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Protest Decision

Matter of:	Truven Health Analytics LLC
Case No.:	2017-204
Posting Date:	March 27, 2017
Contracting Entity:	South Carolina Department of Health & Human Services
Solicitation No.:	5400011337
Description:	Services to Support a Business Intelligence System

DIGEST

Protest of an award alleging that the apparent successful offeror was non-responsive, and the evaluation was arbitrary and capricious, is denied. Truven Health Analytics' (Truven) amended letter of protest is included by reference. [Attachment 1]

AUTHORITY

The Chief Procurement Officer conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4), including a brief telephone conference with the parties and counsel on March 22, 2017. This decision is based on the procurement file and applicable law and precedents.

BACKGROUND

The South Carolina Department of Health & Human Services (HHS) issued this Request for Proposals on June 1, 2016, under a delegation from the Chief Procurement Officer (CPO). HHS seeks offers for the acquisition of, and services to support, a Business Intelligence System. Truven is the incumbent contractor. HHS received five proposals by August 30, 2016. After evaluation and ranking, SAS Institute, Inc. (SAS) was determined to be the most advantageous responsible offeror and, after negotiations, HHS issued an Intent to Award to SAS on December 30, 2016. Truven filed a timely protest on January 9, 2017, and amended the protest on January 17, 2017.

Event	*Date*
Solicitation Issued	06/01/2016
Amendment 1 Issued	06/23/2016
Amendment 2 Issued	06/24/2016
Amendment 3 Issued	07/18/2016
Proposals Received	08/30/2016
Final Ranking of Proposals	11/04/2016
Record of Negotiation Signed	12/08/2016
Intent to Award Issued	12/30/2016
Initial Protest Received	01/09/2017
Amended Protest Received	01/17/2017

ANALYSIS

Truven raises eight numbered issues of protest. Its first issue alleges thirteen instances where Truven claims SAS' proposal was non-responsive. Subpart "a" of the first numbered issue of protest and issues 2, 3, 4, 5, and 6 all rely on the same set of facts and will be addressed first. Then the remaining subparts of the first issue will be addressed followed by numbered issues 7 and 8.

The initial set of protest issues revolve around the failure of SAS to designate two implementation milestones in its initial proposal as "major milestones." This project is to be executed in three phases: implementation phase, operations phase, and turnover phase. In part,

Offerors were to propose a project plan and schedule for the implementation phase of their proposed solution to include Milestones and Deliverables.

3.7.1 Offeror-Proposed Schedule

Offerors shall propose the schedule and project plan for the Implementation Phase including dates for Milestones and Deliverables.

[Solicitation, Page 52] Offerors were advised to propose realistic project schedules and that the dates for the milestones, deliverables, and operational start date would be contractually binding:

3.7.3 Contractually Binding Dates

Dates for the Milestones and Deliverables, including the Targeted Fully Operational Start Date, are contractually binding and will be used in the calculation of damages as applicable.

Offerors were advised to designate two of the implementation phase milestones as major milestones. Failure to meet a major milestone would result in the State withholding up to four percent of the cost of the implementation phase until the next major milestone was met or the project is operational:

3.5.1 Implementation Phase Incentives

SCDHHS will apply negative incentives to timely acceptance of Milestones during the Implementation Phase. In order for SCDHHS to accept a Deliverable or Milestone, the Deliverable or Milestone must meet its requirements, and all identified Defects must be repaired. Timeliness of Deliverables is measured based on the date the Contractor submits a Deliverable that is free of all material Defects and is subsequently accepted by SCDHHS.

The Offeror shall identify in their Proposal two major Implementation phase Milestones, in addition to the implementation of the final component of the system; these milestones should be fairly evenly spaced out over the Implementation phase timeframe. For each week, or partial week, that a major Milestone is missed SCDHHS shall withhold one-half (1/2) of 1% of the total Implementation phase price up to a maximum of four percent (4%) per major

> Milestone.[1] The withheld funds will be returned to the Contractor when the succeeding major Milestone is accepted by SCDHHS.

 [Solicitation, Page 50] (emphasis added)

Offerors were also instructed to complete implementation phase Pricing Table A, identifying up to 36 milestones, including a total fixed price for each milestone, the month during which the milestone is to occur, and an asterisk if the milestone is a major milestone as described in RFP section 3.5.1. [Solicitation, Page 140]

Section 8.5 of the Solicitation sets out the payment terms and invoicing instructions.[2] Paragraph 8.5.3 covered invoicing for fixed price work:

> The Contractor shall invoice the Department monthly for payment associated with the fixed price Work at the applicable amounts set forth in the Contractor's Proposal. The Contractor shall invoice the Department for Implementation Phase Milestones after they have been accepted by the Department.[3]

[Solicitation, Page 144] (emphasis added)

SAS submitted its proposal on August 30, 2016, including an implementation project plan, schedule and Pricing Table A, identifying eight milestones with the last designated by an asterisk as a major milestone. The procurement officer entered into discussions with SAS under Section 11-35-1530(6) and Regulation 19-445.2095(I) on September 28, 2016. Under these provisions, Offerors are afforded the opportunity to amend their proposals to the extent uncertainties,

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[1] Despite this language, the Pricing Table incorporates a formula which calculates the withholding as a percentage of the "major milestone" payment, not the total price for the Implementation phase.

[2] It is not clear why these provisions appear in Part 8 of the RFP. Since they are performance terms of the resulting contract, they should have been published in Part 7B.

[3] The emphasized language in paragraph 8.5.3 obviates the need for negative incentives during the implementation phase, as described in paragraph 3.5.1. Under paragraph 8.5.3, the contractor is entitled to payment only after a milestone or deliverable has been accepted by HHS. If the contractor fails to achieve a major milestone (or, for that matter, any milestone), it is not entitled to be paid. There would be no payment from which to withhold. Only after HHS acceptance should payment be made. The result is the same if there is some "withholding" pursuant to paragraph 3.5.1: once HHS accepts the major milestone, it must pay the withheld amount.

suspected mistakes, and issues of responsiveness are identified by the procurement officer. [4] The

procurement officer did not identify the missing major milestone designation at that time.[5] The

evaluators completed their scoring on November 3, 2016. Negotiations with the highest ranking

Offeror, SAS, began on November 21, 2016. During negotiations SAS' Pricing Table A was

significantly modified by changing the price for each of the milestones and reducing the total

implementation cost from $19,500,000 to $15,000,000. On November 29, 2016, the procurement

officer acknowledged receipt of a revised Pricing Table A that she had orally requested[6] from

SAS identifying two major implementation milestones by adding asterisks beside milestones

three and five and removing the asterisk by milestone eight. (Attachment 2) No other

information on Pricing Table A - the contract month for performance, pricing, payment

percentage, amount to be withheld or totals - was changed. Although this was a revision to the

original SAS Pricing Table A, it did not reflect the modifications made during negotiations.

Negotiations were finalized and memorialized on December 8, 2016. An Intent to Award was

posted to SAS on December 30, 2016.

Truven argues that the identification of two of the implementation milestones as major

milestones was a material requirement of the solicitation in part because of the penalties to be

assessed for failure to meet the major milestones during implementation.

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[4] Regulation 19-445.2095(I) Discussions with Offerors, allows for limited revisions to an offerors proposal, but only to the extent that deficiencies, uncertainties, or suspected mistakes are identified to the offeror by the procurement officer. The procurement officer may:

    (b)   Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;

    (c)   Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;

    (d)   Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.

[5] In her discussions correspondence, the procurement officer pointed to SAS' failure to provide a complete list of failed projects, suspensions, debarments, and significant litigation, as a potential reason for rejection as non-responsive. As identified in the solicitation, the requested information goes to the determination of responsibility as required by Section 11-35-1810, and can be requested at any time prior to award. Requesting this information through discussions was unnecessary.

[6] There is nothing in the record provided to the CPO to indicate a legal basis for this requested change. Requesting or authorizing a change to an Offeror's proposal should be documented. Conducting public procurement activities through oral communications is poor practice and, in some instances, may violate the Code.

The Procurement Review Panel addressed the issue of the materiality of a requirement in *Appeal by Coastal Rapid Public Transit Authority and Anderson-Oconee Council on Aging*, Panel Case No. 2000-4:

> A "responsive bidder or offeror" is defined in § 11-35-1410(7) as "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or requests for proposals." Section 11-35- 1520(13) of the South Carolina Consolidated Procurement Code provides for the waiver or curing of minor informalities and irregularities in bids and proposals. That section provides in relevant part:
>
>> A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State.
>
> Section 11-35-1520 then sets forth a non-exclusive list of examples of minor informalities or irregularities.
>
> The Panel has read these two sections of the Procurement Code together to arrive at the following conclusions:
>
>> In order to be responsive, a proposal need not conform to all of the requirements of the RFP; it must simply conform to all of the essential requirements of the RFP....[B]ecause the Code requires rejection of a proposal when it fails to meet an essential requirement but allows waiver of an immaterial variation from exact requirements, a requirement is not "essential" if variation from it has no, or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured. Waiver or correction of a variance from such a requirement is appropriate under the Code when relative standing or other rights of the bidders are not prejudiced.
>
> *Protest of National Computer Systems, Inc*., Case No. 1989-13.
>
> In the National Computer case, the Panel determined that a requirement is not "essential" simply because the RFP states that it is mandatory.

(footnotes omitted).

In *Appeal by PS Energy*, Panel Case No. 2002-9, the Panel offered the following caution:

> The Panel takes this opportunity to reiterate it's *[sic]* statement in Protest of Gregory Electric Company, Case No. 19-89-17(II) and once again cautions the State's procuring agencies to review solicitation documents carefully to insure that only essential requirements are stated in absolute or mandatory terms so as not to [reduce] the effect of such language upon the [offerors].

In *Protest of National Computer Systems, Inc*., Panel Case No. 1989-13 the Panel observed:

> The Code is purposely designed to achieve a balance between the need for procuring products and services at the lowest possible price and the need for competition and fair and equitable treatment of all vendors. Unfettered discretion in a procuring agency would bode a return to the pre-Code days when purchasing was for the most part subjective. Too little discretion and too much rigidity in interpreting requirements would result in the intolerable situation of the State's paying more (in this case $1,100,000 more) because of minor technical errors. It is the intent of the Panel in this case to leave intact this delicate balance. The discretion to waive noncompliance with bid requirements is still limited and should be judiciously exercised with the above in mind.

In its initial response, SAS listed eight payment milestones, marking the eighth with an asterisk. It did not designate two major milestones "fairly evenly spaced out over the Implementation phase timeframe." Nevertheless, HHS evaluated the offers, including SAS's proposal and determined SAS to be the highest ranked Offeror. After opening negotiations with SAS, the procurement officer requested SAS designate two major milestones on Pricing Table A. She requested no other changes to Pricing Table A.[7]

The procurement officer did not identify the lack of a second major milestone during discussions or as a minor informality as provided for in Section 11-35-1520(13).[8] While the authority for her

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[7] The milestone pricing on Pricing Table A was significantly modified during negotiations.

[8] Section 11-35-1520(13) Minor Informalities and Irregularities in Bids. A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing.

late November request may be unclear, the procurement officer did not permit SAS to amend its pricing or any of the milestone dates. Because the State's payment obligations were expressly conditioned on its acceptance of milestones or deliverables, SAS' failure to achieve a milestone would result in no payment at all. And, once the missed milestone were accepted (or the implementation phase completed), the State would owe the entire fixed price for that milestone. In either event, SAS' failure to designate two major milestones did not affect the price to the State for the Implementation phase. Finally, Truven articulates no prejudice because of the missing designation. The omission of a single asterisk had no effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of the omission was not be prejudicial to bidders. That the procurement officer failed to document a waiver or cure of the minor informality is unfortunate, but irrelevant. *See Appeal by PS Energy*, Panel Case No. 2002-9 ("The Panel finds that the CPO's decision satisfies the writing requirement of §11-35-1520 (13)….")

Truven protests that the designation of the implementation milestones was a mandatory requirement of the solicitation and the failure to correct this omission prior to final ranking disqualified SAS as non-responsive is denied.

