NAZTEC software on their controllers, nor would they certify unconditionally that NAZTEC’s software, currently used throughout SCDOT’s statewide network, would run on their controller hardware. Because the compatibility of NAZTEC software with the controller hardware is essential, protestants have failed to prove SCDOT’s choice of specification was unreasonable, arbitrary, capricious or contrary to the Procurement Code, and thus failed to show that the specification is unduly restrictive.

DETERMINATION

For the aforementioned reasons, the protests are denied.¹

¹ During the settlement attempt, SCDOT offered to limit its purchase to 250 controllers it needs now and buy no more units until it can upgrade its software network except for emergencies. Although the protestants rejected SCDOT’s offer, it is reasonable.

R. Voight Shealy

R. Voight Shealy
Chief Procurement Officer
For Supplies and Services

8/13/12

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised July 2012)

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 83.1 of the 2012 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, an incorporated business must retain 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).

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, 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.



An **ECONOLITE** Group Company

April 24, 2012

Ms Vicki Stephens
SCDOT Procurement
955 Park St
Suite 101
Columbia, SC 29201

Re: Alternate Bid for 2070 Controller w/ software. **Solicitation #5400004267**

Ms Stephens,

With respect to Solicitation #5400004267, and the following clause, Econolite wishes to submit an official protest to the bid for the 2070 Controller and included software, specifically the requirement that the 2070L Controller must come preloaded with Naztec software.

DISCLOSURE OF CONFLICTS OF INTEREST OR UNFAIR COMPETITIVE ADVANTAGE (MAY 2011)

You warrant and represent that your offer identifies and explains any unfair competitive advantage you may have in competing for the proposed contract and any actual or potential conflicts of interest that may arise from your participation in this competition or your receipt of an award. The two underlying principles are (a) preventing the existence of conflicting roles that might bias a contractor's judgment, and (b) preventing an unfair competitive advantage. If you have an unfair competitive advantage or a conflict of interest, the state may withhold award. Before withholding award on these grounds, an offeror will be notified of the concerns and provided a reasonable opportunity to respond. Efforts to avoid or mitigate such concerns, including restrictions on future activities, may be considered. [02-2A047-1]

Econolite strongly suggests that the procurement officers review all information prior to making an award using tax payers funding to purchase equipment that is considered excessive spending per Solicitation Number: **5400000850**. By evidence, the attached SCDOT document it is shown that Naztec has already been recognized as an "unfair" bidder and continued business following the specifications outlined in the current solicitation provides Naztec with yet another opportunity to force the SCDOT into purchasing low bid equipment at maximum cost. "It is in the best interest of the State to change all specifications to remove the software from being installed on any item and securing firm pricing on hardware items only. The specifications for the controllers have been revised to allow any brand controller meeting specifications to be used and the software being installed separately."

The 2070 controller contract for the NCDOT, which Naztec charged \$1389 per unit, is proof that Naztec is using the controller software as a tool to overprice the hardware.

Respectfully,

Jim Madden
Account Manager – NC/SC
Econolite

STATE OF SOUTH
CAROLINA
MATERIALS MANAGEMENT OFFICE
1201 MAIN STREET, SUITE 600
COLUMBIA, SOUTH CAROLINA 29201

Statement of No Award
Posting Date: July 6, 2009

Bidder's right to protest as listed in section 11-35-4210 in the South Carolina Consolidated Procurement Code applies to this award. Protest to be filed with:

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201
Facsimile: 803-737-0639
E-mail: protest-mmo@mmo.state.sc.us

NO AWARD – PRICE EXCESSIVE: NO AWARD IS MADE ON ALL ITEM(S) PRICE IS CONSIDERED EXCESSIVE. (PER ATTACHED DETERMINATION)

NO AWARD – RESOLICIT ITEMS – ALL ITEMS WILL BE RE-SOLICITED WITH REVISED SPECIFICATIONS

Solicitation : 5400000850

Issue Date : 04/03/2009

Opening Date: 05/07/2009

Description : TRAFFIC SIGNAL CONTROLLERS

Agency : STATEWIDE TERM CONTRACT

State Procurement Office

Buyer: GARY HODGIN, CPPB

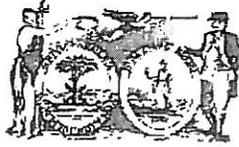


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State Budget and Control Board
PROCUREMENT SERVICES DIVISION

