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Written Determination

Posting Date: May 11, 2017

Contracting Entity: SC State Fiscal Accountability Authority

Solicitation No.: 5400011888

Description: Information Security and Privacy Services (Lot Five (5) - Security Assessments and Other Consulting Services)

This matter came before the Chief Procurement Officer by way of a protest by 22nd Century Technologies, Inc. The CPO dismissed the protest for failure to state a violation of the Consolidated Procurement Code. However, the CPO must cancel the award of Lot 5 to Johnstek, Inc., because of administrative error of the purchasing agency discovered prior to performance, pursuant to S.C. Code Ann. §§ 11-35-1520(7) and -1530; and Reg. 19-445.2085(C)(7). *See, e.g., Appeal by C&C Boiler Sales and Services, Inc.*, Panel Case No. 2000-12; and *Appeal by Blue Cross Blue Shield of South Carolina*, Panel Case No. 1996-3.

BACKGROUND

The State Fiscal Accountability Authority (SFAA) issued RFP 54000011888 to establish a state term contract for Information Security and Privacy Services. The solicitation included seven lots and permitted, but did not require, multiple awards:

AWARD CRITERIA -- PROPOSALS

Award *may be made* for up to the four (4) highest ranked, responsive and responsible offerors for each Lot, whose offers are determined to be the most advantageous to the State. Each Lot will be scored and ranked individually.

Amendment 5, page 2 (emphasis supplied).

Written Determination, page 2
Solicitation No. 5400011888, Lot 5
May 11, 2017

AWARD TO MULTIPLE OFFERORS (JAN 2006)

Award *may be made* for up to four (4) Contractors per lot. [06-6035-1]

Amendment 5, page 3 (emphasis supplied). This determination concerns only Lot 5, Security Assessments and Other Consulting Services.

SFAA received more than four¹ proposals for Lot 5. On April 7, 2017, SFAA posted a document titled “Extension of Award Posting #2.” It reads as follows:

In accordance with The Budget and Control Board Regulations, Section 19-445.2090 (B), the Posting Date for the referenced solicitation is extended until further notice. The Intent to Award for all finalized offers will be posted on Monday, April 10, 2017. *Additional Intents to Award will be posted as they are completed. The State will provide all intent to award notifications via e-mail through SCEIS as they are finalized.*

(emphasis supplied) On April 10, SFAA posted an intent to award a contract for Lot 5 to a single offeror, Johnstek, Inc. Subsequently, another vendor requested a debriefing by the procurement officer. The procurement officer responded by providing “redacted” scoring information.

Although the names of the other bidders were concealed, the disclosure revealed the number of offerors. Additionally, scoring for the three evaluation criteria—including price—was shown for each offeror. For the reasons that follow, the failure to post all awards at the same time was an administrative error of the agency requiring cancellation of the award to Johnstek. This error was compounded by the disclosure of source selection information to one of the offerors.

ANALYSIS

At the outset, the CPO emphasizes the following analysis pertains only to competitive sealed proposals, not invitation for bids. This is because in an RFP, matters other than price are evaluated and scored using subjective criteria; and because the procurement officer may be authorized to conduct negotiations with one or more offerors.

¹ As discussed below, S.C. Code Ann. Reg. 19-445.2010(D) prohibits disclosure of the number or identity of offerors throughout the sealed proposal process. Accordingly, the CPO reveals only so much information as is necessary to this decision.

Written Determination, page 3
Solicitation No. 5400011888, Lot 5
May 11, 2017

S.C. Code Ann. Reg. 19-445-2010(D) provides:

Throughout the competitive sealed proposal process, state personnel with access to proposal information shall not disclose either the number of offerors or their identity, except as otherwise required by law.

By posting the award statement the agency identified one of the offerors. By providing a scoring summary the agency disclosed the number of offerors. It is impossible to reconcile either of these actions with the plain text of Reg. 19-445-2010(D).