Truven's second numbered issue of protest is that SAS' failure to designate major milestones effectively limited the State's rights in the event of nonperformance, mandating rejection of the proposal at the outset. As stated above, the missing designation of a major milestone was a minor informality and properly cured as provided for by the Code. Since the State was not obliged to make any payment to the contractor until after acceptance of a milestone, its remedies for nonperformance were unaffected. *See also* note 3 and accompanying discussion, *ante*.

To the extent Truven claims SAS' failure to designate amounts to an implied exception to the withholding requirement, it also fails. SAS submitted a signed cover page with its proposal [SAS Technical Proposal, ninth page (not sequentially numbered)] Above its authorized signature, the cover page provided, "By signing, You agree to be bound by the terms of the Solicitation." The solicitation provided in Section 4.1.1:

> Submission of a Proposal shall constitute recognition, understanding, acceptance, and consent by the Offeror to adhere (without any reservation or limitation whatsoever) to the requirements, terms, and conditions of this RFP, including any RFP amendments. This consent to adhere to requirements shall also apply to the use of all forms and tables of this RFP. Offerors are not required to repeat each RFP requirement in their responses in order to be found responsive.

[Solicitation, Page 86] (emphasis supplied). Similarly, Section 4.2.1 reads in part, "By submitting a Proposal, Offerors agree to the requirements in the RFP…." SAS took no exception to the withholding requirements of Section 3.5.1. By signing its proposal it accepted the State's terms. This issue of protest is denied.

Truven's third numbered issue of protest is that SAS' proposal was not eligible for clarifications, discussions or negotiations because its proposal did not provide the required Major Milestones, and it could not be lawfully "cured". As stated above, the missing designation of a major milestone was a minor informality and properly cured as provided for by the Code. This issue of protest is denied.

Truven's fourth numbered issue of protest alleges that the State improperly allowed SAS so much latitude in its deficient "response" that SAS was effectively allowed to submit an "amended" proposal long after the deadline for proposal submission. To the extent that this issue of protest relies on the revision to SAS' Pricing Table A, which was the only known amendment to SAS' proposal, the modification was a minor informality properly cured under the Code. This issue of protest is denied.

Truven's fifth numbered issue of protest alleges that DHHS improperly attempted to allow SAS to submit a change, correction or clarification of its proposal without the proper procedures and after the time for any clarification had passed, in violation of governing laws, regulations and published written policies. As stated above, the revision to SAS' Pricing Table A, which was the only known amendment to SAS' proposal, the modification was a minor informality properly cured under the Code. This issue of protest is denied.

Truven's sixth numbered issue of protest alleges that the State's "clarification" of SAS' Proposal after final scoring, ranking and after negotiations was legally defective in that it failed to meet

the requirements for even a properly timed clarification. As stated above, the change in Pricing Table A from one asterisk to two asterisks without any additional changes to milestones, time or pricing is a minor informality having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which was not be prejudicial to bidders. This issue of protest is denied.

The second subpart of Truven's first issue of protest alleges that SAS failed to propose the required Contract Deliverables and Contract Data Requirements. Truven argues in part 1(b) of its amended protest:

> The RFP provided as follows:
>
>> Offerors shall propose the schedule and project plan for the Implementation Phase including dates for Milestones and Deliverables.
>
> RFP, § 3.7.1. The RFP further provided that:
>
>> Offerors shall propose Contract Deliverables via the Contract Data Requirements List (CDRL). Unless otherwise specified in this Contract, the format of the Deliverables shall be chosen by the Contractor, subject to approval by the State.
>
> RFP, § 3.13.3. The RFP defined the CDRL as follows:
>
>> The Contract Data Requirements List (CDRL) is a list of contract data requirements that are required by this Contract.
>
> The RFP identified 27 data requirements. *See* RFP, Attachment I, pp. 174-188. SAS did not propose Contract Deliverables via the CDRL as required. Further, SAS' plan only shows 4 of the 27 Plans or deliverables required. The plans are not classified as Deliverables in SAS' project plan. The 4 plans identified in the schedule do not reference the CDRL Reference numbers from Attachment I of the RFP, adding to the lack of clarity and incompleteness of the project schedule. Additionally, SAS' Technical Proposal does not have any reference to CDRLs as required by the RFP.

The solicitation did not request a point-by-point affirmation of compliance with each of its requirements. In fact, it specifically discouraged offerors from this approach: "Offerors are not required to repeat each RFP requirement in their responses in order to be found responsive." [Solicitation, section 4.1.1, Page 86] While SAS did not propose contract deliverables via the

CDRL, it did commit in its transmittal letter to provide all required data sets and reports as follows:

> SAS will implement this solution with four (4) major deliverables, leveraging our expertise in each area in order to maximize impact for SCDHHS:
>
> **Data Management**
>
> The compilation and resolution of all required data sets provided by SCDHHS becomes the "source of truth" for the state. This will be the foundation from which actionable output can be created with utmost confidence in the findings.
>
> **Compliance and Reporting**
>
> Surveillance and Utilization Review Subsystem (SURS), Payment Error Rate Measurement (PERM), Management and Administrative Reporting System (MARS) and Transformed Medicaid Statistical Information System (T-MSIS) reports as defined by CMS (Centers for Medicare & Medicaid Services) are automatically generated as required for state compliance by SAS' Reports and Analytics capabilities.
>
> Decision Support System (DSS) results not only meet SCDHHS requirements, but will also provide unique results by leveraging SAS' analytics systems with financial reporting and forecasting capabilities second to none. SAS has extensive experience providing forecasting, modeling, and budgeting analytics at all levels within an organization, from the CFO to a super-user analyst. SCDHHS will be able to leverage the same system SAS clients, such as VISA use where on an annual basis $4.7 billion transactions are analyzed, predictive models are applied, and financial forecasting and budget results are created. This one client example typifies SAS' abilities to not just deliver a DSS system, but also provide a comprehensive enterprise perspective on all claim and financial behaviors and impact.

The contract resulting from this solicitation will include the solicitation and all amendments and attachments one of which is the CDRL. SAS proposed a schedule and project plan for the Implementation Phase including Milestones and Deliverables which was reviewed and modified during negotiations. The schedule and project plans were not separately evaluated but considered in conjunction with other supplied information during the evaluation. SAS agreed to provide all the CDRL deliverables and its failure to list contact deliverables via the CDRL is a minor informality. This issue of protest is denied.

The third subpart of Truven's first issue of protest alleges that SAS did not propose a User

Acceptance Test (UAT) meeting the mandatory requirements of the solicitation. Truven argues:

> While the RFP required a 65 business day (roughly 3 month) UAT, SAS only proposed a 39 business day (roughly 7 weeks) UAT period. As shown on SAS' Project Schedule, SAS identified UAT test plan periods for each for the Decision Support System ("DSS"), Surveillance and Utilization Review Subsystem ("SURS"), Payment Error Measurement ("PERM"), Management and Administrative Reporting System ("MARS") and Transformed Medicaid Statistical Information System ("TMSIS"), *happening in parallel for each solution and iteration. See* SAS Project Schedule, DSS Task # 101, 109, 117; SURS – Task # 129, 137, 145; PERM – Task # 157, 165, 173; MARS – Task # 185, 193, 201; TMSIS – Task # 213, 221, 229.

> Further, SAS's proposed UAT does not exclude any fix/re-test period as required. There is no task identified in the project schedule for fix/retest. According to SAS' proposed schedule, once "UAT" is completed, the next task seen on the schedule is "Deploy." *See* SAS Project Schedule, DSS Task # 118; SURS – Task # 146; PERM – Task # 174; MARS – Task # 202; TMSIS – Task # 230.

The solicitation requirement is as follows:

3.22.4 State-Centric Testing

> User Acceptance Testing (UAT) will not be a repetition of system testing. While targeted verification of Contractor test results is likely, particularly for high risk areas, UAT will be geared toward execution of operational scenarios. While these tests, like any other disciplined test, will require planning and structure, they will frequently not be step-by-step, scripted tests. It is not possible to understand how a system will react to "real" users without letting these users exercise it the way they plan to do on a daily basis. Additionally, since training for a complex new system is crucial, the failure of the user-testers to be able to perform required functions will be a clear indication of problems in the system, its documentation, or the training that has been provided.

> The Contractor shall plan for a sixty-five (65) business day (roughly three [3] months) final UAT, not including any fix/re-test/regression test cycles.

[Solicitation, Page 74]

Historically, software development projects have followed a "waterfall" approach, where

requirements are fully defined and documented in detail before any testing or other customer

input. This methodology has suffered a low rate of success. When it does succeed, it often results in a high incidence of paying for features that never are used.[9] Newer approaches include agile and modular development. Agile describes an iterative and incremental process that requires close collaboration between the customer and software developer, and that focuses on keeping code simple, testing often, and delivering functional bits of an application as soon as they are ready. Modular contracting acquires information systems in successive, interoperable increments to reduce overall risk and support rapid delivery of incremental new functionality. The Centers for Medicare and Medicaid Services (CMS) has updated its Enterprise Certification Toolkit. CMS now encourages and supports modular and agile development.[10]

The solicitation itself reflects this trend. It specifically refers to the revised MECT. [Solicitation, Page 5] It acknowledges an offeror's ability to propose (and CMS' willingness to accommodate) modular development methodology:

> An unusual aspect of System Certification for this project is that the MMIS and supporting operations may be deployed incrementally. The State has received permission from CMS to do a modular System Certification, if required, supported by "regression System Certification" activities to ensure that previously certified areas remain properly functional.

[Solicitation, § 3.17, Page 60]

SAS' proposal evidently chose this approach. It adverts to SAS' strict adherence to agile development methodology. Both the "swimlane" graphic and the project schedule plainly contemplate separate, albeit concurrent, development of five components or modules, beginning with the Decision Support System (DSS) module. SAS' schedule explicitly describes three iterations of code release for each component, with user acceptance testing following each

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[9] Less than one-third of waterfall procurements (28%) succeed. CRAIG LARMAN, AGILE AND ITERATIVE DEVELOPMENT: A MANAGER'S GUIDE 101(2001). Only 20% of features are used often, 30% get used only sometimes or infrequently and 50% are almost never, if ever, used. THE STANDISH GROUP, INC., THE CHAOS MANIFESTO 2013, at 2, available at http://www.immagic.com/eLibrary/ARCHIVES/GENERAL/GENREF/S130301C.pdf (last viewed March 24, 2017).

[10] *See* introduction to the Medicaid Enterprise Certification Toolkit (MECT), available at https://www.medicaid.gov/medicaid/data-and-systems/mect/index.html (last viewed March 24, 2017).

iterative release of each component. [The schedule appears beginning at the 150th page of the

SAS Technical Proposal (not sequentially numbered)] If all the User Acceptance Testing

activities in the SAS schedule are added together, there are twenty-eight weeks allocated, or

approximately 140 business days. SAS also responded to the UAT requirement as follows:

> SAS will work with SCDHHS to define an appropriate process for managing user acceptance testing. Effective acceptance management involves all stakeholders, including the project team and end users. Acceptance is a gradual process occurring throughout the project rather, than a one-time event at the end of the project. A series of small controlled acceptances of life cycle phases, milestones, or work products leads to total acceptance of the final system.

[SAS Technical Proposal, Page 36]

The CPO elicited comment from the parties' business and technical staff on the UAT issue.

Valerie Stribling, Truven's project manager, and Nilay Patel, its technical lead, pointed out that

the DSS module must be completed before the other components can be tested. Bryan Miles for

SAS responded that development of the DSS begins about a month before the other modules.

According to Miles, the DSS only needs sufficient functionality to support the features involved

in the early iterations of development of the other modules. Ms. Stribling also noted that the

iterative testing cycles would necessarily include some fix or retesting. The solicitation

specifically excludes that testing from the total. Mr. Miles responded that, even if you omitted an

entire iteration's testing from each module, there still remains about one hundred total UAT

days, more than the solicitation required.