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(803) 734-2320

MATERIALS MANAGEMENT OFFICE
1201 MAIN STREET, SUITE 600
COLUMBIA, SOUTH CAROLINA 29201
(803) 737-0600
Fax (803) 737-0639

R. VOIGHT SHEALY
MATERIALS MANAGEMENT OFFICER

JUNE 21, 2009

MEMO FOR RECORD

SOLICITATION 5400000850 – TRAFFIC SIGNAL CONTROLLERS

REF: REGULATION 19-445-2065 – REJECTION OF ALL BIDS

In accordance with Regulation 19-445-2065, B(1) (b), Revised Specifications, the above solicitation will not be awarded. The original solicitation required that the State's current software from NAZTEC would be pre-loaded on the NAZTEC 2070 controller and included in a complete cabinet assembly. This software and controller are currently supplied from the manufacturer's local distributor under contract with DOT (@ \$3,477.50). The software was to be made available to other vendors in order for those vendors to supply a complete, ready to install cabinet assembly. When bids were opened it became apparent that prices were excessive as bid by the contract vendor (bid @ \$4,083.83). It is in the best interest of the State to change all specifications to remove the software from being installed on any item and securing firm pricing on hardware items only. The specifications for the controllers have been revised to allow any brand controller meeting specifications to be used and the software being installed separately. Specifications have already been received by MMO.

A handwritten signature in cursive script that reads "Gary Hodgins".



4-23-2012

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

Subject: Solicitation No. 5400004267

Dear Mr. Shealy:

I am writing you to file an protest against the proprietary specification contained in Solicitation No. 5400004267.

I am specifically protesting the requirement that the 2070 Controller must be supplied pre-loaded with software that is compatible with existing SCDOT Central Software.

FURNISH 2070 CONTROLLERS WITH SOFTWARE

Furnish software/firmware necessary to operate Model 2070L controllers as local traffic signal controllers. Provide model 2070L with the software compatible with the controller. The software shall be compatible with the existing SCDOT central signal software.

This requirement is clearly proprietary, in that SCDOT uses Naztec Central Software meaning the 2070 Controller MUST be supplied with NazTec Controller software.

The solution is to bid the 2070 Controller and the Controller Software as separate line items; otherwise competitive bidding will not be possible.

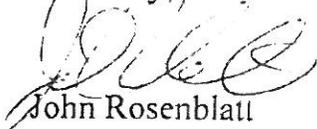
A 2070 Controller is a 2070 Controller, numerous companies manufacturer 2070 Controllers, and they are all 100% identical. North Carolina Dept of Transportation, as do most state DOT's, bid the Controller Software separate from the 2070 Controller to insure competitive hardware pricing.

There are four manufacturers of 2070 Controllers on the SCDOT Qualified Products List (QPL), meaning there are 4 brands of 2070 Controllers that meet SCDOT's 2070 Controller specification. Even though there are four 2070 Controllers on the SCDOT QPL, only a Naztec 2070 Controller loaded with NazTec's proprietary software can meet this bids specifications.

I am requesting SCDOT re-advertise this solicitation, and make the 2070 Controller and the 2070 Controller Software separate line items. This change would potentially save SCDOT close to \$400,000.00 on this bid alone.

Thank you for your time and consideration. I look forward to hearing back from you.

Sincerely,



John Rosenblatt
Vice President
RAI Products

Skinner, Gail

From: Stephens, Vickie W. <StephensVW@dot.state.sc.us>
Sent: Tuesday, May 01, 2012 8:24 AM
To: Skinner, Gail
Subject: FW: Solicitation #5400004267

Have you gotten this one? I received this while I was out.

Vickie

From: Nathan Welch [<mailto:NWelch@mccain-inc.com>]
Sent: Tuesday, April 24, 2012 1:34 PM
To: Stephens, Vickie W.
Cc: Jan Amato
Subject: Solicitation #5400004267

Good afternoon,

On behalf of McCain, Inc. I would like to Protest an "unfair competitive advantage" under Section DISCLOSURE OF CONFLICTS OF INTEREST OR UNFAIR COMPETITIVE ADVANTAGE (MAY 2011).

Per the solicitation, the Specifications call for the 2070 controllers to be supplied with Software – "Furnish software/ firmware necessary to operate Model 2070L controllers as local traffic signal controllers. Provide model 2070L with the software compatible with the controller. The software shall be compatible with the existing SCDOT central signal software." The only software/ firmware compatible with the existing SCDOT central signal software is proprietary to Naztec and therefore the Solicitation provides an unfair competitive advantage to Naztec.

It is our suggestion that in order for the State to procure Hardware through a competitive bidding process, the State separates the Controller Software from the Hardware bid.

Kind regards,

Nathan Welch
National Sales Manager
McCain, Inc.



phone: +1-760-734-5020 | mobile: +1-760-497-0953 | fax: +1-760-599-7102
2355 Oak Ridge Way, Vista, CA 92081
NWelch@mccain-inc.com
<http://www.mccain-inc.com>

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