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STATE OF SOUTH CAROLINA

BEFORE THE CHIEF PROCUREMENT OFFICER

COUNTY OF RICHLAND

CASE NUMBER 2004-208

IN THE MATTER OF:

METS Corporation and Parsons Advanced Technologies, Inc. Vs.

DECISION

Information Technology Management Office

Services and Products for a Uniform Statewide Voting System for the South Carolina State Election Commission

Solicitation No. 04-s6230

The South Carolina Consolidated Procurement Code grants the right to protest to any bidder who is aggrieved in connection with the solicitation or award of a contract. METS Corporation (METS) and Parsons Advanced Technologies, Inc. (PAT) filed protests of solicitation 04-s6230 - Services and Products for a Uniform Statewide Voting System for the South Carolina State Election Commission under section 11-35-4210, of the South Carolina Consolidated Procurement Code. The Chief Procurement Officer (CPO) for the Information Technology Management Office (ITMO) conducted a hearing on the issues of protest on November 21, 2003. Prior to the commencement of the hearing, Parsons withdrew all its issues of protest. Present at the hearing before the CPO were representatives from METS, South Carolina Elections Commission (SEC), Senator Jake Knotts, and the Information Technology Management Office (ITMO).

METS' protest was based upon the following grounds:

We believe that the South Carolina-Election Commission (SC SEC) has no authority to request that the Office of CIO issue this solicitation.

Currently, SC Code §7-13-1660 grants each individual governing body of any County, City, or Town the authority to choose and purchase its own voting system or systems. Further, it specifically states that different kinds of voting machines may be adopted and used within those jurisdictions. An Act permitting the SEC to purchase failed in June 2003 and to date, no legislation has passed changing that:

- Removes this sole authority from the local jurisdictions,
- Authorizes the purchase of any voting equipment by any individual, group, or state agency other than those individual Counties, Cities, or Towns already specifically outlined in SC Code, or
- Grants any individual, group, or state agency the right to dictate what voting equipment any jurisdiction must use.

SC Code requires 1 voting machines per 350 Registered voters or “as near thereto as may be practicable”. Traditionally that has been held to mean 3 units per 1000 registered voters in South Carolina. However, this RFP does not require the normal 3 or even the more ideal 4 units per 1000 voters. The Offeror is required to furnish an excessive 5 units per 1000 voters, completely outside SC Code. The RFP caps the total dollar value at \$36 M, guaranteeing the lowest possible quality system will survive this process.

Many counties have large investments in voting equipment not considered in the “buy back” plan referenced in this RFP. This solicitation destroys millions of dollars of value from local jurisdictions. The Offeror is explicitly required not to reuse or refurbish any existing equipment, not even the thousands of perfectly good voting booths already owned by the counties (some just recently purchased). No legislation grants a state agency the right to destroy a county’s assets and waste state funds.

The Federal HAVA Law specifically requires a state appropriation of 5% of the refund amount expected to qualify for federal funding. Claiming it as carried over funding is not an option listed in the HAVA legislation. As the “yet to be formed” EAC (Election Assistance Commission) will decide if South Carolina will actually qualify to receive the funds we expect, we should adhere to the letter of HAVA; at least until we can ask someone with authority. The SC Legislation has the sole responsibility for all appropriations, and nothing has been passed to authorize or fund this RFP.

We also believe that the process for this RFP is flawed. From many conversations with the SC SEC, we learned the RFP was originally scheduled to be released by early summer. Then, the date was pushed back to late summer. Finally, it was published on your web-site on October 10, without notice. There was not sufficient time to properly evaluate the requirements for comments/questions at the pre-proposal conference. That time had been eliminated by continually pushing back the release of the RFP without moving the end dates and not publicly releasing any of the requirements. The RFP contains many useless/needless requirements that are mandated without any public input, ability to refute them, or even the ability to take exception to them. Many of those items are not required by SC Code, but have been included as “must” provisions to be furnished in the proposal.