The solicitation required that the proposed solution address five functional areas: a Decision

Support System (DSS), a Surveillance Utilization Review Subsystem (SURS), a Transformed

Medicaid Statistical Information System (T-MSIS), a Management Administration Reporting

Subsystem (MARS), and a Payment Error Rate Measurement (PERM) system. According to

SAS' project schedule, [SAS Technical Proposal, Page 127], SAS proposed to develop and test

its solution to each functional area in three successive iterations with a two work-week UAT

period at the end of each iteration. On its face, the SAS proposal and schedule includes more than the minimum number of test days required by the RFP. This issue of protest is denied.[11]

The fourth subpart of Truven's first issue of protest alleges that SAS failed to meet proposal requirements for training users for User Acceptance Testing. Truven argues:

> The RFP required the Contractor to plan for a 65 day User Acceptance Test ("UAT") period, not including any fix, re-test, or regression testing:
>
> > The Contractor shall plan for a sixty-five (65) business day (roughly three [3] months) final UAT, not including any fix/retest/regression test cycles.
>
> RFP, § 3.22.4.
>
> ***
>
> The RFP required user training be completed prior to User Acceptance Training:
>
> > The Contractor shall provide training to State testers in advance of testing. Because UATs will evaluate the quality of training and user documentation, this training and documentation shall be production-ready prior to UAT.
>
> By the time the BIS is ready to be deployed, the Contractor shall have completed the entire training package. Offerors shall propose a strategy that provides comprehensive and manageable training that minimizes unnecessary duplication.
>
> RFP, § 3.23.3.
>
> ***
>
> SAS' proposed project plan at task # 76 states that SAS will deliver Training to UAT Group from 11/17/2017- 11/27/2017. *SAS's proposal does not state any other period of UAT User training*. SAS' proposed dates for UAT User testing **POST-DATES** the actual UAT. This proposal by SAS for training the UAT Testers will result in the "the failure of the user-testers to be able to perform required functions," since SAS has proposed UAT Testing from 7/26/2017-

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[11] It is not clear why HHS set a minimum of 65 days for UAT. The RFP otherwise reads similar to a solutions-based solicitation, beginning with its use of a "Statement of Objectives" rather than a traditional scope of work. If HHS wants to invite vendors to propose innovative approaches to solving its business problems, it should de-emphasize specific requirements in favor of the high-level statements expressed as objectives. Otherwise, it may create apparent responsiveness issues where none actually exist.

> 8/8/2017 and 10/13/17-10/26/2017. These dates are almost 4 months and 1 month *ahead* of the actual UAT Group training that SAS has proposed. This will result in a failure to do UAT since the Test Users would not have been trained across the 5 different systems that is expected to be tested during this 4-week window.

SAS proposed to implement this project through three successive iterations of each component, with UAT at the end of each iteration and final deployment after UAT of the third iteration. During the parties' telephone conference, Bryan Miles also noted that SAS's schedule contemplates "Baseline System Overview Training" in January and February 2017, a full month before any UAT. . [Schedule Activity ID 59, 151st page of the SAS Technical Proposal (not sequentially numbered)] Truven protests that the solicitation required all training to be completed prior to UAT of the first iteration. That is not what the RFP requires. The "entire training package" had to be completed "by the time the BIS is ready for deployment." [Solicitation Page 76] The training required for testers was necessarily different, since the full functionality of the system would not be known until UAT was nearly complete. SAS proposed to deliver "baseline system overview training" to the users involved in acceptance testing beginning two months prior to any UAT. It planned to complete all training for the UAT group from November 17, 2017 through November 27, 2017, prior to UAT and deployment of the final iteration in December of 2017. This issue of protest is denied.

The fifth subpart of Truven's first issue of protest alleges that SAS did not meet the requirement to provide three full-time employees on site. Truven argues:

Truven protests that SAS did not propose three full time employees on site at HHS as required by the solicitation:

> Beginning on the Actual Operational Start Date, the <u>Contractor must staff three full time Contractor staff on-site at SCDHHS' Columbia office</u> to be responsible for maintenance and creation of new reports and ad hoc reporting, support user query development and execution, and to provide subject matter expertise (SME) as needed.

[Solicitation, Page 48] (emphasis added)

SAS did not address on-site resources in its technical or business proposal. Truven points to SAS' proposed strategy for operations management as evidence that SAS will not provide the required on-site support:

> **The proposed strategy for operations management.**
>
> Post successful implementation and signoff from the SCDHHS Team, SAS will transition day-to-day support to the SAS Help Desk included as a part of the SAS proposal. SAS will provide up to five full time resources with intimate knowledge of the implementation to support the system during the operations phase.

SAS Proposal, p. 88.

The contract resulting from this procurement will consist of the solicitation and the offeror's proposal. The Offeror need is not required to indicate that it intends to meet every requirement listed in the solicitation. This issue of protest is denied.

The sixth subpart of Truven's first issue of protest alleges that SAS is not NIST compliant, putting the State's data at risk, and preventing the delivery of a NIST-compliant system as required.

The solicitation required:

> … The system may be hosted at the Offeror's physical location or in the "cloud".[12] If a cloud-based solution is proposed, the Offeror has the responsibility to prove that the solution complies with MARS-E 2.0 standards and hosted within the continental United States as required by Section 7.36 of this RFP.

[Solicitation, Page 71]

Solicitation Amendment 1 included the following question and the State's response:

> Q. 69. This solicitation states, "If a cloud-based solution is proposed, the Offeror has the responsibility to prove that the solution complies with MARS-E 2.0

---

[12] The RFP apparently drew a distinction between an offeror-hosted system, on the one hand, and one hosted in the "cloud," presumably with a third-party hosting service. By its terms the solicitation required offerors to establish compliance of a "cloud-based solution." It had no similar requirement for a system hosted on the contractor's physical location. Amendment 1purports to require a proposed cloud-based solution to be "fully NIST compliant."

standards…" MARS-E 2.0 refers to NIST 800-53 standards that it incorporates. Does the proposed solution have to be fully NIST compliant or does the solution only need to incorporate those NIST standards listed in MARS-E 2.0?

A. 69. Yes, the solution must be fully NIST compliant.

SAS proposed to host the BIS at its own facilities. *See, e.g.*, SAS Technical Proposal, page 94 ("SAS hosts 2,500+ managed servers and > 15 Petabytes of data under management"); Page 116 (figure showing top-level architecture). It included the following description of its hosting infrastructure:

> <u>A secure NIST 800-53 compliant environment will be deployed and leveraged for the proposed solution</u>, including disaster recovery. Authorized users will be able to seamlessly access the system via web browser and remote desktop (power users) to access reporting and analytical tools.
>
> SAS Software hosted by SAS provides the following benefits:
>
> ➢ Rapid Time to Value: rapid scalable hosting, customer focus culture, delivery model
> ➢ End-to-end Solution: Single point for software, implementation, mentoring, ongoing support & infrastructure, integrated approach for customers
> ➢ Expertise and Best Practices: Staff with unparalleled experience and best practices in hosting SAS Analytics, Reporting, and Data Warehousing solutions
> ➢ Secure and Scalable: SAS hosting can scale to support most customers' project needs in a secure and compliant manner

[SAS Technical Proposal, page 94] (emphasis supplied) This part of SAS' proposal explicitly meets the RFP requirement, with or without the "clarification" afforded by the State's answer to questions 69.

The RFP required offerors to complete a security assessment questionnaire, describing measures in place to protect the confidentiality, integrity, and availability of hosted government information. SAS' completed questionnaire spans twelve single-spaced pages. The fifth question asked for any reports or certifications demonstrating adequate security. At the bottom of the fifth page SAS wrote:

> As a part of this project, SAS is committing to reach NIST 800-53 compliance within one year of contract signature. While SAS benchmarks the hosting operations and software against NIST 800-53 today, SAS is committed to reaching full compliance.

[SAS Proposal, Page 18]

Based on these two sentences Truven argues that SAS is not "NIST compliant" and consequently non-responsive:

> NIST Compliance is a standard for government IT companies. The State indicated that their Sharepoint Site was preferred. Instead, SAS proposed the use of their portal, which introduces more risk since they will not be NIST compliant at the start of the project. The documents that are stored on SAS' site will not be secure or adequately protected against breaches as they will not be NIST compliant from the beginning of the project. In addition, compliance with the NIST standards and requirements certainly involves significant cost.[13]

---

[13] The procurement officer's response in Amendment 1, that a solution must be "fully NIST compliant," and Truven's statement that "NIST Compliance is a standard for government IT companies" both betray a fundamental misunderstanding of these standards.

NIST is the National Institute of Standards and Technology. Its 800 series of publications include scores of documents intended to guide federal agencies in complying with data security and privacy requirements. They are all part of a risk management framework that requires classification of data according to its sensitivity and adoption of "security controls," or specific protocols, to protect the data as appropriate to the risk of its loss or compromise. NIST Special Publication 800-53, now in its fourth revision, is a comprehensive compendium of those security and privacy controls. Its introduction describes it as:

> This publication provides a catalog of security and privacy controls for federal information systems and organizations and a process for selecting controls to protect organizational operations (including mission, functions, image, and reputation), organizational assets, individuals, other organizations, and the Nation from a diverse set of threats including hostile cyber attacks, natural disasters, structural failures, and human errors. The controls are customizable and implemented as part of an organization-wide process that manages information security and privacy risk. The controls address a diverse set of security and privacy requirements across the federal government and critical infrastructure, derived from legislation, Executive Orders, policies, directives, regulations, standards, and/or mission/business needs. The publication also describes how to develop specialized sets of controls, or overlays, tailored for specific types of missions/business functions, technologies, or environments of operation. Finally, the catalog of security controls addresses security from both a functionality perspective (the strength of security functions and mechanisms provided) and an assurance perspective (the measures of confidence in the implemented security capability). Addressing both security functionality and security assurance ensures that information technology products and the information systems built from those products using sound systems and security engineering principles are sufficiently trustworthy.

[NIST Special Publication 800-53, Page iii]

The solicitation asked offerors to describe the proposed security and privacy solution to include a general description of how the solution meets MARS-E 2.0:

> **Proposal Section B5. Security and Privacy Solution**
>
> This section shall include:
>
> • A description of the proposed security and privacy solution to include a general description of how the proposed solution meets MARS-E 2.0 requirements and other security- and privacy-related HIPAA requirements.
>
> • Any assumptions pertinent to the proposed security and privacy solution. Offerors are reminded to select assumptions carefully in order to avoid creating Proposal responsiveness issues.
>
> • How the Offeror plans to prepare for and participate in security audits.

The purpose of NIST 800-53 is further set forth as follows:

> The purpose of this publication is to provide guidelines for selecting and specifying security controls for organizations and information systems supporting the executive agencies of the federal government to meet the requirements of FIPS Publication 200, Minimum Security Requirements for Federal Information and Information Systems.

[NIST Special Publication 800-53, Chapter 1, Page 2]

SP 800-53 and its appendices include nearly 500 pages. It provides guidance and tools to protect federal information systems, a specifically defined term. There is no testing for a contractor to establish "compliance with NIST 800-53."

The State of South Carolina has developed an enterprise security policy that adopts many, but hardly all, of the security controls in SP 800-53. That policy makes clear, though, that individual agencies must modify, or "tailor," controls as appropriate for the type of information they collect and the risk of its loss. In similar fashion, the Centers for Medicare & Medicaid Services (CMS) developed its own subset of security controls designed to protect information typically collected by Medicaid administrators: Minimum Acceptable Risk Standards for Exchanges, or MARS-E 2.0. The security requirement published in the solicitation was for the proposed solution to comply with the MARS-E 2.0 standards.

CMS described the MARS criteria as:

> The purpose of MARS -E is to provide security information aimed to protect and ensure the confidentiality, integrity and availability of Personally Identifiable Information (PII), Protected Health Information (PHI) or Federal Tax Information (FTI) of enrollees of Administering Entities. MARS-E 2.0 is comprised of security updates that respond to the National Institute of Standards and Technology (NIST) updates and the evolving technology and threat space such as mobile and cloud computing, insider threat, applications security, advanced persistent threat, supply chain risks, trustworthiness, assurance and resilience of systems.

[https://www.medicaid.gov/federal-policy-guidance/downloads/cib-09-23-2015.pdf last viewed February 9, 2017.] NIST 800-53 provides guidelines for selecting and specifying security controls, not a prescribed set of standards. CMS and HHS established the security controls relative to this project by requiring compliance with MARS-E 2.0.

