

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

**BEFORE THE CHIEF PROCUREMENT OFFICER
FOR INFORMATION TECHNOLOGY**

In the Matter of:

WRITTEN DETERMINATION

Cancelation of Solicitation No.
5400004448

Information Technology Management
Office

POSTING DATE: April 4, 2013

Comprehensive Individual Education
Program Case Management Solution
SC Department of Education

The Information Technology Management Office issued Solicitation 5400004448 for a Comprehensive Individual Education Program Case Management Solution for the Department of Education Public Consulting Group, Inc. (PCG) protested ITMO's notice of intent to award the contract to Excent Corporation. Following a hearing, the Chief Procurement Officer for Information Technology (CPO) found, among other things, that Excent's proposal was not responsive to a material and essential requirement of the solicitation and ordered resolicitation of the contract. Excent appealed the CPO's decision to the South Carolina Procurement Review Panel. The Panel intends to hear the appeal on April 19, 2013.

While assembling the record on appeal, the CPO found in Excent's proposal other language bearing on responsiveness that the procurement officer overlooked, and that was not raised as a protest ground. This discovery led the CPO to examine more closely the procurement file. The CPO is now convinced that, even if the protest decision is reversed, the solicitation must be canceled on independent statutory authority (and) and on a different factual basis.

AUTHORITY

The CPO has authority to cancel awards or contracts, after award but before performance, in accordance with regulations promulgated by the Budget and Control Board. S.C. Code Ann. § 11-35-1520(7) (2011); *see* S.C. Code Ann. Regulation 19-445.2085(C). *See generally, Analytical Automation Specialists*, Panel Case No. 1999-1. Other Panel decisions recognizing the CPO's authority to cancel solicitations include *Appeal of Keenan & Suggs*, Panel Case No. 2004-2;

Appeal by Helena Chemical Company, Panel Case No. 2001-5; *Appeal by C&C Boiler Sales and Services*, Panel Case No. 2000-12; *Appeal by Steen Enterprises, Inc.*, Panel Case No. 2000-9; and *Protest of Blue Cross Blue Shield and Public Consulting Group, Inc.*, Panel Case No. 1996-3.

BACKGROUND

Nine offerors submitted proposals in response to the solicitation. The State utilized a two-part evaluation process where all proposals were evaluated in phase one and three offerors were invited to give demonstrations as phase two of the evaluation. Excent, CORE Education and Consulting Solutions, Inc. (CORE), and PCG were the three finalists and were ranked by the evaluators in that order. As a result of the aforementioned protest, the CPO found that the highest ranked offeror, Excent, was not responsive to a material and essential requirement of the solicitation. The CPO subsequently conducted a closer review of the procurement file. That review has disclosed other aspects of Excent's offer that make it non-responsive on its face. The proposals from PCG and CORE are likewise non-responsive and cannot be considered for award.

THE PROPOSALS

1. Excent

In his February 7, 2013, determination, the CPO set forth reasons why Excent failed to meet a material and essential requirement of the solicitation. Those findings are incorporated here by reference. They are, however, unnecessary to the CPO's conclusion here, as Excent is non-responsive for other reasons. In subsequently reviewing Excent's proposal the CPO found that twice in its proposal, Excent clearly states that its proposal is not an offer.

A fundamental characteristic of how the State structures its solicitation is as a request for an irrevocable, binding offer to contract. This structure is emphasized throughout the request for proposals. On the cover page—the very first document any vendor sees—above the line for his signature, appears this language:

By submitting a bid or proposal, You agree to be bound by the terms of the Solicitation. You agree to hold Your Offer open for a minimum of thirty (30) calendar days after the Opening Date.

Solicitation, p. 1. On page 7 are these clauses:

BID/PROPOSAL AS OFFER TO CONTRACT (JAN 2004)

By submitting Your Bid or Proposal, You are offering to enter into a contract with the Using Governmental Unit(s). Without further action by either party, a binding contract shall result upon final award. Any award issued will be issued to, and the contract will be formed with, the entity identified as the Offeror on the Cover Page.

BID ACCEPTANCE PERIOD (JAN 2004)

In order to withdraw Your Offer after the minimum period specified on the Cover Page, You must notify the Procurement Officer in writing.

Page 10 has a clause titled "Responsiveness/Improper Offers." It provides in part:

Offers which impose conditions that modify material requirements of the Solicitation may be rejected. If a fixed price is required, an Offer will be rejected if the total possible cost to the State cannot be determined.

On page 13 is a clause governing discussions and negotiations. It expressly contemplates that, notwithstanding any negotiations, the State may accept the vendor's original offer:

If negotiations are conducted, the State may elect to disregard the negotiations and accept your original proposal.