This RFP requires state certification of new voting systems meeting the HAVA requirements before Jan 1, 2004. I submit that none of the vendors present at the pre-proposal conference can legitimately meet this requirement (I will provide the boring details upon request). This is a completely unreasonable timeline.

This solicitation should be withdrawn, and the state HAVA plan should be amended and re-filed with EAC (or FEC if still not formed), allowing Counties access to HAVA funds. This would maintain the authority that SC Code invests in the Counties.

If the plan is not to be amended, at the very least the solicitation should be withdrawn. Then, SC law must first be amended restrict the rights of the individual Counties, Cities, and Towns and to authorize a state agency or other entity to choose and purchase a statewide system. The legislature needs to appropriate 5% of the expected refund next. The system requirements could be published for comment and revision from interested parties, and the RFP could be rewritten and issued again with the ability to take an exception to a needless requirement without being rejected as “Non-Responsive”.

There is plenty of time for all of this to take place, as appropriated HAVA funds have “Continuing Availability” and are without fiscal year limitations. South Carolina’s share of any HAVA funds is based on Voter Age Population in the 2000 census, not on any race to file early.

### **FINDINGS OF FACT**

ITMO issues solicitation 04-s6230, on behalf of the SEC, on October 10, 2003. Amendment 1 was issued on October 10, 2003, with instructions about downloading the solicitation. An advertisement of the solicitation was posted on the ITMO Internet site on October 10, 2003, and appeared in the October 13, 2003, edition of the South Carolina Business Opportunities publication. A pre proposal conference was conducted on October 21, 2003 where interested parties were invited to ask questions and seek clarification of the solicitation. METS’ and PAT’s protests were received on October 24, 2003. The solicitation was suspended on October 27, 2003.

### **DISCUSSION**

PAT withdrew its issues of protest prior to the beginning of the hearing an will not be addressed.

METS protest contains six issues:

- Based on §7-13-1660 the State Election Commission lacks the authority to authorize a solicitation for a Uniform Statewide Voting System.
- The requirement that the Offeror furnish at least 5 units per 1000 voters is excessive and limits the quality of the system being purchased.
- The RFP does not address the used equipment that currently exists in the counties.

- The Legislature has not appropriated the funds necessary to receive the HAVA (EAC) grants and that HAVA may at some time in the future rule that the source of funding identified by the SEC for this contract is not appropriate.
- Potential Offerors were not afforded sufficient time to review the solicitation prior to the deadline for submission of questions and suggestions.
- The RFP requires Offerors guarantee compliance with specifications that HAVA are not approved as of the date of solicitation issuance. The SEC agreed to remove the requirement for compliance with yet to be defined specifications from the solicitation and METS withdrew this issue of protest.

The first issue of protest is that the State Election Commission lacks the authority to authorize ITMO to issue a solicitation for a Uniform Statewide Voting System because the exclusive authority to purchase voting equipment is vested to the governing body of any county, city, or town by §7-13-1660 and that legislation was introduced to specifically grant SEC the authority to create a uniform statewide voting system and that legislation has not passed and consequently SEC does not have the authority to mandate such a system.

METS cites §7-13-1660 of the Code of Laws which it believes delegates exclusive authority for the purchase of all voting equipment to the governing body of any county or of any city or town in this State as follows:

§7-13-1660 - ...Any such governing body may purchase, lease or otherwise acquire such voting machines and provide for the payment therefore in such manner as such governing body may deem proper. Voting machines of different kinds may be adopted for use and used in different districts of the same city, town or county.

The CPOIT agrees that §7-13-1660 vests the authority to purchase voting equipment with the governing body. The CPOIT does not find anything in the RFP that usurps that authority from the governing body. The CPOIT does find that §7-13-1660 allows the governing body to acquire voting machines “in a manner as such governing body may deem proper.” If the governing body decides to aggregate its requirements or otherwise join with other governing bodies in acquiring voting machines, it has the authority to do so under this statute. The RFP paragraph titled “Type of Contract” on page 13 of the solicitation states:

An agency term contract or contracts will be awarded by the Information Technology Management Office for the period indicated and in accordance with the provisions and conditions of this solicitation. The only state agency authorized to purchase from this contract is listed herein. Purchases by local public procurements are optional.

