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Protest Decision

Matter of: SourceCorp Bps, Inc. / Exela Technologies, Inc.

Case No.: 2021-213

Posting Date: August 4, 2021

Contracting Entity: SC Department of Revenue

Solicitation No.: 5400020364

Description: Forms Processing Services

DIGEST

Protest of intent to award is granted. The protest letter of SourceCorp Bps, Inc. (SCB) is included by reference. (Attachment 1) SCB is a subsidiary of Exela Technologies, Inc., and the contracting party, on behalf of itself and its affiliates (“Exela”) submitted the proposal.

AUTHORITY

The Chief Procurement Officer (CPO) held a hearing on July 15, 2021 and conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on materials in the procurement file and applicable law and precedents.

BACKGROUND

Solicitation Issued	11/30/2020
Amendment 1 Issued	12/17/2020
Proposals Received	01/14/2021
Negotiations with SCB Initiated	03/12/2021
SCB Negotiation Response	03/25/2021
SCB Negotiations Terminated	04/13/2021
Negotiations with IM Initiated	04/13/2021
IM Negotiation Response 1	04/27/2021
Negotiations with IM 2	05/03/2021
IM Negotiation Response 2	05/05/2021
Intent to Award Posted	06/02/2021
Intent to Protest Received	06/09/2021
Protest Received	06/17/2021

The State Fiscal Accountability Authority (SFAA) published a Request for Proposals on behalf of the South Carolina Department of Revenue (DOR) on November 30, 2020, to establish a new contract for forms processing. Those services have been provided by SCB since 2014 under an expiring seven-year contract. Amendment 1 was published on December 17, 2020. Two businesses submitted proposals: SCB and Iron Mountain Information Management, LLC (IM). An evaluation team comprised of ten subject matter experts and five scoring evaluators reviewed the proposals against three evaluation criteria: Technical (40%), Qualifications (35%), and Price (25%).

During the evaluation, at least one evaluator sought guidance from the Procurement Officer (PO) about whether their personal experience with SCB over the past seven years could be factored into their evaluation of SCB's qualifications. Through an email dated February 3, 2021, the PO advised them that they could only evaluate the information provided in SCB's proposal and they could not address past performance, as "this will be addressed in negotiations or in our responsibility check." The PO reasoned that he was not allowed to "subjectively evaluate" SCB's past performance when the State lacked the same hands-on experience with IM.

After the technical proposals and qualifications were evaluated, the prices were subjectively evaluated. The five scoring evaluators awarded IM the highest score for the technical proposal and qualifications. SCB received the highest score for price and the highest overall score.

SCB and DOR entered negotiations on March 12, 2021 when the PO sent SCB a letter requesting SCB's response to 21 negotiation points. The negotiation points included requests for clarification of some of SCB's proposal responses, assurances that changes that were negotiated during the current contract would carry over to the new contract, and assurances that problems with current performance would be resolved in the new contract. SCB responded on March 25, 2021. After reviewing SCB's response, DOR advised the PO that it did not believe a satisfactory contract could be negotiated with SCB at that time and requested the PO terminate negotiations with SCB and open negotiations with IM. The PO acted on both requests on April 13, 2021, terminating negotiations with SCB and opening negotiations with IM.

IM responded to DOR's negotiation points on April 27, 2021. DOR sought additional clarification on May 3, 2021 which IM responded to on May 5, 2021. The Record of Negotiations was finalized and an Intent to Award was posted to IM on June 2, 2021.

SCB filed an Intent to Protest on June 9, 2021 followed by its formal protest on June 17, 2021. SCB alleges an improper evaluation, improper negotiation, an award in excess of available funds, an improper determination and findings, bias and undue influence on the evaluation panel, that IM is not a responsible offeror, and that IM's proposal is not responsive.

The CPO held a hearing on these issues on July 15, 2021.¹ SCB was represented by M. Elizabeth Crum, Esq. and Pamela A. Baker, Esq.; IM was represented by Melissa J. Copeland, Esq and John E. Schmidt, Esq.; and DOR was represented by Joe S. Dusenbury, Jr., Esq.