Page 25 includes a requirement that pricing in the offer be fixed:

FIXED PRICING REQUIRED (JAN 2006)

Any pricing provided by contractor shall include all costs for performing the work associated with that price. Except as otherwise provided in this solicitation, contractor's price shall be fixed for the duration of this contract, including option terms....

Excent included the following language in its Technical Proposal and its Price Proposal:

Excent is responding to your proposal request with current information about our software and services. **Please understand that this proposal response is not an offer, commitment, or contract.** Excent will only be bound by a separate, definitive, duly executed and delivered written agreement. **Due to possible changes in business direction or for any other reason or no reason, Excent may (at any time, without penalty or obligation) update, otherwise modify, or withdraw this proposal response, or choose not to engage in or withdraw from any associated negotiations.**

Excent Technical proposal at page iv (emphasis added).

Excent is responding to your proposal request with current information about our software and services. **Please understand that this proposal response is not an offer, commitment, or contract.** Excent will only be bound by a separate, definitive, duly executed and delivered written agreement.

Excent Price Proposal at page ii (emphasis added).

Under these terms Excent can decline to honor the proposal at its whim, and at any time. It has expressly denied having made an offer at all; it has refused to hold the offer open for the time period required in the RFP; and it has declined to accept any of the terms in the RFP unless subsequently negotiated in a separate contract documents. These conditions clearly “modify material requirements of the Solicitation.” Equally as important, there is no firm price offer. The terms of the RFP require that any offer from which “the total possible cost to the State cannot be determined” must be rejected. By any measure Excent’s proposal is non-responsive to the solicitation and should not have been considered for evaluation.

2. CORE

Paragraph 3.7.1 of the solicitation requires:

The vendor must provide sufficient training to districts. The training must encompass all aspects of the solution. Individuals in districts will attend the training and must be trained to train additional individuals once they return to their perspective districts (Train-the-trainer approach). Training manuals must be provided to the train the trainers....

Solicitation, page 17. Amendment 2 answered a number of questions posed by prospective offerors, and included this colloquy:

2. Items 3.7.1 and 3.7.2 indicate the requirements for training to include a train-the-trainer approach and training for up to 60 SCDE staff members as well as some unidentified number of district trainers.
 - How many trainers will be trained from the 84 districts? How many total trainers will be trained?

ANSWER: Trainers will be trained either regionally or in individual districts. We expect each district to send a minimum of two staff members to train, with a maximum of four staff for larger districts.

(emphasis in original.) The terms of Amendment 2 make clear that the successful contractor must provide training for well over 200 people: sixty Department employees and at least 168 local district personnel (a minimum of two from each of 84 districts).

CORE wrote this tendering text in its Price-Business Proposal:

Professional Development – 100 hours of on-site Professional Development provided to State and District personnel in Train-the-Trainer model and appropriate training materials **for approximately 100 trainees.**

CORE Business and Price Proposals at 69 (emphasis added). By offering to train only half the required personnel as required by the RFP, CORE imposed conditions limiting its obligations to the State.

The solicitation also required configuration and customization of the software to meet specific South Carolina requirements. Solicitation at 15, ¶3.1.12. Offerors were to submit a total fixed cost to include all aspects of the work, broken down by year. *Id.* at 19. And the RFP included, on page 25, the “Fixed Pricing Required” provision quoted above.

CORE identified a fixed amount for “Customization – Modification of solution for South Carolina (incl. development of custom reports, custom data cubes, SC-specific IEP and related forms, lookup codes, etc.)” However, it qualified that price with the following note:

Initial customization based on expected functionality and may be modified based on actual required functionality. Level of customization expected and required may modify first year costs.

As it did with the training requirement, CORE qualified its price offer by modifying the customization requirement in the RFP.

Another section of the solicitation required offerors, if the offer involves the licensing of software by the State, to submit “all licensing agreements applicable to that software.” Solicitation at 33. In response CORE attached a copy of its “General Terms and Conditions.” A single paragraph in those terms deals with licensing software. The remaining three pages of contract boilerplate conflicts in many instances with the solicitation requirements, and expressly seeks to limit CORE’s liability to the State; to require the State to indemnify CORE against loss; to impose both the law and the judicial forum of New York for the resolution of any disputes.

Each of these features in CORE's proposal "modify material requirements of the Solicitation." The limitations on training and customization make it difficult, if not impossible, to determine "the total possible cost to the State." By the terms of the RFP the proposal is non-responsive.

