STATE OF SOUTH CAROLINA
State Budget and Control Board
PROCUREMENT SERVICES DIVISION

MARK SANFORD, CHAIRMAN
GOVERNOR

CONVERSE A. CHELLIS III, CPA
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL

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

DANIEL T. COOPER
CHAIRMAN, WAYS AND MEANS COMMITTEE

FRANK W. FUSCO
EXECUTIVE DIRECTOR

DELBERT H. SINGLETON, JR.
DIVISION DIRECTOR
(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

July 21, 2008

Johnny Graham
Sales Manager
Altman Tractor & Equipment Co., Inc.
1808 East Pamplico Hwy.
Florence, SC 29505

Wayne Crow, Account Manager
Government/Fleet Sales
CNH America LLC – New Holland Brand N.A. HQ
500 Diller Ave (Mail Station 248)
New Holland, PA 17557

Re: **DECISION**
IN THE MATTER OF: Protest
Statewide Contract for Lawn & Landscape Equipment
IFB NO.: 08-S7683
CASE NUMBER'S 2008-114 and 2008-115 Respectively

Dear Sirs:

Please find enclosed the Decision of the Chief Procurement Officer concerning the administrative review held on July 9, 2008, relative to the referenced matter.

If I can be of assistance to you in this matter, please let me know. Also, please note that a copy of this Decision has been posted today on the sixth floor of the Materials Management Office, 1201 Main Street, Columbia, South Carolina.

Respectfully,

R. Voight Shealy
Chief Procurement Officer
for Goods and Services

enclosure

cc: Keith McCook, Assistant General Counsel
Frank Potts, Assistant General Counsel
John Stevens, State Procurement Officer
Allen Register, Lead Procurement Manager
Cooper Marlowe, Procurement Manager

STATE OF SOUTH CAROLINA
State Budget and Control Board
PROCUREMENT SERVICES DIVISION

MARK SANFORD, CHAIRMAN
GOVERNOR

CONVERSE A. CHELLIS III, CPA
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL

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

DANIEL T. COOPER
CHAIRMAN, WAYS AND MEANS COMMITTEE

FRANK W. FUSCO
EXECUTIVE DIRECTOR

DELBERT H. SINGLETON, JR.
DIVISION DIRECTOR
(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

July 21, 2008

Billy Steen
Steen Enterprises
7634 Savannah Hwy.
Adams Run, SC 29426

Re: **DECISION**
IN THE MATTER OF: Protest
Statewide Contract for Lawn & Landscape Equipment
IFB NO.: 08-S7683
CASE NUMBER: 2008-113

Dear Mr. Steen:

Please find enclosed the Decision of the Chief Procurement Officer concerning the administrative review held on July 9, 2008, relative to the referenced matter.

If I can be of assistance to you in this matter, please let me know. Also, please note that a copy of this Decision has been posted today on the sixth floor of the Materials Management Office, 1201 Main Street, Columbia, South Carolina.

Respectfully,

R. Voight Shealy
Chief Procurement Officer
for Goods and Services

enclosure

cc: Keith McCook, Assistant General Counsel
Frank Potts, Assistant General Counsel
John Stevens, State Procurement Officer
Allen Register, Lead Procurement Manager
Cooper Marlowe, Procurement Manager

STATE OF SOUTH CAROLINA	)	**BEFORE THE CHIEF PROCUREMENT OFFICER**
COUNTY OF RICHLAND	)	
	)	DECISION
In the Matter of the Protests of:	)	
	)	CASE NO. 2008-113
Steen Enterprises, Inc.	)	
&	)	CASE NO. 2008-114
Altman Tractor & Equipment Co.	)	
&	)	CASE NO. 2008-115
CNH America LLC – New Holland	)	
	)	
Re: Statewide Contract for Lawn &	)	POSTING DATE:
Landscape Equipment	)	
IFB NO. 08-S7683	)	JULY 21, 2008

These matters are before the Chief Procurement Officer (CPO) pursuant to letters of protest from Steen Enterprises (Steen), Altman Tractor & Equipment Co. (Altman) and CNH America LLC – New Holland (New Holland). Case numbers 2008-114 and 2008-115 were combined for hearing, and all three have been combined for decision due to the similarity of the issues raised and the relief accorded.

The cases all arise from protests of the award resulting from Solicitation Number 08-S7683 issued on March 7, 2008. The solicitation was for a statewide contract for lawn and landscaping equipment. All protest the State's decision to declare that all or various parts of the offers submitted by them were deemed non-responsive because each provided multiple discounts for certain equipment in some of the lots upon which they bid. They all contend that their offers were responsive to the solicitation and in addition, their offers had the practical effect of decreasing the cost of the equipment solicited to the using State agencies and political subdivisions.