MOTIONS

IM filed a motion on July 1, 2021, to dismiss SCB's protest on the grounds that:

SourceCorp's protest should be dismissed as it raises no issues that warrant the relief requested. In summary, the issues raised by SourceCorp are not subject to review, concern actions that were compliant with procurement regulations and

¹ Because SCB claimed bias and undue influence during the evaluation process, the CPO required all evaluators be available at the hearing. None were called to testify. In fact, SCB rested its case after examining two witnesses.

precedent, are clearly meritless or erroneous, do not present a ground for protest, or are at most harmless error.

SCB responds

Iron Mountain's Motion is legally insufficient to be granted. It does not allege that SourceCorp has failed to state claims sufficient to constitute grounds for protest. To the extent that it contends it has raised such grounds, there are clearly issues of fact in dispute.

In light of the decision below, the motion to dismiss is denied.

ANALYSIS

SCB protests an improper evaluation:

SourceCorp's performance under its current contract with DOR was used by the evaluators in scoring SourceCorp's proposal.... "Proposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously." The panel members, or some of them, did not evaluate the SourceCorp's proposal based only on the criteria stated in the RFP.

[Protest, p. 9]. The CPO agrees with SCB that the evaluators failed to evaluate SCB wholly based on the evaluation criteria. As discussed below, one or more evaluators failed to evaluate SourceCorp's performance as the incumbent contractor, leading to an incomplete evaluation and a failure to measure that performance against the RFP's evaluation criteria.

SCB points to an exchange between the evaluation team and the PO about whether SCB's current performance could be considered in evaluating SCB's qualifications. The PO advised the evaluators not to consider SCB's current performance during the evaluation, adding that SCB's current performance could be addressed during negotiations or the determination of responsibility.

The PO's guidance not to consider SCB's current performance was improper. The second most important evaluation criterion was Qualifications. (Solicitation, Page 37). The solicitation detailed the information that offerors were to submit for evaluation. (Solicitation, Page 27) Under paragraph H - Qualifications, the solicitation required:

Offeror shall describe how its company's financial, technical, and organizational resources ensure satisfactory completion of the services. Furthermore, the Offeror shall provide its established record with comparable government and/or commercial accounts.

(Solicitation, Page 32) (emphasis added)

Paragraph H cross-referenced Section V – Qualifications (Solicitation, Page 35) as information to be considered during the evaluation of the offeror's qualifications. Section V requires offerors to submit references. It also alerts offerors that the State "may consider information [about qualifications] from any source at any time prior to award." At the hearing, SCB introduced two reference checks performed by DOR during this evaluation, one for each company, that asked the references to rate the offeror's performance. Finally, SCB included the current contract with DOR in its proposal to demonstrate its qualifications for this contract.

An important part of the evaluation process is to gather information from offerors and evaluate that information against the evaluation criteria. Here the solicitation required evaluation of the offeror's qualifications and requested information to aid that evaluation. There can be no better indication of an offeror's ability to perform than its record of performance on similar contracts. SCB identified its current contract with DOR and stressed its role as "SCDOR's current partner" and the "current incumbent," noting that it "has worked for the past seven years processing the tax forms noted in this proposal and have gained the knowledge to ensure the proper load balancing of resources in each critical area of the form and payment process." (Technical Proposal, pp. 11-12, 22). SCB, not DOR, invited consideration of its performance on the current contract.

The PO was concerned that evaluating an incumbent's past performance of the previous contract would introduce bias and "subjectivity" into the evaluation. The PO's concerns, however, were unfounded. "[T]he Panel has recognized that evaluators are often chosen for their experience and judgment and that 'an evaluator should be allowed to have that experience and judgment enter into the procurement process.'" *Appeal by Provaliant Holdings, LLC*, Panel Case No. 2017-4(II). And while an evaluator cannot show favoritism or bias, "an evaluator's experience will include working with an incumbent vendor during the performance of the current contract[.]" *Id.*

Although not binding on the CPO, federal authorities have explicitly recognized the value of an evaluator's knowledge about an offeror's past performance. "[I]t has been repeatedly held that it is proper for evaluators to use their personal knowledge of an offeror's performance of a contract with an agency." *Seattle Sec. Services, Inc. v. United States*, 45 Fed. Cl. 560, 568 (2000). "We have held that an agency may properly use the opinions of its own evaluators, as any other references, in aid in the evaluation of proposals." *Matter of Inlingua Schools of Languages*, 88-1 CPD P 340 (Comp. Gen. 1988). As the Comptroller General has stated:

We have long recognized that incumbent contractors with good performance records can offer real advantages to the government, and that those advantages are often taken into account in proposal evaluation. An agency is not required to equalize competition with respect to these advantages so long as these advantages do not result from a preference or unfair action by the government.