• Any other information pertinent to the security and privacy solution.

[Solicitation, Page 93]

SAS agreed to provide a NIST 800-53 compliant environment. In addition, the SAS proposal includes two pages describing the proposed security and privacy solution. SAS Technical Proposal, Pages 121-122. SAS took no exception to the security requirements, either NIST 800-53 or MARS-E 2.0. This issue of protest is denied.

The seventh subpart of Truven's first issue of protest alleges that SAS failed to meet the requirements of corporate skills and capabilities and failed to provide the required organizational chart for each phase as required.

Truven argues that the SAS response does not describe how the project organization will contribute to contract success and only provides one organizational structure for the entire project instead of an organizational structure for each phase of the project as required by the solicitation.

> The Offeror shall describe the general structure and capabilities of its company or of the business unit that will service this Contract. In particular, this subsection shall describe its corporate skills and background and how these will contribute to successful Contract performance and provide the greatest value to the State. RFP, Proposal Section E.1. SAS' Proposal does not describe how their corporate skills and capabilities will contribute to successful contract performances measured by the metrics described in page 123 of SAS response. *See* SAS Proposal, p. 138….
>
> RFP, Proposal Section C1. SAS response does not include project organization structure for each phase. There is only one project organization chart that has been portrayed as the project team. SAS response does not describe how the project organization will contribute to contract success. The page limit for the response of this section was 15 pages. SAS response was 3 pages, highlighting SAS' failure to meet the RFP requirements. *See* SAS Proposal, p. 130.

SAS reproduced the requirement for organization charts for each phase in section C1 of its proposal (pages 130 – 133) as follows:

C1. Overview and Organization (3 pages)

A description of the proposed organization for each Contract phase (Implementation, Operations, and Turnover). The Turnover Phase organization discussion should focus only on organizational difference from the Operations Phase.

Organization charts for each Contract phase identifying the general structure of the units performing Work. It is not necessary to include the level of detail illustrating individual workers.

All SAS projects are run through the Project Management Office (PMO). The PMO has established best practices and documentation consistent across all projects. The Project Management Methodology (PMM) was established based on successful project implementations….

This was followed by a single organizational chart. Since SAS acknowledged the requirements followed by a single organization chart implying a single organizational structure for all phases. The failure to reproduce the same organization chart three times would be considered a minor informality. This issue of protest is denied.

The eighth subpart of Truven's first issue of protest alleges that SAS failed to meet the required disaster recovery requirements.

Truven argues that the RFP required that the Offeror have redundant systems located in two different parts of the country:

> SAS does not have redundant systems and data located in two different parts of the country. Their proposal only indicates that the hosting location is at a distance greater than 150 miles. *See* SAS Proposal, pp. 14-15. Certainly, compliance with this disaster recovery requirement involves significant cost.

The solicitation required:

> • Have redundant systems and data located in two (2) different parts of the country in the event of a disaster.

[Solicitation, Page 62]

SAS stated that its redundant data hosting location would be at a greater geographical distance than 150 miles not that it was 150 miles distant:

> SAS solution includes redundant systems in place to support disaster recovery following accepted standard IT procedures, with the data hosting location at a greater geographical distance than 150 miles. SAS recognizes the State's goal of 99.99% uptime of the system with a minimum of 99.5% system availability. <u>SAS' solution will support the standards as outlined by the State in the RFP.</u>

[SAS Proposal, Page 14](emphasis added)

SAS clearly stated that it would support the standards as outlined in the solicitation and that its redundant facilities will be at least 150 miles apart. Truven has failed to prove that SAS' redundant facilities are not in different parts of the country. This issue of protest is denied.

The ninth subpart of Truven's first issue of protest alleges that SAS has proposed an unrealistic CMS certification date, thus putting the entire project at risk.

Truven argues that the RFP sets a goal of CMS certification within one year of the Actual Operational Start Date. Truven alleges that the schedule SAS proposed only allowed for a four day review and approval by CMS when typically this takes 6-9 months, that SAS proposed having the CMS review running concurrently for the entire project which it never does, and that SAS did not include details addressing the RFP requirements for CMS certification.

The solicitation states that

> **Implementation Phase** – this phase begins on the Contract Effective Date and extends until completion of the CMS System Certification and resolution of all identified system and operations Defects discovered prior to achieving CMS System Certification. This phase overlaps the Operations Phase.

[Solicitation, Page 46]

The solicitation put Offerors on notice that the milestones and deliverables, one of which is CMS Certification, are contractually binding:

3.7.3   Contractually Binding Dates

Dates for the Milestones and Deliverables, including the Targeted Fully Operational Start Date, are contractually binding and will be used in the calculation of damages as applicable.

[Solicitation, Page 53]

Offerors were cautioned to propose realistic project schedules:

3.7.2   Schedule Realism

The State believes that pursuing unrealistic schedule dates often results in a greater cost and a longer schedule due to potential quality issues and the premature reallocation of resources directed at transitioning. While minimizing the project schedule is an objective, Offerors shall propose realistic project schedules, and the selected Contractor shall continue this practice throughout the life of the Contract.

3.5   Contract Incentive Structure

Schedule and performance liquidated damages will be used for the Implementation Phase, and quality liquidated damages will be used for the Operations Phase. For the Implementation Phase, these liquidated damages shall be used in association with the Firm Fixed Price and Actual Operational Start Date; however, this shall not limit SCDHHS' remedies pertaining to this Contract.

The solicitation put Offerors on notice of the penalties attendant to failure to achieve CMS certification:

3.5.2   System Certification Withhold

In addition to any remedies available to the State, five percent (5%) of all invoiced Implementation Phase fixed costs shall be withheld. Any amounts withheld will be payable after successful completion of the CMS System Certification.

3.5.3   System Certification Damages

If CMS does not certify the system retroactive to the Actual Operational Start Date, the Contractor shall pay SCDHHS the difference between enhanced and non-enhanced federal funding for the period the system was deemed non-certified, to the extent such non-compliance is a result of inadequate performance or non-performance of the required services by the Contractor.

[Solicitation, Page 51]

SAS has provided a proposed implementation schedule with milestones and deliverables that was reviewed by the evaluators and revised during negotiation. SAS' ability to meet the proposed schedule and achieve CMS certification is a post award performance requirement with consequences and not an issue of responsiveness. This issue of protest is denied.

The tenth subpart of Truven's first issue of protest alleges that SAS failed to comply with the requirement to identify tasks in the Operations Phase.

Truven points to requirement 3.4.6 of the solicitation and alleges that SAS failed to identify any task related to Operations in the project schedule which is a noncompliance to the requirements of the Project Schedule.

> The Operations Phase encompasses activities associated with performing business operations functions; operating and maintaining the BIS; and performing upgrades to the BIS and associated business operations Services. Biennial SSAE 16 SOC 2 audits by an independent auditor are required during the Operations Phase. Consulting Support services also begin with the Operations Phase.

> Operations Phase Modifications; this is analogous to Replacement Phase Modifications and applies to Customer Service Requests and Contract Change Orders for Services and system modifications during the Operations Phase. See Section 8.5 Invoicing and Payment for additional information.

> The Operations Phase begins with the Actual Operational Start Date ("go live") and ends with the termination, cancellation, rejection, or expiration of the Contract. The Operations Phase will overlap in time with the Implementation Phase and the Turnover Phase.

[Solicitation, Page 49]

This section of the solicitation does not include any requirement that the project schedule reflect any tasks related to the operations phase of the project. Truven failed to identify a material and essential requirement to which SAS failed to comply. This issue of protest is denied.

The eleventh subpart of Truven's first issue of protest alleges that SAS failed to reference its inclusion of HEDIS requirements.

Truven points to paragraph 3.26.2 of the solicitation and alleges that SAS failed to specifically agree to provide ready-to-use data subsets for HEDIS cohort reporting.

The RFP requirement states:

> The system must provide for the applicable user level the ability to create data subsets, study groups and filter report results. There shall be ready-to-use subsets that are appropriate to Medicaid (such as Federal age groups, ethnicity groups, eligibility groupings), and HEDIS cohorts (such as candidates for preventive screenings) as well as user-defined groups such as ranges of values. The subsetting feature must support complex "and/or" logic and nesting of subsets and/or scripts.

There is no requirement that the Offeror acknowledge compliance with every requirement of the solicitation. The contract resulting from this solicitation will be comprised of the solicitation and the offeror's response. Consequently, unless the Offeror takes specific exception to a requirement, it has agreed to meet that requirement. Truven has failed to identify an instance where SAS took exception to this requirement and this issue of protest is denied.

The twelfth subpart of Truven's first issue of protest alleges that SAS failed to comply with the requirement to offer a robust library of algorithms to deal with waste, fraud, and abuse.

Truven points to requirement 4.17 in Attachment N to the solicitation alleging that SAS failed to offer a robust library of algorithms and did not "describe each algorithm in detail. The solicitation included the following guidance regarding Attachment N:

> **3.26.6 DETAILED REQUIREMENTS**
>
> Although this RFP is designed as a Statement of Objectives (SOO), <u>SCDHHS has identified detailed requirements that the proposed system must meet in addition to the objectives outlined in this RFP.</u> The detailed requirements are meant to convey more granularity to the stated objectives. If Offerors identify any conflicting or ambiguous relationships between the objects and detailed requirements, they are urged to identify those items during the question and answer phase of this solicitation.
>
> The detailed requirements are included as Attachment N to this RFP.

(emphasis added) [Solicitation, Page 87]

Requirement 4.17 requires that the proposed system must have a robust library of algorithms and there must be a description of each algorithm in the library as follows:

> The Offeror must have a *robust library of algorithms* dedicated to the detection of waste, fraud and abuse. These algorithms must be available through the BIS and modifiable by the user. The Offeror *must describe each algorithm in the library*. Any additional algorithms developed by the Offeror related to waste, fraud and abuse shall be incorporated into the BIS without additional charge.

Attachment N sets forth additional requirements of the proposed solution, not additional information to be included in an Offeror's proposal. There is no requirement that each Offeror's proposal include a description of each algorithm in its library of algorithms. This issue of protest is denied.

The thirteenth subpart of Truven's first issue of protest alleges that SAS failed to meet the reporting requirements.

Truven argues:

> The RFP required that:

>> The BIS should make substantial use of a COTS reporting/business intelligence tool that allows authorized end users to create, modify, and manage reports and queries, and groups of reports and queries, as well as share reports among users. The Contractor shall develop and deliver all reports that are:

>> · Necessary for the proper operation of the system.
>> · Necessary for the proper conduct of the Contractor's business operations duties on the Contract.
>> · Required to report on a Contract performance standard.
>> · Are included in the baseline system.
>> · Are otherwise included in the Contractor's proposed system.
>> · In addition to reports specified within the body of this RFP, the BIS is also required to produce the reports listed in Attachment P.

> RFP, § 3.20.3. The RFP provided that Offerors should provide:

>> A description of how the Offeror proposes to measure and report on Contract performance standards. The Offeror must include a table listing

all Operations Phase performance standards and whether they will be
measured on a monthly basis or measured on a 2- or 3-month rolling basis.

RFP, Proposal Section B6. SAS failed to respond to this requirement and its
response did not include the required table listing all Operations Phase
performance standards and whether they would be measured on a monthly basis
or measured on a rolling basis. *See* SAS Proposal, p. 124.

While SAS agreed in multiple instances, some of which are repeated below, to provide all

required reports, the CPO does not find a table listing all Operations Phase performance

standards. However, solicitation Attachment O - Performance-Based Requirements Table

identifies system performance requirements, tolerances, and liquidated damages required by the

State.

In its Executive Summary SAS states:

SAS will implement this solution with four (4) major deliverables, leveraging our
expertise in each area in order to maximize impact for SCDHHS:
…
Compliance and Reporting
Surveillance and Utilization Review Subsystem (SURS), Payment Error Rate
Measurement (PERM), Management and Administrative Reporting System
(MARS) and Transformed Medicaid Statistical Information System (T-MSIS)
reports as defined by CMS (Centers for Medicare & Medicaid Services) are
automatically generated as required for state compliance by SAS' Reports and
Analytics capabilities.