In order to resolve the matters, the CPO conducted two hearings on July 9, 2008. The first hearing involved the protest of Steen Enterprises, Inc. represented by Billy Steen. The second hearing involved the protests of Altman Tractor & Equipment Company and CNH America LLC – New Holland which were heard together. In the second hearing New Holland was represented by Marcus A. Manos, Esq. and Manton Grier, Jr., Esq. of Nexsen Pruet, LLC and Altman Tractor Co. was represented by Mr. Johnny Graham of Florence. Mr. John Stevens, State Procurement Officer, represented the Materials Management Office.

NATURE OF THE PROTESTS

The letters of protest are attached and incorporated herein by reference.

FINDINGS OF FACT

The invitation for bids, issued March 7, 2008, sought various types of lawn and landscaping equipment for purchase by the agencies of the State as well as political subdivisions. The invitation sought bids in eleven different lots comprised of various types of equipment. These lots ranged from commercial lawn mowing equipment in lots 1 and 2 to various types of loaders and trailers in lots 10 and 11. Some of the lots, such as lot 5, were relatively limited in their scope (various types of chain saws) while others such as lot 1 ranged from push type rotary mowers to "heavy duty" mowers. Included in the lots were items such as all types of mowers, sprayers, turf equipment, utility vehicles, tractors (both compact and utility) and safety equipment. Offers were permitted to be made on one or more of the eleven lots.

Bidding was limited to manufacturers or those specifically authorized by the respective manufacturers of the equipment being solicited. It was the intent of MMO that bidders offer a single percentage discount for all items within each lot which signified the percentage discount allowed off each manufacturer's published price for the particular item sought within the lot. A minimum ten percent discount was required to be eligible. Contracts would be awarded to all bidders who offered ten percent or more off their manufacturers' published prices. The discounts listed would not foreclose further negotiation by the purchasing agencies but would constitute guaranteed minimum discounts from the published prices of each manufacturer.

Prior to the issuance of the solicitation a pre-solicitation conference was conducted on January 22, 2008. After the Invitation for Bids was issued on March 7, 2008 a pre-bid conference was held on March 18, 2008. All parties who protested were represented at the pre-bid conference. An amendment to the IFB was issued on March 21, 2008 and the bid opening occurred on April 7, 2008. On April 16, 2008, the procurement manager, Cooper Marlowe, issued to the protestants determinations of non-responsiveness with

respect to various lots for which bids were submitted.[1] Mr. Marlowe found Steen non-responsive as to lot 2; Altman was determined non-responsive with respect to lot 10[2]; and New Holland was deemed non-responsive as to lots 8 and 9. The reason that the bids of the parties were rejected was that each of the above-referenced bidders offered multiple discounts within a single lot thus violating the requirement of the IFB that "Your price must be in the form of a single percentage discount to apply to a catalog, price sheet, or price schedule as described."

The explanation for the submission of multiple bids was provided by the witnesses of the protestants. The witnesses explained that the grouping of equipment into lots by MMO was broad with wide varieties of equipment contained in single lots. Essentially they all contend that the manufacturers they represent produce more than one "line" or grade of equipment. Some equipment has all the "bells and whistles" whereas other equipment is more basic. The mark-up for the equipment with the "bells and whistles" is higher than it is for the more basic equipment. If each manufacturer is required to make both the basic and the higher-end equipment available for only one discount off the published price, the percentage offered will, of necessity, be a blend or one which provides protection for the seller in the event that the more basic model with a smaller markup is selected. In other words, the seller will have to offer a smaller discount off the price of the more basic equipment to protect itself when, with a multiple discount, it can offer a maximum discount on the both types of equipment.[3] The contention of the protestants is that they wish to be as competitive as possible with respect to each model offered and permitting them to be competitive is to the benefit of the State and its purchasing agencies.

---

[1] The three named parties are the only bidders who protested the determination of non-responsiveness and rejection of their bids. However, there were several other bidders who did not protest the determination whose bids were rejected for the identical reason—the offering of multiple discounts.

[2] In the case of Altman, lot 10 was the only lot upon which it bid and as a result, Altman's bid was rejected in its entirety. Both New Holland and Steen had made acceptable/responsive bids on other lots and their bids were only rejected in part. It might also be noted that Mr. Steen testified in his hearing that although his company's bid was rejected with respect to lot 2, the description of lot 1 was sufficiently broad that he could, in fact, still provide all the items described in lot 2 through the acceptance of his bid under lot 1. He testified that the only reason he protested was because the rejection of the multiple bids (such as his) could (and would in his case—representing Kubota) result in a higher cost to the State for the equipment purchased.