3. PCG

PCG attached to its Bidding Schedule two pages of "Pricing Assumptions." PCG Bidding Schedule, page 4. Some of the twenty-six items listed under Pricing Assumptions merely restate limitations already included in the solicitation and amendments. Others, however, limit the functionality required by the RFP

Paragraph 3.1.12 of the RFP required:

The solution must be customized according to South Carolina regulation, policies, and practices. South Carolina State Board regulations 43-243 and 43-243.1 currently address the needs of special education. Other information on policies, practices and procedures may be accessed at: <http://ed.sc.gov/agency/programs-services/173/>. The amount of customization may vary, depending on what is currently available in the product. The entire IEP form may need to be customized or merely parts. The other documents and data collection parameters may also require customization.

PCG included this assumption:

11. Following initial set up and configuration, PCG is providing the SCDE a bank of 750 hours for custom development. The SCDE will have the flexibility to use these hours for any changes to the user interface, documents or reports creation allowed by the system architecture. These hours must be utilized by the end of the year 2 of the contract.

Paragraph 3.1.6 of the RFP placed no limit on the amount of existing data to be imported into the new system. It required:

The successful offeror must work with the current vendor to migrate data from the old solution to the new one. The data includes placement history and IEPs housed in the current solution.

Paragraph 3.2.15 explicitly required storage of historical data and the export or uploading of documents in digital form. It included no limitation as to size or monthly volume.

Student case file storage, including historical information and scanned documents, for team sharing and review.

PCG added these assumptions:

13. Basic demographic data from legacy special education system (student disability, eligibility date, annual review date, IEP placement, services) will be imported into PCG platform for use in PCG proposed special education module. Not more than 12 months of data will be imported for any student.

15. PCG will migrate the most recent year IEP document available in the following formats of pdf, word, and text for all currently active special education students.

16. Includes use of paperclip uploading functionality with capacity limits of 15GB per month.

Paragraph 3.6.1 required year-round telephone support from the hours of 7 a.m. to 6 p.m. EST, Monday through Friday. PCG excluded federal holidays in assumption no. 24. Since the State does not observe the same holidays as the federal government it would be without support on some days.

By qualifying its price on conditions contrary to requirements of the solicitation PCG made its proposal non-responsive.

ANALYSIS

Section 11-35-1410(7) defines a responsive offeror as “a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.” Each of the proposals ranked highest by the evaluators fails to meet the statutory standard for responsiveness. The procurement officer overlooked the deficiencies described above and committed administrative error when submitting the proposals to the evaluators.¹

¹ Prior to changes to the Code and Regulations in 2006 and 2007 respectively, proposals received in response to a RFP had to be accepted unconditionally and without alteration. The law was modified to allow for clarification of all deficiencies in a proposal that would result in its rejection as non-responsive, resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions, resolve in writing suspected mistakes and allow the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal if that proposal was determined to be reasonably susceptible of being selected for award. While all three proposals could have been made acceptable through the application of Section 11-35-1530(6) and Regulation 19-445.2095(I), the procurement manager, in her discretion, chose not to enter into discussions for the purpose of correcting these and

In light of the fact that none of the proposals under consideration for award are eligible for award, the solicitation should be cancelled pursuant to Code Section 11-35-1520(7) and Regulation 19-445-2085(C)(7) and (8):

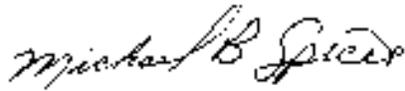
After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:

(7) Administrative error of the purchasing agency discovered prior to performance, or

(8) For other reasons, cancellation is clearly in the best interest of the State.

DETERMINATION

Solicitation 5400004448 is cancelled.



Michael B. Spicer
Chief Procurement Officer for Information Technology

similar issues. As noted by the Procurement Review Panel in *Protests of Qualis Health et al.*, Panel Case No. 2010-4, once the proposals have been evaluated and ranked, it is too late for such clarification, and allowing it after those stages would be unfair to the other offerors.

STATEMENT OF RIGHT TO ADMINISTRATIVE REVIEW

Written Determination Appeal Notice (Revised January 2013)

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b) states:

- (1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:
- (b) requests for review of other written determinations, decisions, policies, and procedures arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

Copies of the Panel's decisions and 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: Requests 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 2011 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 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.” 2011 S.C. Act No. 73, Part IB, § 83.1. 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 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.

Exhibits-CPO Determination

1. Solicitation No. 5400004448, July 5, 2012
2. Amendment No. 2, August 8, 2012
3. Excent Technical Proposal, September 11, 2012
4. Excent Price Proposal, September 11, 2012
5. CORE Business and Price Proposals, September 11, 2012
6. Public Consulting Group Business Proposal, September 11, 2012