Id. at *3 (internal citations omitted).

In *Inlilngua Schools of Language*, the protester complained that the evaluators had failed to investigate the protestor's past performance with the agency. In disregarding the evaluator's personal experiences, the agency had reasoned that the incumbent would have gained an unfair advantage had it used the agency's evaluators as references. The Comptroller General, however, found this was improper and sustained the protest. It reasoned that the incumbent's past performance with the agency "was the most relevant" reference because "the current solicitation was for the same services performed under the prior contract." *Id.* at *3. "To ignore this experience was improper when the RFP's evaluation scheme contained 'references' as an evaluation factor and the incumbent listed the procuring agency as a reference." *Id.*; *see also Matter of Gaver Technologies, Inc.*, 2015 CPD P 115 (2015) (finding agency properly relied on subcontractor's experience as the incumbent, as "experience under the predecessor contract clearly had a very high degree of relevance.").

Here, the PO's instruction to ignore the incumbent's past performance on the previous contract distorted the evaluation and confused the evaluators. Two evaluators scored SCB higher than IM, two scored it lower and one gave the same score to both. One evaluator actually commented:

Vendor does not go into detail about the ways in which they will provide some of the technical requirements, instead referring to the contract that is currently in place.

(emphasis added)

This evaluator also only awarded SCB half the available points for Qualifications. Ultimately, no evaluator specifically addressed SCB's past performance on the previous contract, choosing instead to speak in general terms about its work in the industry. Because no party called the evaluators to testify, the extent to which the PO's erroneous instruction affected the scoring is unknown. What is clear, however, is that the evaluation and scoring do not reflect SCB's past performance in rating its qualifications to perform the next contract. This ground of protest is granted.

SCB also protests that IM is not responsive, and that it does not meet the Special Standards of Responsibility required by the RFP. Both these claims are based on SCB's assertion that IM does not have experience with three "comparable contracts." SCB offered no evidence or testimony on these grounds at the hearing. In its proposal IM identifies several state and federal agencies with image and transaction processing exceeding the volume requirements in the Special Standards of Responsibility. In addition to those customers IM identified current contracts with many federal agencies, financial institutions and service companies, and a state department of revenue to provide comprehensive records and information management systems. The Panel has held that a request for "comparable" contract experience does not require identical contracts. *Appeal by Any Transactions, Inc.*, Panel Case No. 2012-6; *Protest of NBS Imaging Systems, Inc.*, Panel Case No. 1993-16. The DOR, experts in tax processing, determined that IM's experience was comparable. The CPO will not substitute his judgement for that of the evaluators who are experts in this field. These grounds of protest are denied.

REMEDY²

In *Protest of Carter Goble Associates, Inc.*, Panel Case No. 1989-25, the Panel held that where an offeror is disqualified in a competitive sealed proposal acquisition the appropriate remedy is re-solicitation. They wrote:

Offerors must necessarily be evaluated in relation to each other and ranked on each criteria including cost. Simply deleting ATE's scores from the process at this stage does not accurately reflect the result as it would have been if ATE had never been included. If ATE's proposal is removed, all evaluations in this case are invalid. Therefore, despite the problem of prior exposure of bid prices, the Panel believes that the fairest remedy in this case and the only way to insure the State gets the most advantageous proposal is to resolicit the contract in question here.

In this case, neither proposal is being removed from consideration. While re-solicitation may offer an opportunity to correct the evaluation error, it is neither necessary nor required by *Carter-Goble*. The most efficient remedy is to cancel the award to IM and remand for re-evaluation.³

DECISION

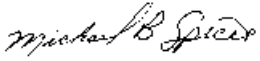
The PO's instructions deprived the State of valuable information, introduced confusion into the process, and resulted in unreliable rankings. Because the evaluation was flawed the of protest is granted. This procurement is remanded to the State for reevaluation and award in accordance with the Code.

² The remaining grounds of protest are that the State improperly terminated negotiations with SCB, that the award exceeds a maximum available price, and that the award is not supported by an adequate written determination. Since a decision on any of these issues cannot inform the decision what remedy should be ordered, the CPO does not reach them.