[3] The explanation is as follows: If a dealer decides that he has to make a 10% profit on each piece of equipment he sells, he can thereby reduce his selling price only to 10% over his cost. If the basic item has a published markup of 20% and he wants to make a 10% profit, he can offer a 10% discount. However, when another item in the same lot (a model with the "bells and whistles") has a markup of 30% the seller could, if permitted to provide multiple discounts, offer a discount on that item of 20%. If he can only offer one discount, he can blend the two or only provide a 10% discount and thus make from 10% to 20% profit depending upon the equipment selected.

The witnesses for the protestants also testified that this issue had been raised earlier, although not formally in writing as required. In essence, all the protestant's witnesses testified that at the pre-bid conference the subject of multiple bids within a lot was raised. It was pointed out to the procurement manager that previous awards for this type of equipment had permitted multiple discounts within a lot and the reasons in support of the practice were explained. All testified that although no definitive response was given by the procurement manager at the conference, they left with the impression that multiple discounts would be permitted unless a forthcoming amendment advised otherwise. Mr. Marlowe agreed that the question had been raised at the pre-bid conference and although he believed the IFB did not then permit multiple discounts within a single lot, if a change was forthcoming it would be noted in the planned amendment.[4]

The expected amendment was issued on March 21, 2008 but did not directly address the issue of multiple discounts within a single lot. However, the protestants contend that because of certain changes to the form in which the amendment was issued, it was reasonable for them to believe that multiple discounts within a single lot were permitted.

In the original solicitation issued March 7, 2008, page 19 there was a heading as follows: "**VIII. BIDDING SCHEDULE / PRICE-BUSINESS PROPOSAL**". Following the heading the remainder of the page (about 40%) was blank except for the page number. On the following page (page 20) at the top were the following statements:

> **IN THE BIDDING SCHEDULE BELOW, PLEASE ENTER THE PERCENTAGE DISCOUNT OFF LIST PRICE YOU ARE OFFERING FOR EACH LOT OF EQUIPMENT. THIS PERCENTAGE DISCOUNT MUST APPLY TO <u>ALL</u> EQUIPMENT CLASSIFIED IN THE LOT.**
>
> **AT THE BID OPENING, THE BID CLERKS WILL READ ALOUD THE LOT NUMBER, THE NAME OF THE BIDDER, AND THE PERCENT DISCOUNT IT OFFERED AND ENTERED INTO THE APPLICABLE SPACES BELOW.**

Following the above statements were the lots numbered one through eleven.

---

[4] There is a dispute of fact in this instance. The protestants contend that they were led to believe that after they explained the purpose of multiple discounts and showed evidence of the past practice that multiple discounts would be permitted <u>unless</u> they were advised otherwise in the upcoming amendment. They contend, at the least, they left the conference with the impression that multiple discounts would be permitted. The procurement manager testified that no decision was made at that time and that the protestants had no basis upon which to even believe that such discounts would be permitted.

In the Amendment, answers were given to the written questions asked, changes to the solicitation were noted, including that all bidders must offer a minimum discount of 10% followed by a statement in bold, capital letters, that the State had elected to issue a revised bidding schedule and that bidders were to use the form beginning on the following page to submit their offer. The following page (page 5 of the Amendment) provided a new bidding schedule which did not include any of the language that had previously appeared in bold, capital letters, on page 20 of the original solicitation. Pages 5 through 9 contained the same lot numbers and descriptions that had been in the original solicitation except that additional lines had been added that permitted bidders to also indicate percentage discounts for attachments and accessories.

It is the absence of the language requiring a single discount per lot that protestants contend established their reasonable belief that their question about multiple discounts had been answered. They indicated they did not pursue the matter further because they felt MMO had answered the question by allowing multiple discounts within lots. The protestants contend that the language cited by the procurement manager in rejecting their bids is ambiguous and not generally applicable to their particular situations[5] and that the omission of the language from the Amendment was properly interpreted as either a response to their inquiries or a confirmation of their belief and contention—that multiple discounts were appropriate and permissible.

The procurement manager, Mr. Marlowe, testified that the omission of the writing in bold, capital letters beginning on the same page as the bid sheets was not intended to convey any change of previous mandatory requirements but was simply a matter of form—that which was not specifically deleted or amended from the original solicitation remained unchanged. As a result, he rejected the bid of any offeror who supplied multiple bids for any lot as nonresponsive to the solicitation.[6]

---

[5] This is because many of the manufacturers do not have a single catalog or price list. Rather, one page of a price list may contain equipment from one or more lots or be contained in a loose leaf book which is amended regularly.