Decision Support System (DSS) results not only meet SCDHHS requirements, but
will also provide unique results by leveraging SAS' analytics systems with
financial reporting and forecasting capabilities second to none. SAS has extensive
experience providing forecasting, modeling, and budgeting analytics at all levels
within an organization, from the CFO to a super-user analyst. SCDHHS will be
able to leverage the same system SAS clients, such as VISA use where on an
annual basis $4.7 billion transactions are analyzed, predictive models are applied,
and financial forecasting and budget results are created. This one client example
typifies SAS' abilities to not just deliver a DSS system, but also provide a
comprehensive enterprise perspective on all claim and financial behaviors and
impact.

[SAS Technical Proposal, Page 1]

The SAS proposal states:

> Compliance and Reporting
>
> • SURS, PERM, MARS and TMSIS reports as defined by CMS (Centers for Medicare & Medicaid Services) are automatically generated as required for state compliance.
>
> • DSS results not only meet DHHS requirements but will provide dynamic results leveraging SAS' analytics systems to provide intelligent insights into the Medicaid program as well as ad hoc reporting.

[SAS Technical Proposal, Page 39]

The SAS proposal states:

> **Management and Administrative Reporting Subsystem (MARS)**
> MARS contains a comprehensive set of state and federal required reports used to provide financial, administrative, and operational data from the Medicaid program to support monitoring and administrative functions of the Agency and its Federal partner. These reports assist SCDHHS in monitoring eligibility and program utilization, evaluating performance indicators, overseeing the program budget, and initiating program changes in response to regulatory developments or trends identified through data analysis.
> MARS reports from SAS are created to support five traditional functional areas of healthcare program monitoring:
> - ☐Recipient Relations
> - ☐Administration
> - ☐Provider Relations
> - ☐Federal Reporting
> - ☐Operations
>
> Reported information from each of the functional areas may be current or historical and range from status level reports consisting of concise summary data to detailed level reports reflecting specific detail information generated for use by a given functional area.

[SAS Technical Proposal, Page 47]

The SAS proposal also includes the following:

> *A description of how the Offeror proposes to measure and report on Contract performance standards. The Offeror must include a table listing all Operations*

Phase performance standards and whether they will be measured on a monthly basis or measured on a 2- or 3-month rolling basis.

SAS teams, as appropriate, maintain systems that detect anomalies or malicious, unauthorized activities within network device and server systems through active and passive network monitoring devices. These devices assist with detecting potential network-based logical intrusions. SAS monitors server health with the aforementioned monitoring applications running on the servers. The monitored components can include metrics of server and solution availability such as:

➢ Server up-time in days
➢ Disk usage per file system
➢ Database operational/listener status
➢ Recent list of user ID that last logged onto server
➢ List of user ID that are currently logged onto the server
➢ Network interface status
➢ List of processes currently running
➢ Total disk usage
➢ Completion of successful backups
➢ CPU specifications
➢ Memory utilization

Monitoring alerts are sent to SAS' Data Center Operations to be forwarded to the appropriate on-call group for triage and resolution. SAS Solutions OnDemand also performs enhanced monitoring, as appropriate, to confirm the effective operation of hosted applications. Checks, which must be non-intrusive, involve navigation and key functionality according to role for each applicable environment.

[SAS Technical Proposal, Page 124]

SAS identified the requirement and provided a response. The adequacy of that response was determined by the evaluation committee and the CPO will not substitute his judgement for that of the evaluators who apparently found the SAS response adequate. This issue of protest is denied.

Truven's seventh major issue of protest alleges that the evaluation was Arbitrary and Capricious in that it Treated SAS' Response as if it were fully compliant in the above areas, and ignored the above major non-responsiveness issues. Truven argues:

> Given that SAS' proposal did not conform to all requirements of the RFP and limited the State's rights and remedies under the RFP, it was impossible for SAS to be evaluated on equal footing with the vendors which did not so limit their risks and the State's rights and remedies. Therefore, any evaluation was of unequal performance and is arbitrary and capricious as a matter of law.

The American Heritage Dictionary defines an arbitrary decision as one determined by chance, whim, or impulse, and not by necessity, reason, or principle. Capricious is defined by the American Heritage Dictionary as one that is characterized by, arising from, or subject to caprice; impulsive or unpredictable. The evaluators scored each evaluation criteria and provide a short explanation about the Offeror and proposed solution. The evaluation was not arbitrary or capricious. This issue of protest is denied.

Truven's eighth major issue of protest alleges that the RFP process was also fatally defective and did not comply with the minimum legal essential requirements and SAS' contract cannot proceed in light of such defects. Truven argues:
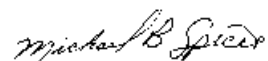
> Details regarding the failure of the State to abide by governing procurement laws, regulations and published policies is described in detail above.

The Consolidated Procurement Code and Regulations provide the procurement officer with the tools and procedures necessary to put fully compliant proposals before an evaluation committee that may not be well versed in laws and regulations governing public procurement. Those tools and procedures were not effectively employed in this case. However those errors and omissions were not so severe as to create a fatal flaw in this procurement. This issue of protest is denied.

DECISION

For the reasons stated above, the protest of Truven Health Analytics LLC is denied.

For the Information Technology Management Office

Michael B. Spicer
Chief Procurement Officer

Attachment 1

SCHMIDT & COPELAND LLC

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January 17, 2017

Via Email to protest-itmo@itmo.sc.gov

Chief Procurement Officer
State of South Carolina
State Fiscal Accountability Authority
Information Technology Management Office
Division of Purchasing
1201 Main Street, Suite 600
Columbia, South Carolina 29201

> RE: AMENDED Protest of Notice of Intent to Award to SAS INSTITUTE INC.
> Notice of Intent to Award Posted: 12/30/16
> Solicitation: 5400011337
> Description: Department of Health & Human Services, SERVICES TO SUPPORT A BUSINESS INTELLIGENCE SYSTEM

Dear Chief Procurement Officer:

This firm represents Truven Health Analytics LLC, formerly known as Truven Health Analytics Inc., an IBM Company, ("Truven") in connection with the above referenced matter and submits this Amended protest of the Notice of Intent to Award a contract to SAS INSTITUTE INC. ("SAS"), first posted December 30, 2016. The grounds of this protest are set forth below.

In accordance with applicable law, this protest letter is intended to provide notice of issues to be decided as required by law and as such it does not purport to set forth all facts and evidence in support of the protest issues.

Truven is informed and believes that a letter or email was provided by SAS to Michelle Mahon or some other representative of South Carolina Department of Health & Human Services ("DHHS") to convey a revised "Price Table A" spreadsheet, but Truven does not have a copy of that document. Truven also is concerned it does not have a copy of communications related to negotiations with SAS. Thus, Truven is uncertain that, to date, it has been provided for viewing under its open records requests all proposals and procurement materials it has requested. Truven asks that the Chief Procurement Officer ("CPO") request clarification

from DHHS and the Information Technology Management Office ("ITMO") that all such public records and records of procurement activity have been provided to Truven, and provide such clarification, or any and all omitted records to Truven promptly. The entire procurement file must be provided to the undersigned on behalf of Truven as required by *S.C. Code* § 11-35-410, the South Carolina Consolidated Procurement Code and under the S.C. Freedom of Information Act.

Truven also asks that all such records, un-redacted, be made a part of the Record for review. Truven asks that the CPO permit it to examine the actual full responses of SAS to the proposal protested herein, and herewith makes such request, formally, under all relevant records laws. Truven reserves the right to offer new issues, facts, evidence and argument in support of the protest at any time as may be permitted by law.

Truven requests due notice and a hearing at which it will present facts, evidence and argument on these issues. If for any reason a hearing will not be held, Truven requests that the Chief Procurement Officer ("CPO") promptly provide to the undersigned a copy of all materials submitted or provided to the CPO for consideration and a copy of all materials (other than any submitted by Truven) reviewed by the CPO as a part of his review as they are submitted or reviewed, so that Truven may review and comment on them as appropriate. Truven also asks that the CPO to advise Truven of any deadlines for the submission of evidence and argument in regarding this matter and in reply to the protest, in advance of the issuance of a decision on the protest.

In this competitive Request for Proposals process, Truven was the close, second ranked offeror. SAS' proposal was ranked highest and selected for negotiations. However, it is apparent from documents provided to date by DHHS that SAS' proposal was wholly non-responsive and further, that the process for selection of SAS as the highest ranked offeror for negotiations was legally and materially flawed, and SAS was improperly permitted to attempt to "cure" its gravely non-responsive proposal in a manner contrary to governing laws, regulations and written policies. Therefore, the notice of intent to award to SAS must be cancelled, and the solicitation must be resolicited under the authority of *In re Appeal of Carter Goble Associates, 1990 CPO LEXIS 16*, SC PRP 1989-25.*

BACKGROUND

This protest concerns the procurement referenced above to solicit proposals to obtain a subset of the Medicaid Management Information System ("MMIS"); a Business Intelligence System ("BIS") that can fully meet the specific CMS components of decision support subsystem ("DSS"), surveillance utilization review subsystem ("SURS"), Transformed Medicaid Statistical Information System ("T-MSIS"), and management administration reporting subsystem ("MARS"). Additionally, the system was to provide the necessary functions, system capabilities

and user features to efficiently deliver and promote DHHS' higher quality of care; promote new models and modernization of care delivery; manage costs and cost saving provisions; and through data verification programs and quality assurance initiatives, detect and reduce waste, fraud and abuse. A BIS is also referred to and is synonymous with a Reporting and Analytics ("R&A") system. *See* DHHS RFP 5400011337, Issued 6/1/2016 ("RFP").

According to the RFP, DHHS sought by this solicitation the professional services of a qualified full-service R&A firm to work as a collaborative partner with DHHS and its contracted vendors in the support of the Department's efforts to replace its MMIS and BIS. MMIS is a system that meets the intent of a "mechanized claims payment and information retrieval system" as described in the Code of Federal Regulations ("CFR") at 42 CFR 433.111. This solicitation addressed a subset of the MMIS: a BIS that can fully meet the specific CMS components of DSS, SURS, T-MSIS, and MARS – as well as provide the necessary functions, system capabilities and user features to efficiently deliver and promote DHHS' higher quality of care; promote new models and modernization of care delivery; manage costs and cost saving provisions; and through data verification programs and quality assurance initiatives, detect and reduce waste, fraud and abuse.

As set forth in the RFP, the stated objective of DHHS by the solicitation was to acquire a BIS that can fully meet the specific needs of each of the main components of the BIS – the DSS, SURS, T-MSIS and MARS – as well as provide the necessary functions, system capabilities and user features to efficiently deliver and promote DHHS' higher quality of care; promote new models and modernization of care delivery; manage costs and cost saving provisions; and through data verification programs and quality assurance initiatives, detect and reduce waste, fraud and abuse.

OVERVIEW OF THE PURCHASING PROCESS

An overview of the purchasing process was documented by DHHS. According to DHHS' *"Written Determination Regarding Which Solicitation By A Responsible Offeror Is Most Advantageous To The State And Record Of Basis For Award"* dated November 10, 2016, attached as **Exhibit 1** hereto:

> SCDHHS issued the subject Request for Proposal for a single agency term contract on May 19, 2016. On June 23, 2016, Amendment 1 was issued responding to Offerors' questions and modifying some language. On June 24, 2016 Amendment 2 was issued with a correction to Amendment 1 providing responses to questions that were accidentally left off Amendment 1. On July 18, 2016 Amendment 3 was issued with additional modifications and no further changes.

On August 30, 2016, proposals were received from five prospective Offerors: Deloitte, Elder Research, Optum, SAS, and Truven.

On September 28, 2016, a request for discussions was sent to four potentially responsive Offerors with a request to remove, clarify or correct items in order to assist in responsiveness.

The week of November 1 – 4, 2016 Oral Presentations/Demonstrations were held *as well as the scoring of each offer. On November 21, 2016 the panel then entered into negotiations with SAS.*

Exhibit 1 at page 1 (emphasis added). Records provided by DHHS show that the spreadsheet of the scoring of proposals is a file dated November 8, 2016, and a "normalized" "BIS Panel Final Scores" document is a file dated November 16, 2016.