³ Subsequent to its decision in *Carter-Goble*, the Panel decided *Appeal by Industrial Sales Co., Inc.*, Case No. 1993-11 (reversed on other grounds sub nom. *Cameron & Barkley Co. v. South Carolina Procurement Review Panel*, 317 S.C. 437, 454 S.E.2d 892, 98 Ed. Law Rep. 474 (1995)). In *Industrial Sales* the Panel vacated an award to the highest ranked vendor. Since there were only two offers, the Panel distinguished *Carter-Goble* and directed that the contract be awarded to Industrial Sales Co., the second-ranked offeror. In this case, neither proposal is disqualified. Accordingly, *Industrial Sales* is inapplicable.

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Case No. 2021-213
August 4, 2021

For the Information Technology Management Office

A handwritten signature in cursive script, appearing to read "Michael B. Spicer".

Michael B. Spicer
Chief Procurement Officer

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VIA EMAIL (mspicer@mmo.sc.gov)

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Re: Protest of RFP 54000020364— Forms Processing Services—SC Dept. of Revenue (SCDOR)

Dear Mr. Spicer:

Pursuant to S.C. Code Ann. § 11-35-4210, on behalf of our client SourceCorp BPS (SourceCorp), Inc., we protest both the decision to cease negotiation with our client, as the highest ranked offeror, and to award the solicitation to Iron Mountain Technologies, Inc. (Iron Mountain). The grounds for the protest are set forth below. SourceCorp timely filed its Notice of Intent to Protest on June 9, 2021.

FACTUAL BACKGROUND

SourceCorp is the incumbent Forms Processing Vendor and has been for approximately seven (7) years. SourceCorp submitted a pricing proposal of \$23,570,900.85 and Iron Mountain submitted a pricing proposal of \$33,417,111.96. **SourceCorp is \$9,846,211.11 lower** than Iron Mountain.

On December 15, 2020, the Div. of Procurement Services, ITMO, issued the above referenced RFP, containing Appendices A-N. Amendment 1 was issued on December 17, 2020. The award was extended on March 16, 2021 and the notice of award was posted on May 23, 2021. There were only two (2) offerors—SourceCorp and Iron Mountain.

The RFP provides for the option for the State to enter into discussions and negotiations. Ex. 1, RFP, VI. Award Criteria, p. 37. The Evaluation Factors are:

- Technical 45%
- Qualifications: 30%
- Price: 25%

Ex. 1, VI. Award Criteria, Evaluation Factors – Proposals (Modified), p. 37. Offerors were prohibited from submitting any pricing information with their technical proposal. Ex. 1, IV (C.) Price proposal, p. 33. The RFP also allows for Discussions and Negotiations. Ex. 1, IV

The timeline for receipt of proposals, evaluation, negotiation and notice of intent to award the contract is:

12/12/2020	Justification for Competitive Sealed Proposal Ex. 2
11/30/2020	RFP issued
12/15/2020	Pre-Proposal Conference and questions received
12/17/2020	Amendment 1 issued
01/14/2021	Proposal submission date
01/21/2021	Evaluation Panel(E{p or panel) charging meeting held—15 DOR attendees and Zack Yarbrough (PO) (via teleconference) Ex. 3 ¹
01/28/2021	Evaluation Panel meeting where PO gave a “brief overview of the procurement process”. They went into executive session for contract negotiations. The same 15 DOR attendees, plus 1 additional DOR person attended (total 16 DOR personnel) (via teleconference) Ex. 4
02/03/2021	Evaluation Panel meeting where PO gave a “brief overview of the procurement process”. They went into executive session for contract negotiations. The same 15 DOR attendees. Ex. 5
02/04/2021	Evaluation Panel meeting where PO gave a “brief overview of the procurement process”. They went into executive session for contract negotiations. The same 15 DOR attendees. On information and believe, this was the scoring session. Ex. 6
03/12/2021	DOR revises and approves negotiations with SourceCorp. Ex. 7
03/12/2021	PO notifies SourceCorp it is the highest ranked offeror and begins negotiation process. Ex. 8.
03/16/2021	Extension of Award. Ex. 9
03/25/2021	SourceCorp sends its negotiation response to the PO. Ex. 10.