The prohibited disclosure resulted in a number of consequences impairing the integrity of the procurement process. First, by reviewing the scores, a vendor could determine her standing among all vendors, as well as the relative rank of each of her competitors. Second, the pricing scores, presumably determined by formula, could yield the actual pricing of competing bidders by reference to the “total potential value” on Johnstek’s award statement. Third, the disclosure significantly undermined the State’s bargaining leverage by revealing the relative standing of each offeror, for each of the evaluation criteria—not to mention the potential compromise of actual pricing information. Finally, should the State fail to reach agreement with vendors ranked higher than the contractor who received the information, that contractor will have a significant advantage over her competitors if she enters into negotiations.

Posting the “initial” award and providing scoring information to a disappointed bidder also involved “procurement information” as defined in Regulation 19-445.2010(C). This regulation is applicable to all source selection methods, not just RFPs. While the regulation grants limited discretion to the procurement officer, it generally prohibits disclosure prior to award:

C. Prior to the issuance of an award or notification of intent to award, whichever is earlier, state personnel involved in an acquisition shall not engage in conduct that knowingly furnishes source selection information to anyone other than the responsible procurement officer, unless otherwise authorized in writing by the responsible procurement officer. “Source selection information” means any of the following information that is related to or involved in the evaluation of an offer (e.g., bid or proposal) to enter into a procurement contract, if that information has not been previously made available to the public or disclosed publicly: (1) Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices, ... (4) technical evaluations of proposals, (5) cost

or price evaluations of proposals, ... (7) rankings of responses, proposals, or competitors, (8) reports, evaluations of source selection committees or evaluations panels, (9) other information based on a case-by-case determination by the procurement officer that its disclosure would jeopardize the integrity or successful completion of the procurement to which the information relates.

As discussed above, disclosure of the scoring summary may have furnished information described in subparagraphs (1), (4), (7), and (8) of Reg. 19-445.2010(C). There is nothing in the circumstances here to justify the release of source selection information.

There are several other ways that disclosure of this information—both posting less than all of the intended awardees, and releasing the scoring summary—jeopardized the integrity or successful completion of the procurement. First, posting the award only to Johnstek gave that company a competitive advantage. By being “first out of the gate,” Johnstek would be the only vendor who could sell to the State until the remaining awards were posted. Second, staggering the awards created confusion about when the protest period begins. Not only is the State not *required* to issue four awards, there may not be four bidders *eligible* for award. Because the decision to make multiple awards is discretionary, and because the actual number of responsive and responsible offerors is unknown prior to award, there is no way for a bidder to know when an award statement is the “final” one, triggering the time limitations in S.C. Code Ann. § 11-35-4210. That is exactly what happened here: One vendor protested the award to Johnstek, even though additional awards—possibly even to that protester—may be forthcoming. Finally, the procedure effectively stripped from the CPO or the Procurement Review Panel the ability to grant a successful protester a meaningful remedy. Suppose a challenge to the evaluation process were filed following the award of the State’s fourth contract. By that time the “protest period” for the contracts previously awarded would have run. If the CPO or the Panel sustained the later protest, it would affect the awards to all four contractors. Any orders or statements of work that were placed against those contracts would have been awarded in violation of law, and must be ratified or terminated pursuant to S.C. Code Ann. § 11-35-4310(3).

Written Determination, page 5
Solicitation No. 5400011888, Lot 5
May 11, 2017

DETERMINATION

For the reasons stated above, the award to Johnstek, Inc., for Lot 5 is canceled under Regulation 19-445-2085(C). The solicitation for Lot 5 is remanded to the procurement officer with instructions to proceed in accordance with the Code. Should SFAA determine to award multiple contracts for Lot 5, it should issue a single award statement with all contracts on it.²

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

² The CPO recognizes that a new protest clock will start when SFAA posts its award for Lot 5. Regrettably, that may allow the same protester who obtained a debriefing a second opportunity to protest.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Written Determinations Appeal Notice (Revised November 2016)

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

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

(Emphasis added.) *See generally Protest of Three Rivers Solid Waste Authority by Chambers Development Co., Inc., Case Nos. 1996-4 & 1996-5, Protest of Charleston County School District, Case No. 1985-5, Charleston County School Dist. v. Leatherman*, 295 S.C. 264, 368 S.E.2d 76 (Ct.App.1988).

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.