This solicitation is for an agency term contract for the SEC, a state agency. Local governing bodies have an option to use this contract but are not compelled to do so. There is nothing in the solicitation that indicates that local governing bodies must adopt the system being solicited. Prior to release of this solicitation, SEC polled the counties and 41 indicated their intention to use the contract resulting from this solicitation without condition. The other 5 counties indicated a desire to use this contract under certain conditions. No counties indicated a desire to be excluded from using this contract. So while it is not mandatory that the local governing bodies use this contract, it appears that nearly all intend to do so.

METS points to H3777, introduced in the last Legislative session, which would specifically authorize the State Elections Commission to adopt one voting system to be used to conduct elections in this State and proposes to repeal section 7-13-1660 relating to the acquisition and use of approved voting machines by a county or municipality. Since H3777 was not passed into law, METS argues that the SEC does not have the authority to mandate one voting system nor purchase voting machines for use by the local governing bodies.

As explained above, there is nothing in this solicitation to indicate that SEC is compelling local governing bodies to adopt the system being solicited as a uniform statewide voting system.

Finally, under §7-3-20(A) the Executive Director of the SEC is the chief administrative officer of the agency and under §7-3-20(C)(11) the State's chief election official. The Executive Director of the SEC has the authority to request ITMO issue this solicitation on behalf of SEC and award the subsequent contract.

The CPOIT finds that the SEC does have the authority to contract for that equipment and services that are the subject of this solicitation.

This issue of protest is denied.

METS second issue of protest is that with the \$36 million dollar cap on this contract and the RFP requirement for 5 units per 1000 voters instead of the 3 units per 1000 voters required by statute is excessive, limits the quality of the system being purchased, and gives vendors with the less expensive systems a competitive advantage that effectively limits competition to 2 or three vendors.

METS' protest indicates that the law requires one voting machine per 350 Registered voters or "as near thereto as may be practicable". This would equate to approximately 3 machines for each 1000 voters. Section 7-13-1680 actually requires one machine for every 250 voters or 4 machines per 1000 voters as follows:

The governing body of any county or municipality providing voting machines at polling places for use at elections shall provide for each polling place at least one voting machine for each two hundred fifty registered voters or portion thereof or as near thereto as may be practicable.

In order to successfully protest that a specification is excessive, the protestant must show the requirement is unreasonable, arbitrary, capricious, or that it in some way violates the Procurement Code. The SEC indicates that the additional machine was required to accommodate future growth and training requirements. METS indicated that there was more than one vendor that could provide a system at or below the maximum price cap set in the solicitation while providing the required number of machines. METS did not provide evidence that the purchase of the additional machine per 1000 voters would result in an unusable system. METS did not protest that the specification in some way violates the Procurement Code.

It does not appear that the decision to require 5 machines per 1000 voters was unreasonable, arbitrary, capricious, or contrary to the Procurement Code. The CPOIT will not substitute his judgment for the judgment of the procuring agency. The Procurement Review Panel adopted this position In re: 1992-7 Protest of Cambex Corporation:

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.

This issue of protest is denied.