¹ There are only 5 evaluation panel members who scored the proposals: Joy Causey (#1), Jennifer Jenkins Bitzky (#2), Matthew Norman (#3), Sebrina Preston (#4), and Jonte Colclough (#5). Seven subject matter experts were listed from DOR for a total of 12 from DOR. Yet, 2 of the EP meetings had 15 people from DOR and one has 16.

04/07&16/21 SourceCorp sends emails to PO inquiring if there is anything else the State needs from it. Ex. 11.
04/13/2021 DOR determined, pursuant to § 11-35-1530(8)(a), to halt negotiations with SourceCorp. Ex. 12
04/13/2021 PO sends email to SourceCorp that DOR has elected to halt negotiations and it will be notified if negotiations resume. Ex. 13
04/13/2021 DOR sends approval to negotiate with Iron Mountain to PO Ex. 14
04/13/2021 Negotiation letter sent to Iron Mountain. Ex. 15
04/27/2021 Iron Mountain's 1st response to negotiation letter. Ex. 16
05/03/2021 2nd negotiation letter sent to Iron Mountain. Ex. 17
05/___/2021 Iron Mountain's response to 2nd Negotiation letter. Ex. 18
05/18/2021 RON with Iron Mountain Ex. 19
05/21/2021 Determinations and Findings for award to Iron Mountain. Ex. 20
06/02/2021 Notice of Intent to Award posted. Ex. 21.

DISCUSSION

A. Cessation of Negotiations with SourceCorp. The State chose to negotiate after completion of evaluation and scoring. According to § 11-35-1530(8), negotiations began with SourceCorp, as the highest ranked responsive offeror. The determination to cease negotiations (Cessation Decision) with SourceCorp is clearly erroneous, arbitrary, capricious, or contrary to law and in violation of the Code in multiple respects.² The notice of award should be overturned and the matter remanded to SFAA to complete good faith negotiations with SourceCorp.

1) First, the Cessation Decision violates § 11-35-20. The South Carolina Consolidated Procurement Code, §§ 11-35-10, et seq. (2019) (Code) requires that the Code be construed and applied to promote its underlying purposes and policies, which include, in part:

(2) The underlying purposes and policies of this code are:

(a) to provide *increased economy* in state procurement activities and to *maximize to the fullest extent practicable the purchasing values* of funds while ensuring that procurements are the most advantageous to the State and in compliance with the provisions of the Ethics Government Accountability and Campaign Reform Act;

² See § 11-35-2410.

(b) to foster effective broad based competition for public procurement within the free enterprise system;

... ;

(d) to consolidate, clarify, and modernize the law governing procurement in this State and permit the continued development of *explicit and thoroughly considered procurement policies and practices*;

(e) to require the adoption of competitive procurement laws and practices by units of state and local governments;

(f) to ensure the *fair and equitable treatment of all persons who deal with the procurement system* which will promote increased public confidence in the procedures followed in public procurement;

(g) to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process; and

S.C. Code Ann. § 11-35-20. (Emphasis added). In addition, the Code imposes an obligation of good faith in negotiations, performance or enforcement of matters subject to the Code. See S.C. Code Ann. § 11-35-30. In light of the fact that SourceCorp's pricing proposal was almost **ten million dollars less** than Iron Mountain's, the State's Cessation Decision does not promote or comply with § 11-35-20(2)(a), (b), (d), (e), (f) and (g). As is discussed further below, the DOR and the evaluation panel members, or some of them, had a bias against SourceCorp based on its performance of the current contract and the panel members' resulting scoring and DOR's decision to halt negotiations was clearly erroneous, arbitrary, capricious, or contrary to law.

2) Section 11-35-1530(8) provides, in pertinent part: "If a satisfactory contract cannot be negotiated with the highest ranking offeror, negotiations may be conducted, in the *sole discretion of the procurement officer*, with the second, and then the third, and so on, ranked offerors to the level of ranking determined by the procurement officer in his sole discretion; ...". Based upon the information provided to SourceCorp pursuant to its Freedom of Information (FOIA) request, the DOR, not the PO, made the decision to negotiate with SourceCorp, to cease negotiations with SourceCorp and to negotiate with Iron Mountain. Ex. 12. While the PO participated in the negotiations, he was not in control of the negotiations or the decision to halt negotiations with SourceCorp as required by Reg. 19-445.2095(K). In fact, DOR drafted the memo directing the PO to halt negotiations. EX. 12, Email from Bob Thomas to Zachary Yarbrough, 04/13/2021. Approximately two (2) hours after receiving this directive, the PO notified SourceCorp that negotiations were being halted, without providing any explanation or justification. EX. 13.