However, on November 29, 2016, Procurement Officer Michelle Mahon sent the following e-mail to SAS:

Justin,

Michele Mahon

"Justin.Evans@sas.com"

Follow up - Pricing Table Clarification Tuesday, November 29, 2016 4:44:00 PM

This is conformation regarding my verbal request for clarification of your business proposal with the asterisks on the Price Sheet Table A Implementation as outlined in the solicitation. Your document was received.

Sincerely, Michele

E-mail of Michelle Mahon dated November 29, 2016, attached as *Exhibit 2*.

The record shows that in fact SAS submitted its original Price Sheet Table A with its original proposal, and that SAS was in fact permitted, on or after November 22, 2016, to supply a revised Price Sheet Table in the form of an excel file dated November 22, 2016. *See* SAS' Original Price

Sheet Table A, attached as *Exhibit 3*, and SAS' Revised Price Sheet Table A dated November 22, 2016, attached as *Exhibit 4*.

ISSUES OF PROTEST

The issues of protest as identified to date are set forth below:

1.   SAS' proposal was non-responsive to material, essential and mandatory requirements of the RFP in ways that affected price, quality, quantity and delivery of the services and as such, SAS' proposal should have been rejected, without clarification, before evaluation, scoring and final ranking.

SAS was non-responsive to the material, essential, and mandatory requirements of the RFP as detailed further below in sub-sections a-n below. Such failures are plainly failures to meet mandatory, material, essential and non-waivable requirements of the RFP, affecting price, quality and delivery of the services at issue and, standing alone, mandate rejection of the SAS proposal.

   a.   SAS failed to identify Major Milestones as required by the RFP.

SAS failed to meet the requirements of the RFP at page 50, item 3.5.1 and related requirements of the RFP pertaining to Major Milestones. SAS' omission of designated Major Milestones significantly reduced SAS' monetary risk of performance and significantly impaired and reduced the State's rights under the contract to impose substantial monetary penalties. As such, SAS' proposal should have been rejected, without clarification, before evaluation and scoring.

The RFP required as follows:

> *3.5.1 Implementation Phase Incentives*
> SCDHHS will apply negative incentives to timely acceptance of Milestones during the Implementation Phase. In order for SCDHHS to accept a Deliverable or Milestone, the Deliverable or Milestone must meet its requirements, and all identified Defects must be repaired. Timeliness of Deliverables is measured based on the date the Contractor submits a Deliverable that is free of all material Defects and is subsequently accepted by SCDHHS.
>
> *The Offeror **shall identify in their Proposal two major Implementation phase Milestones**, in addition to the implementation of the final component of the system; these milestones should be fairly evenly spaced out over the*

> *Implementation phase timeframe. **For each week, or partial week, that a major Milestone is missed SCDHHS shall withhold one-half (1/2) of 1% of the total Implementation phase price up to a maximum of four percent (4%) per major Milestone. The withheld funds will be returned to the Contractor when the succeeding major Milestone is accepted by SCDHHS.***
>
> SCDHHS will apply negative incentives to the Targeted Fully Operational Start Date. For each calendar day that the Actual Operational Start Date is late, the negative incentive shall be the actual cost for SCDHHS to extend the project. The South Carolina Enterprise Information System (SCEIS) accounting system will be used to determine the actual cost of the project. At this time SCDHHS estimates its actual daily project costs will be $5,000.

RFP at 50 (emphasis added.) Thus, the designation of two Major Milestones during the Implementation Phase, in addition to the implementation of the final component of the system was mandatory, by the use of the word "shall" in the above requirement.

Further, at page 140 of the RFP the vendors were required as follows:

- For each Milestone (a maximum of 36 Payment Milestones may be listed), the Offeror shall enter:
    - the Payment Milestone number.
    - the Milestone name.
    - ***an asterisk if the Milestone is one of two Major Milestones see RFP 3.5.1.***
    - the Contract Month in which the Milestone is planned to occur. A payment milestone is not required for each month, and a month may have more than one payment milestone.

RFP at 140 (emphasis added). SAS did not meet this requirement in its proposal as submitted on the due date. Nowhere did SAS designate the required two interim Major Milestones in the Implementation Phase.

As can be seen from the Procurement Officer's e-mail to SAS, attached as *Exhibit 2*, the State actually noted, in late November, well after scoring and ranking of proposals, and even after negotiations with SAS were commenced, that SAS had failed to meet the mandatory RFP requirement to designate two interim Major Milestones during the Implementation Phase, as set forth and required by Section 3.5.2 of the RFP quoted above.

SAS original, as submitted Price Sheet Table, attached as *Exhibit 3*, plainly shows this omission, in that it fails to designate any Major Milestones in the Implementation Phase other than the

implementation of the final component of the system. None of the intervening milestones is noted or marked or anywhere stated to be Major Milestones. As a consequence, SAS' proposal as submitted was unambiguously non-responsive to this mandatory requirement.

The mandatory requirement was essential and non-waiveable. It had a significant and material effect on risk and price, and it limited the State's rights set forth in the RFP in the event of non-performance. As can be seen from the details set forth in RFP Section 3.5.2, by omitting these Major Milestone designations, SAS exempted itself from the significant monetary penalties attendant to such Major Milestones. For each week, or partial week, that a major Milestone is missed SCDHHS is to withhold one-half (1/2) of 1% of the total Implementation phase price up to a maximum of four percent (4%) per major Milestone. By omitting the required designation of the two interim Major Milestones, SAS exempted itself from this significant penalty, and reduced its risk. Such reduced risk has more than a trivial or negligible effect on price by definition – if the penalty at stake were trivial, it would serve no purpose whatsoever, which was clearly not the purpose or intent of including such a penalty.

Under the RFP, the payment schedule for an uncertified CMS vendor such as SAS would permit SAS to receive 20% of the DDI ("Design Development and Implementation") Total, minus 5% CMS Certification withhold - about $9.26M. This is approximately 47.5 % of the $19.5M DDI received by SAS *in month 3* - *without SAS encountering the Major Milestones that the State properly required in order to identify satisfactory work, and act as significant protective checkpoints for the State's benefit.* Those payments include (less the 5% CMS Certification withhold):

·   20% paid upon contract signature;

·   10% paid upon project initiation;

·   20% paid upon environment setup.

RFP, Pricing Table 1, Tab A. Thus, in addition to removing significant material monetary risk by failing to designate the two required interim Major Milestones during the Implementation Phase, the proposed payment schedule would put almost $9.3M in SAS' hands without the benefit of the State's required contractual checkpoints.[1]

Vendors cannot simply modify or correct deficiencies in their proposals at any time after submission. Because SAS' original proposal was not responsive to this mandatory, material, essential and non-waiveable requirement, SAS' proposal was not responsive and not eligible to be ranked, and was not eligible for award. It had to be rejected as non-responsive. *S.C. Code*

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[1] It should be noted that this fact also calls into question the evaluators' scoring of the Risk factor for award, which accounted for 30% of the evaluation. As evaluators noted, SAS does not have a CMS certified BIS or DSS in any state, this is its first such major contract, therefore there is significant risk of failure that was unrecognized.

Regs. § 19-445.2095 (I) *Competitive Sealed Proposals; Procurement Policy Statement No. 2008-2 Issued April 28, 2008, Guidance & Best Practices for Permissible Communications in a Competitive Sealed Proposal After Opening but Prior to Award --- State Procurement Office / Information Technology Management Office / State Engineer's Office* --- Version Date: November 26, 2007; *Procurement Policy Statement No. 2008-2,* Issued April 28, 2008.

Further, as we show below, even if for some reason SAS' deficiency at issue were determined to be eligible for cure through clarification (which it is not), clarification was not accomplished in this case in accordance with governing law, and thus, SAS' proposal – even in light of the attempted late November correction – must be rejected as non-responsive.

      b.   <u>SAS failed to propose the required Contract Deliverables and Contract Data Requirements.</u>

The RFP provided as follows:

> Offerors shall propose the schedule and project plan for the Implementation Phase including dates for Milestones and Deliverables.

RFP, § 3.7.1. The RFP further provided that:

> Offerors shall propose Contract Deliverables via the Contract Data Requirements List (CDRL). Unless otherwise specified in this Contract, the format of the Deliverables shall be chosen by the Contractor, subject to approval by the State.

RFP, § 3.13.3. The RFP defined the CDRL as follows:

> The Contract Data Requirements List (CDRL) is a list of contract data requirements that are required by this Contract.

RFP, Attachment I.

The RFP identified 27 data requirements. *See* RFP, Attachment I, pp. 174-188. SAS did not propose Contract Deliverables via the CDRL as required. Further, SAS' plan only shows 4 of the 27 Plans or deliverables required. The plans are not classified as Deliverables in SAS' project plan. The 4 plans identified in the schedule do not reference the CDRL Reference numbers from Attachment I of the RFP, adding to the lack of clarity and incompleteness of the project schedule. Additionally, SAS' Technical Proposal does not have any reference to CDRLs as required by the RFP.

     c.   <u>SAS failed to comply with proposal requirements for User Acceptance Testing.</u>

The RFP required the Contractor to plan for a 65 day User Acceptance Test ("UAT") period, not including any fix, re-test, or regression testing:

> The Contractor shall plan for a sixty-five (65) business day (roughly three [3] months) final UAT, not including any fix/re-test/regression test cycles.

RFP, § 3.22.4.

While the RFP required a 65 business day (roughly 3 month) UAT, SAS only proposed a 39 business day (roughly 7 weeks) UAT period. As shown on SAS' Project Schedule, SAS identified UAT test plan periods for each for the Decision Support System ("DSS"), Surveillance and Utilization Review Subsystem ("SURS"), Payment Error Measurement ("PERM"), Management and Administrative Reporting System ("MARS") and Transformed Medicaid Statistical Information System ("TMSIS"), *happening in parallel for each solution and iteration.* *See* SAS Project Schedule, DSS Task # 101, 109, 117; SURS – Task # 129, 137, 145; PERM – Task # 157, 165, 173; MARS – Task # 185, 193, 201; TMSIS – Task # 213, 221, 229.

Further, SAS's proposed UAT does not exclude any fix/re-test period as required. There is no task identified in the project schedule for fix/retest. According to SAS' proposed schedule, once "UAT" is completed, the next task seen on the schedule is "Deploy." *See* SAS Project Schedule, DSS Task # 118; SURS – Task # 146; PERM – Task # 174; MARS – Task # 202; TMSIS – Task # 230.

     d.   <u>SAS failed to meet proposal requirements for training users for User Acceptance Testing.</u>

The RFP required user training be completed prior to User Acceptance Testing:

> The Contractor shall provide training to State testers in advance of testing. Because UATs will evaluate the quality of training and user documentation, this training and documentation shall be production-ready prior to UAT.

> By the time the BIS is ready to be deployed, the Contractor shall have completed the entire training package. Offerors shall propose a strategy that provides comprehensive and manageable training that minimizes unnecessary duplication.

RFP, § 3.23.3.

The RFP provided as follows regarding the UAT:

> User Acceptance Testing (UAT) will not be a repetition of system testing. While targeted verification of Contractor test results is likely, particularly for high risk areas, UAT will be geared toward execution of operational scenarios. While these tests, like any other disciplined test, will require planning and structure, they will frequently not be step-by-step, scripted tests. It is not possible to understand how a system will react to "real" users without letting these users exercise it the way they plan to do on a daily basis. *Additionally, since training for a complex new system is crucial, the failure of the user-testers to be able to perform required functions will be a clear indication of problems in the system, its documentation, or the training that has been provided.*

RFP, § 3.22.4 (emphasis added).