METS next issue of protest is that the RFP does not address the used equipment that currently exists in the counties. This ground fails to state a viable issue of protest. Nothing in the procurement laws or the solicitation requires SEC to address existing used equipment. Whether or not the solicitation should seek to capture the value of existing used voting equipment is not a matter of procurement, it is a matter of policy. Nevertheless, it appears that the solicitation does indeed address this issue. RFP paragraph 4.3.2 Equipment Buy Out indicates that the State is concerned about recovering some portion of the investment counties have made in voting equipment. RFP paragraph 4.6 allows Alternate Proposals that present unique and creative means that would provide increased value to the SEC and counties. Trade in of existing equipment would increase the value of a contract to the SEC and counties. Finally, alternate proposals are to be considered under RFP paragraph 5.1.3:

The evaluation committee will evaluate Offeror's Alternate Proposals based on the following criteria:

- Benefits to be obtained by the SEC and counties
- Technical proposal
- Cost Proposal
- Demonstration of partnership and shared risk

The RFP indicates that recovering the investment is a concern and allows Offerors the opportunity to include cost recovery options in their proposals. However, even if the solicitation did not address this matter, or did so poorly, the COP finds this issue to be without merit. This issue of protest is denied.

In its next issue of protest METS argues that the SEC does not have the funds from the HAVA, which apparently requires the appropriation by the State of 5% of the contract price in order to qualify for the funds, and that the required 5% was not appropriated. Again, METS simply fails to state an issue of protest. For that reason along, the protest on this issue is denied. Had METS protested that SEC had insufficient appropriations to meet its obligations, its protest would still fail. Section 11-35-2020 of the procurement code requires only that an agency have sufficient funds to meet its obligations during the first fiscal year. Ms. Andino, the SEC's Executive Director, testified that the SEC currently has sufficient funds to meet its contractual obligations for the first fiscal year. In addition, she identified proviso 62.13 to the State Budget, which authorizes SEC to apply certain funds to HAVA as follows:

(ELECT: Help America Vote Act) Of funds appropriated to the commission for primary elections, the commission shall utilize any excess funds to match the Help America Vote Act program to the greatest extent possible.

METS further argues that HAVA (EAC) may at some time in the future rule that the source of funding appropriated by the Legislature for this contract is not appropriate. The State can not anticipate what the federal government may do in the future. The State legislature did appropriate funds for HAVA through the appropriations act and if future events prove this action to be inappropriate, the Legislature will have to address the issue at that time.

This issue of protest is denied.

The final issue to be decided is METS claim that potential Offerors were not afforded sufficient time to review the solicitation prior to the deadline for submission of questions and suggestions. The Request for Proposals was issued on October 10, 2003. Advertisements were published on the World Wide Web and in the South Carolina Business Opportunities publication in compliance with §11-35-1530(2) of the Consolidated Procurement Code. A pre proposal conference was scheduled for October 21, 2003, to allow interested parties the opportunity to ask questions and seek clarification of the requirements of the Request for Proposals. All Offerors had eleven days to review the solicitation prior to the pre proposal conference. During the hearing, METS indicates that it had anticipated the release of this solicitation for months. METS was on notice of the impending release of the solicitation and ITMO complied with both the spirit and letter of the law in advertising the publication of the solicitation. METS, nor any other attendee, asked for an extension of the deadline for submission of questions at the pre proposal conference.

This issue of protest is denied.

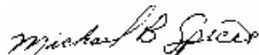
#### DETERMINATION

The SEC does have the authority to request an agency term contract be established for a Uniform Statewide Voting System. Participation by local governing bodies is optional. The Legislature did appropriate funds for this project and in doing so, authorized the project in so much as it must comply

with HAVA requirements. The CPOIT does not find the solicitation unduly restrictive. The CPOIT also finds that METS knew of the impending release of the solicitation and proper notification was given to all Offerors by the State.

Protest denied.

For the Information Technology Management Office



Michael Spicer

Chief Procurement Officer

December 1, 2003

#### STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4210, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten calendar days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the Panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Additional information regarding the protest process is available on the internet at the following web site:

<http://www.state.sc.us/mmo/legal/lawmenu.htm>

**NOTE:** Pursuant to Proviso 66.1 of the 2002 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel [filed after June 30, 2002] 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(4). . . . 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 hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2002 S.C. Act No. 289, Part IB, § 66.1 (emphasis added). PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."