[6] New Holland testified that the language of the solicitation used in support of the procurement manager's rejection of their bids was not applicable to the offers it was making. New Holland stated that it has no single catalog, price sheet or schedule which would apply to a single lot and that this had been explained to and understood by the procurement manager.

CONCLUSIONS OF LAW

The protests of the parties were timely filed and as a result, the issuance of any Intent to Award was suspended however, since the solicitation provided for multiple awards, the Intent to Award was reinstated by decision of the CPO on May 16, 2008. As a result, there are presumably contracts currently in effect. The relief granted herein is therefore fashioned so as not to prejudice either the vendors or the State with respect to contracts already undertaken pursuant to the award.

The issue in this case is whether the bids were properly rejected as non-responsive to the solicitation. In this case, because the protestants' bids were submitted in response to an ambiguous requirement and the bidders' interpretation of that requirement was reasonable, their offers should not have been rejected as non-responsive. It has been determined that if a specification has an uncertain meaning and can be interpreted in more than one way, it is ambiguous. Protest of Warehouse Distributing Company, 1988-2 (SCPD 1988).

However, the specifications and the amendment did not create an ambiguity by themselves. When the "PRICE AS DISCOUNT" (January 2006) language is read, particularly in conjunction with the language in the original specification requiring a single discount per lot, there was no ambiguity. Whatever ambiguity existed arose at the time the query about the multiple discounts was not answered definitively by the amendment coupled with the removal of the clear language requiring only one percentage discount per lot.

While oral statements made at a pre-bid conference are not binding[7] and any questions or queries of the bidders should have properly been submitted in writing, it cannot be said that the conclusion of the protestants that multiple discounts were allowed is entirely unwarranted. The question of multiple discounts was known and could have been easily answered without ambiguity by the amendment issued after the pre-bid conference. A reasonable inference is therefore that the omission of the bold, capitalized language from the new bidding sheets in the amendment created a not unreasonable inference on the part of the protestants (and other bidders) that multiple discounts were allowed as in previous such solicitations. Knowing of the potential for misunderstanding should, in this particular case considering the scope of some of the lots, have resulted in a clarification or, at least, a re-statement of the limiting language regarding multiple discounts

[7] Regulation 19-445.2042 ("Nothing stated at the pre bid conference shall change the Invitation for Bids unless a change is made by written amendment.").

within a single lot. Not providing the needed clarification resulted in good faith offerors being rejected and the possibility that the State was deprived of some the best available prices for its purchases and a limited selection.[8]

DETERMINATION

When the protestants received the amendment and noted the removal of the bold language at the head of the bidding schedule that prohibited multiple discounts within lots, they believed MMO had granted their request for relief from the requirement. That belief was not unreasonable. The amendment created their reasonable belief that they could now bid multiple discounts within lots. Although it was not MMO's intent, the Amendment seems to allow multiple discounts within lots. Therefore, the bids of the protestants should not have been rejected on this issue alone.

The protests are granted. MMO is directed to remove its rejection of the bids from Steen for lot 2; Altman for lot 10; and New Holland for lots 8 and 9. Further, MMO is directed to revisit any rejection of other bids for this single reason.[9]

Voight Shealy

R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

July 21, 2008
Date

Columbia, S.C.

---

[8] If only one bidder had been mis-led the ambiguity might be less emphatic. However, in this case, one of the five bidders rejected for this reason represented companies which had been engaged in the business of supplying such equipment to the State for many years and thus removed at least fifteen separate businesses which could, together with local political subdivisions, suffer from their absence from the approved list of successful bidders.

[9] The remedy for these protests would normally be the re-issuance of the solicitation with the ambiguity clarified. . In this case a re-solicitation would probably be disruptive and costly beyond any reasonable proportion to either the benefits derived or the prejudice suffered and therefore not in the best interests of the State or the protesting vendors. As a result, rather than require a re-solicitation of the bids, those submitting multiple discounts for the lots who were rejected will be incorporated on the list of available vendors at the discounts quoted while all other bids will remain as submitted and received. This is an exceptional and unusual remedy which is limited to this particular solicitation and award. It is anticipated that the current contract will not be renewed and that a new solicitation will be forthcoming at the end of the current one-year contract period.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

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: www.procurementlaw.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 66.1 of the 2007 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(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." 2007 S.C. Act No. 117, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a 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).