SAS' proposed project plan at task # 76 states that SAS will deliver Training to UAT Group from 11/17/2017- 11/27/2017. *SAS's proposal does not state any other period of UAT User training.* SAS' proposed dates for UAT User testing **POST-DATES** the actual UAT. This proposal by SAS for training the UAT Testers will result in the "the failure of the user-testers to be able to perform required functions," since SAS has proposed UAT Testing from 7/26/2017- 8/8/2017 and 10/13/17-10/26/2017. These dates are almost 4 months and 1 month ***ahead*** of the actual UAT Group training that SAS has proposed. This will result in a failure to do UAT since the Test Users would not have been trained across the 5 different systems that is expected to be tested during this 4-week window.

     e.   <u>SAS did not meet the requirement to provide three full-time employees on site.</u>

The RFP required as follows:

> Beginning on the Actual Operational Start Date, the *Contractor must staff three full time Contractor staff on-site at SCDHHS' Columbia office* to be responsible for maintenance and creation of new reports and ad hoc reporting, support user query development and execution, and to provide subject matter expertise (SME) as needed.

RFP, § 3.4.3. (emphasis added).

SAS did not meet this requirement and did not propose the required on-site staff:

> Post successful implementation and signoff from the SCDHHS
> Team, SAS will transition day-to-day support to the SAS Help
> Desk included as a part of the SAS proposal. SAS will provide up
> to five full time resources with intimate knowledge of the
> implementation to support the system during the operations phase.

SAS Proposal, p. 88.

     f.   <u>SAS is not NIST compliant, putting the State's data at risk, and preventing the
delivery of a NIST-compliant system as required.</u>

The RFP required as follows:

> The State supports electronic sharing of data in a secure manner
> (i.e., authorized individuals accessing data they need to perform
> their work, and the use of encryption for data at rest, data in transit,
> or both, as applicable for the method of sharing). The State
> operates various systems to facilitate secure information sharing,
> including but not limited to SharePoint and Secure FTP, and would
> strongly prefer to leverage existing State systems. In the event that
> the Offeror proposes information sharing systems that are not
> existing State systems, the proposed systems must meet security
> requirements as defined elsewhere in this RFP. The Contractor
> shall maintain and facilitate the use of any agreed-upon
> information sharing tools. In the event that information sharing
> tools are selected that are not existing State systems, the Contractor
> must supply licenses (at its own expense) and training for the
> selected tools. Use of these types of tools will reduce the need for
> the Contractor to provide any data in hard copy format other than
> those legally requiring physical copies or signatures, invoices, or
> for documents that are so large that they must be printed in order to
> perform an orderly review.
>
> The Contractor shall ensure that all management tools used for
> information sharing are compatible with current SCDHHS
> computer system configurations.

RFP, § 3.13.1.

> With respect to this Contract, "hosting" means the housing of the
> hardware and software (including servers, storage devices, and
> network devices), the provisioning of power, network access, and

cooling, and the performance of duties requiring physical access to the hardware (including both the primary and disaster recovery sites). The system may be hosted at the Offeror's physical location or in the "cloud". If a cloud-based solution is proposed, the Offeror has the responsibility to prove that the solution complies with MARS-E 2.0 standards and hosted within the continental United States as required by Section 7.36 of this RFP.

SCDHHS' infrastructure is not currently configured to host the BIS solution, and anticipates the Contractor will host the proposed solution. Should an Offeror propose a SCDHHS-hosted solution, the Offeror must present how this would be the best value to the State. The estimated cost for SCDHHS to standup and host a BIS solution will be added to the Total Enterprise Cost of Ownership when scoring costs.

RFP, § 3.21.4.

> Q. 69. This solicitation states, "If a cloud-based solution is proposed, the Offeror has the responsibility to prove that the solution complies with MARS-E 2.0 standards…" MARS-E 2.0 refers to NIST 800-53 standards that it incorporates. Does the proposed solution have to be fully NIST compliant or does the solution only need to incorporate those NIST standards listed in MARS-E 2.0?

> A. 69. Yes, the solution must be fully NIST compliant.

RFP, Addendum 1.

SAS' proposal provided that:

> As a part of this project, SAS is committing to reach NIST 800-53 compliance within one year of contract signature. While SAS benchmarks the hosting operations and software against NIST 800-53 today, SAS is committed to reaching full compliance.

SAS Proposal, p. 18.

NIST Compliance is a standard for government IT companies. The State indicated that their Sharepoint Site was preferred. Instead, SAS proposed the use of their portal, which introduces more risk since they will not be NIST compliant at the start of the project. The documents that

are stored on SAS' site will not be secure or adequately protected against breaches as they will not be NIST compliant from the beginning of the project. In addition, compliance with the NIST standards and requirements certainly involves significant cost.

      g.   <u>SAS failed to meet the requirements of corporate skills and capabilities and failed to provide the required organizational chart for each phase as required.</u>

The RFP required as follows:

> The Offeror shall describe the general structure and capabilities of its company or of the business unit that will service this Contract. In particular, this subsection shall describe its corporate skills and background and how these will contribute to successful Contract performance and provide the greatest value to the State.

RFP, Proposal Section E.1. SAS' Proposal does not describe how their corporate skills and capabilities will contribute to successful contract performances measured by the metrics described in page 123 of SAS response. *See* SAS Proposal, p. 138.

Further, the RFP required as follows:

> This section shall include:
> - A description of the proposed organization for each Contract phase (Implementation, Operations, and Turnover). The Turnover Phase organization discussion should focus only on organizational difference from the Operations Phase.
> - Organization charts for each Contract phase identifying the general structure of the units performing Work. It is not necessary to include the level of detail illustrating individual workers.
> - How the proposed organization fits into the Offeror's corporate structure.
> - A listing of all Subcontractors, why they were chosen, and what roles that they will play in the proposed organization.
> - How the organizational structure will contribute to Contract success.
> - Any assumptions pertinent to the proposed organizational approach. Offerors are reminded to select assumptions carefully in order to avoid creating Proposal responsiveness issues.
> - Any other information pertinent to the organizational approach.

RFP, Proposal Section C1. SAS response does not include project organization structure for each phase. There is only one project organization chart that has been portrayed as the project team. SAS response does not describe how the project organization will contribute to contract success. The page limit for the response of this section was 15 pages. SAS response was 3 pages, highlighting SAS' failure to meet the RFP requirements. *See* SAS Proposal, p. 130.

      h.   <u>SAS failed to meet the disaster recover requirements.</u>

The RFP required as follows:

> The BIS is critical to the daily operations of SCDHHS. The Offeror must assume that any loss of data is unacceptable. The Offeror must provide detailed disaster recovery, turnover and continuity of business plans designed to minimize any potential disruption to its operations within fifteen (15) business days after the project kick-off meeting. This plan must be approved by SCDHHS prior to implementation and is to be modified with approval as circumstances warrant.
>
>   *   *   *
>
> The Offeror must:
> - Propose a schedule for testing the Disaster Recovery Plan before and after implementation
> - **Have redundant systems and data located in two (2) different parts of the country in the event of a disaster.**
> - Provide a plan to return operational status to normal in the event of a disaster as quickly as possible.
> - Describe recovery processes, including requirements for communication plans and redundant or stand-by hardware, software, and staffing
> - Describe provisions to support interim manual operations during recovery.
> - Propose a schedule for testing the Disaster Recovery Plan before and after implementation.

RFP, § 3.15.2.(emphasis added). SAS does not have redundant systems and data located in two different parts of the country. Their proposal only indicates that the hosting location is at a distance greater than 150 miles. *See* SAS Proposal, pp. 14-15. Certainly, compliance with this disaster recovery requirement involves significant cost.

      i.   <u>SAS has proposed an unrealistic CMS certification date, thus putting the entire project at risk.</u>

The RFP requires that:

> The BIS must receive System Certification from CMS with a goal of certification within one (1) year of Actual Operation Start Date, and the Contractor shall ensure that the BIS performs in such a manner as to achieve System Certification on the first attempt. The State shall lead the System Certification process with the assistance of the Contractor.

RFP, § 3.17. The RFP further provides that:

> The State believes that pursuing unrealistic schedule dates often results in a greater cost and a longer schedule due to potential quality issues and the premature reallocation of resources directed at transitioning. While minimizing the project schedule is an objective, Offerors shall propose realistic project schedules, and the selected Contractor shall continue this practice throughout the life of the Contract.

RFP, § 3.7.2. As shown above, the State has established a goal to have CMS Certification within 1 year of the Actual Operation Start Date. SAS has proposed a 4-day review and approval from CMS following Go Live. This proposed date is unrealistic within any historical standards of CMS Certification review and approval. Typically, CMS Certification approval takes anywhere from 6-9 months. Proposing a 4-day approval for CMS review and approval is extremely unreasonable and unrealistic. *See* SAS Project Schedule, Task # 84.

Also, SAS proposes to have CMS review running concurrently for the entire project. *See* SAS Project Schedule, Task # 78-84. This schedule is completely unrealistic and would seem to show that SAS has no experience with gaining CMS approval. CMS cannot even begin its review until the system implementation is complete.

Further, SAS does not include in its proposal or project schedule any details addressing the RFP requirements for CMS system certification. The RFP includes and describes system certification activities required in Section 3.4.5. ("**System Certification** – This includes certification planning, documentation, artifact gathering, support for the CMS certification team, resolution of issues and findings from the System Certification, and repair of system and operations defects discovered as part of the System Certification process.") SAS has not provided any details either

in the project schedule or in their proposal for capturing this RFP requirement. This is non-compliance to the RFP Request to a critical functional requirement and the State's project goals.

      j.   <u>SAS failed to comply with the requirement to identify tasks in the Operations Phase.</u>

The RFP required that:

> The Operations Phase encompasses activities associated with performing business operations functions; operating and maintaining the BIS; and performing upgrades to the BIS and associated business operations Services. Biennial SSAE 16 SOC 2 audits by an independent auditor are required during the Operations Phase. Consulting Support services also begin with the Operations Phase.

RFP, § 3.4.6. SAS has not identified any task related to Operations in the project schedule. This is noncompliance to the requirements of the Project Schedule.

      k.   <u>SAS failed to reference its inclusion of HEDIS requirements.</u>

The RFP required that:

> The system must provide for the applicable user level the ability to create data subsets, study groups and filter report results. There shall be ready-to-use subsets that are appropriate to Medicaid (such as Federal age groups, ethnicity groups, eligibility groupings), and HEDIS cohorts (such as candidates for preventive screenings) as well as user-defined groups such as ranges of values. The sub-setting feature must support complex "and/or" logic and nesting of subsets and/or scripts.

RFP, § 3.26.2. SAS failed to include any reference to HEDIS cohorts and failed to comply with this requirement of the solicitation. The lack of HEDIS cohorts would not allow the State to do the appropriate benchmarking against plan performance and industry norms for South Carolina and other States. As this is a requirement for federal funding, the failure to include it could impair the State receiving federal funding for this project.

      l.   <u>SAS failed to comply with the requirement to offer a robust library of algorithms to deal with waste, fraud, and abuse.</u>

The RFP required that:

> The Offeror must have a *robust library of algorithms* dedicated to the detection of waste, fraud and abuse. These algorithms must be available through the BIS and modifiable by the user. The Offeror *must describe each algorithm in the library*. Any additional algorithms developed by the Offeror related to waste, fraud and abuse shall be incorporated into the BIS without additional charge.

RFP, Requirement 4.17. SAS failed to offer a robust library of algorithms and did not describe each algorithm in detail as required. *See* SAS Proposal, p. 43.

m.   SAS failed to meet the reporting requirements.

The RFP required that:

> The BIS should make substantial use of a COTS reporting/business intelligence tool that allows authorized end users to create, modify, and manage reports and queries, and groups of reports and queries, as well as share reports among users. The Contractor shall develop and deliver all reports that are:
>
> · Necessary for the proper operation of the system.
> · Necessary for the proper conduct of the Contractor's business operations duties on the Contract.
> · Required to report on a Contract performance standard.
> · Are included in the baseline system.
> · Are otherwise included in the Contractor's proposed system.
> · In addition to reports specified within the body of this RFP, the BIS is also required to produce the reports listed in Attachment P.

RFP, § 3.20.3. The RFP provided that Offerors should provide:

> A description of how the Offeror proposes to measure and report on Contract performance standards. The Offeror must include a table listing all Operations Phase performance standards and whether they will be measured on a monthly basis or measured on a 2- or 3-month rolling basis.

RFP, Proposal Section B6. SAS failed to respond to this requirement and its response did not include the required table listing all Operations Phase performance standards and whether they would be measured on a monthly basis or measured on a rolling basis. *See* SAS Proposal, p. 124.

2.   SAS' omission of the two required interim Major Milestones in the Implementation Phase had the effect of limiting the State's rights set forth in the RFP in the event of non-performance, in clear violation of governing laws, regulations and published written policies, mandating rejection of the proposal at the outset.

Because as shown above, SAS' failure to provide in its proposal the two required interim Major Milestones in the Implementation Phase had the effect of limiting the State's rights under an important penalty clause, and otherwise limited the State's rights under other contract clauses set forth in the RFP, SAS' proposal should have been rejected outright, as indicated in S.C. Reg. 19-445.2070:

> Ordinarily a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the State, since to allow the bidder to impose such conditions would be prejudicial to other bidders. For example, bids should be rejected in which the bidder… limits the rights of the State under any contract clause.

While the solicitation at issue is not a bid, bid procedures do apply in connection with discussions and clarifications, and the terms of Regulation 2070 are instructive on this important point.

The existing laws regarding clarifications and discussions also preclude correction of SAS' failure to provide the interim Major Milestones in the Implementation Phase in this RFP process. Only before final scoring and ranking of responsive vendors, and prior to negotiations, may the State conduct clarifications and discussions:

> I. Discussions with Offerors
> (1) Classifying Proposals.
> For the purpose of conducting discussions under Section 11-35-1530(6) and item (2) below, proposals shall be initially classified in writing as:
> (a) acceptable (i.e., reasonably susceptible of being selected for award);
> (b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or
> (c) unacceptable.
>
> (2) Conduct of Discussions.

If discussions are conducted, the procurement officer shall exchange information with all offerors who submit proposals classified as acceptable or potentially acceptable. The content and extent of each exchange is a matter of the procurement officer's judgment, based on the particular facts of each acquisition. In conducting discussions, the procurement officer shall:

(a) Control all exchanges;

(b) Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;

(c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;

(d) Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.

(e) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above.

(3) Limitations. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. Ordinarily, discussions are conducted prior to final ranking. Discussions may not be conducted unless the solicitation alerts offerors to the possibility of such an exchange, including the possibility of limited proposal revisions for those proposals reasonably susceptible of being selected for award.

(4) Communications authorized by Section 11-35-1530(6) and items (1) through (3) above may be conducted only by procurement officers authorized by the appropriate chief procurement officer.

S.C. Code Regs. § 19-445.2095 (I) Competitive Sealed Proposals.

The published policy of the SFAA regarding the implementation of this provision is instructive. It states clearly, among other things, that:

(a) Clarifications may be conducted *only* to clarify an ambiguity in a proposal.

[Commentary: (1) Exchange sufficient information with the vendor to resolve the ambiguity. (2) The procurement officer is charged with limiting such exchanges to only the information necessary to determine how to read language *already existing* in the proposal. (3) A proposal is ambiguous if open to more than one reasonable interpretation or obscure in meaning, through indefiniteness of expression.3 Silence is not an ambiguity. (4) Clarifications *cannot* involve an opportunity for proposal revisions. Accordingly, clarifications must be limited to determining which reasonable interpretation was intended and should *not* include new information or revisions to existing information. Identifying the correct interpretation of language requires only a limited amount of information.]

(b) Clarifications may be conducted only with offerors who have submitted proposals that are obviously responsive to the solicitation's material requirements. [R.19-445.2080] A proposal is not obviously responsive if the determination of responsiveness is dependent on the vendor's resolution of an ambiguity in its proposal.4

[Commentary: (1) Allowing the clarification of an ambiguity under Section 11-35-1520 to determine whether an offer is responsive is fundamentally inconsistent with the competitive bidding process, around which Section 11-35-1520 is written.5 (2) In determining responsiveness, only the face of the proposal may be considered.]

Procurement Policy Statement No. 2008-2 Issued April 28, 2008, Guidance & Best Practices for Permissible Communications in a Competitive Sealed Proposal After Opening but Prior to Award --- State Procurement Office / Information Technology Management Office / State Engineer's Office, April 28, 2008, published at https://procurement.sc.gov/policy .

Note that without allowing SAS to designate, after the fact, which, if any, interim milestones of the Implementation Phase were "Major Milestones" the State had no way based on what SAS actually submitted in its original proposal to guess – or interpret - such significant matters. As written and submitted, the SAS proposal was unambiguously non-responsive in failing to provide two interim Major Milestones for the State to rely on during the Implementation Phase to gain needed contractual protections and to assert important rights, including penalty rights. Such limitations, as shown above, are exactly the cause for immediate rejection, not an opportunity for clarification or discussion. The published policy guidelines of the State could not be more explicit.

Because SAS' proposal as submitted withdrew significant contractual rights and remedies of the State expressed in the RFP, SAS' proposal should have been rejected, and was not eligible for

clarification. *Data Recognition Corporation Protest of Intent to Award to ACT, Inc.*, CPO Case No. 2015-210, 2014 SC CPO LEXIS 68 * (December 18, 2014), and within authorities.

3.   SAS' proposal was not eligible for clarifications, discussions or negotiations because its proposal did not provide the required Major Milestones, and it could not be lawfully "cured".

Details related to SAS' failure relevant to this issue are fully described above. SAS' proposal as submitted did not qualify for clarification or discussion at any time. *See In Re: Data Recognition Corporation Protest of Intent to Award to ACT, Inc.,* CPO Case No. 2015-210, 2014 SC CPO LEXIS 68 * (December 18, 2014), and within authorities.

4.   The State improperly allowed SAS so much latitude in its deficient "response" that SAS was effectively allowed to submit an "amended" proposal long after the deadline for proposal submission. This approach is simply not allowed.

Details related to the State's improper process that allowed SAS so much latitude in its unambiguously deficient proposal that SAS was effectively allowed to submit an "amended" proposal long after the deadline for proposal submission are set forth hereinabove. Such a process is unlawful and fails to afford vendors equal treatment. *See In Re: Data Recognition Corporation Protest of Intent to Award to ACT, Inc.,* CPO Case No. 2015-210, 2014 SC CPO LEXIS 68 * (December 18, 2014), and within authorities.

5.   DHHS improperly attempted to allow SAS to submit a change, correction or clarification of its proposal without the proper procedures and after the time for any clarification had passed, in violation of governing laws, regulations and published written policies.

As shown above, by attempting to allow SAS to *revise* its proposal to *add* interim Major Milestone designations in the Implementation Phase, DHHS violated governing laws, regulations and policies described above, and governing case law.

By attempting to conduct clarifications and discussions with SAS about such matters *after final scoring, ranking and commencement of negotiations*, DHHS clearly violated the above-described laws, regulations and policies as well. *S.C. Code Regs.* § 19-445.2095 (I) Competitive Sealed Proposals. *In Re: Data Recognition Corporation Protest of Intent to Award to ACT, Inc.,* CPO Case No. 2015-210, 2014 SC CPO LEXIS 68 * (December 18, 2014)("Finally, since only responsive proposals can be ranked, discussions 'to assure…responsiveness to the solicitation requirements' must occur prior to final ranking.' [O]nce 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.' *Qualis Health, ante,* Panel Case No. 2010-4, note 8. This timing is critical….

only responsive offers are evaluated and ranked which precludes any post-final-ranking discussions to correct issues of responsiveness.")

6.   The State's misguided effort to "clarify" SAS' Proposal after final scoring, ranking and after negotiations was also legally defective in that it failed to meet the requirements for even a properly timed clarification.

Even if the SAS Proposal defect in question were of the type as to which clarification could be obtained, and even if such clarification had been timely performed, the attempted clarification was legally defective in that it was not documented fully as required by governing law.

Specifically, the law requires a well-documented series of activities to gain clarification, due to the fact that post-submission communications and changes are fraught with risk to the process. The governing regulations require:

> Conduct of Discussions.
> If discussions are conducted, the procurement officer shall exchange information with all offerors who submit proposals classified as acceptable or potentially acceptable. The content and extent of each exchange is a matter of the procurement officer's judgment, based on the particular facts of each acquisition. *In conducting discussions, the procurement officer shall:*
> (a) Control all exchanges;
> (b) Advise *in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive*;
> (c) *Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any*;
> (d) Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.
> (e) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above.

S.C. Code Regs. § 19-445.2095 (I) (2) Competitive Sealed Proposals.

The Procurement Officer's effort in late November 2016 to conduct a "verbal clarification" with SAS was contrary to law, and her failure to clearly document what clarification she requested

and why is fatal. Her statement in a *post hoc* e-mail that "This is conformation regarding my verbal request for clarification of your business proposal with the asterisks on the Price Sheet Table A Implementation as outlined in the solicitation. Your document was received" (***Exhibit 2***) simply does not meet the detailed criteria of the regulation. *See In Re: Data Recognition Corporation Protest of Intent to Award to ACT, Inc.,* CPO Case No. 2015-210, 2014 SC CPO LEXIS 68 * (December 18, 2014).

Here, it is plain that the Procurement Officer well knew the correct process for clarification and discussions and that she well knew the need for documentation of any clarification fully in the format required by the regulation. Indeed, earlier, on September 28, 2016 she actually performed properly documented clarifications and discussions with all vendors, including SAS, on a range of matters. ***See Exhibit 5***, SAS September 28, 2016 Clarifications and Discussions. That clarification and discussion was properly performed and documented.

However, months later, even after SAS had been scored, ranked and selected for negotiations, Procurement Officer Mahon inexplicably conducted a self-described "verbal clarification" "of [SAS'] business proposal with the asterisks on the Price Sheet Table A Implementation as outlined in the solicitation. Your document was received." Such a "clarification" does not meet any of the statutory or regulatory criteria for a properly documented clarification. As such, it is void, a nullity. *See Appeal by Qmatic, 2012 South Carolina CPO Lexis 20* SC PRP 2012-3* (Panel affirming CPO decision and stating "Because Qmatic's clarification was not properly documented and because the requested clarification amounted to the State attempting to make ACF responsive, the CPO found that Qmatic's revised price proposal was equally non-responsive. The CPO ordered the solicitation re-bid.")

7.   The Evaluation was Arbitrary and Capricious in that it Treated SAS' Response as if it were fully compliant in the above areas, and ignored the above major non-responsiveness issues.

Given that SAS' proposal did not conform to all requirements of the RFP and limited the State's rights and remedies under the RFP, it was impossible for SAS to be evaluated on equal footing with the vendors which did not so limit their risks and the State's rights and remedies. Therefore, any evaluation was of unequal performance and is arbitrary and capricious as a matter of law.

8.   The RFP process was also fatally defective and did not comply with the minimum legal essential requirements and SAS' contract cannot proceed in light of such defects.

Details regarding the failure of the State to abide by governing procurement laws, regulations and published policies is described in detail above.

CONCLUSION

Based on the grounds set forth herein, as well as any others added or amended in accordance with law, Truven requests a hearing and that the State honor the automatic stay, cancel the intent to award the contract to SAS, and mandate re-solicitation under the governing authority set forth in the Procurement Code and Regulations. **Truven also asks that the CPO immediately require that the entire procurement file be provided to the undersigned on behalf of Truven as required by *S.C. Code* § 11-35-410, the South Carolina Consolidated Procurement Code and under the S.C. Freedom of Information Act.** If the CPO determines that he will not hold a hearing, Truven requests that the CPO promptly provide to the undersigned a copy of all materials submitted or provided to the CPO for consideration, and a copy of all materials (other than those submitted by Truven) reviewed by the CPO as a part of his review as they are submitted or reviewed. Truven asks that it be permitted to review and comment on such materials and submissions as appropriate. Truven also asks that the CPO provide all interested parties a deadline by which to provide evidence for the CPO to consider in reaching its decision, and the date on which the CPO's review will be completed.

Very truly yours,

John E. Schmidt, III

Attachment 2

Justin,

This is conformation regarding my verbal request for clarification of your business proposal with the asterisks on the Price Sheet Table A Implementation as outlined in the solicitation. Your document was received.

Sincerely,

Michele

Michele Mahon
Program Manager II
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Columbia, SC - 29201
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STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised November 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
1205 Pendleton Street, Suite 473, 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.