When DOR halted the negotiations with SourceCorp, it stated to the PO: "After review of Exela's responses from March 25, 2021, to SCDOR's Negotiation Points document, SCDOR does not believe that it could negotiate a satisfactory contract at this time." Unlike the situation in *In Re: Protest of Andersen Consulting*, Case No. 1994-1, 1994 SC CPO LEXIS 12, SourceCorp was not afforded a full, fair and meaningful opportunity to negotiate, even though it could have saved the State approximately ten (10) million dollars, and the parties had not come to an impasse. DOR did not say that the parties had come to an impasse or that SourceCorp was refusing to agree to something requested as part of the negotiation. It just stopped the negotiations. Simply put, neither DOR nor the PO know whether or not they could reach a "satisfactory contract" with SourceCorp because the negotiation efforts were nothing more than a show. In fact, on April 21, 2021, Mark Fox, a subject matter expert, emailed the PO stating he needed to be updating his management on the RFP and the effort required to "bring Iron Mountain on-board." See Ex. 27, email from Fox to Yarbrough. At the time of this email, Iron Mountain had not even submitted its response to the negotiation questions.

In fact, the three reasons supplied by DOR³ as grounds for why it did not "believe" that a contract could be successfully negotiated, could easily have been negotiated. Two of them would have required that the SourceCorp's price be adjusted approximately \$134,250. SourceCorp's price would still have been approximately ten (10) million dollars less than Iron Mountain's. The third reason stated in DOR's memo was that SourceCorp refused to confirm that it would "comply to the process specified in the original solicitation" because in "ten separate instances "[SourceCorp] stated that it would work with SCDOR to address and meet the requirement". SourceCorp responded the exact same way in negotiating the current Contract, which clearly DOR found acceptable as they were awarded the contract and are the incumbent vendor. Clearly, DOR found that SourceCorp would comply with the requirements of the RFP as they and the PO found SourceCorp's proposal was responsive before they began negotiations, allowing them to enter into negotiations with SourceCorp. § 11-35-1530(7) and (8). Moreover, stating that you will meet the requirement is indeed confirmation that you will comply. Finally, the PO and DOR could have certainly asked SourceCorp to clarify its response. In fact, when negotiating with Iron Mountain, the PO and DOR did just that. See EX. 17 (asking Iron Mountain to clarify some of its responses to the 1st negotiating letter). The fact of the matter is that the reasons stated by DOR for ceasing negotiations with SourceCorp lack legitimacy.

³ The PO requested that DOR slap a couple of "big ticket items" in the memo that it could defend. The above three are the "defensible" ones DOR chose.

As stated above, in contrast to the negotiation process with SourceCorp, after Iron Mountain submitted its response (EX. 16), DOR engaged in follow-up clarification questions and spoke to Iron Mountain. EXs. 17 and 18. Iron Mountain was told that the maximum amount of money DOR would pay was \$30,000,000. Iron Mountain rejected the \$30,000,000 cap and DOR agreed to raise the price to what Iron Mountain requested--\$31.4 million. See EX. 22, Email from Mark Fox to Zachary Yarbrough, May 18, 2021.⁴ Unlike the negotiations with Iron Mountain (see EXs. 16, 17 and 18), it appears that the negotiations with SourceCorp were a means to an end to be able to negotiate with Iron Mountain. As discussed below in D., the evaluators and DOR seem to be biased against SourceCorp.

3) On information and belief, DOR did not document its negotiation objectives. Reg. 19-445.2095(K) provides that “[p]rior to initiating negotiations under Section 11-35-1530(8), the using agency must document its negotiation objectives.” In the FOIA response, there does not appear to be any documentation of the negotiation objectives from DOR. Documentation of negotiation objectives assures fairness, uniformity and public confidence in the procurement and negotiation process.

4). The Code requires “[e]very contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. ‘Good faith’ means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.” As discussed below in D., the evaluators and DOR seem to be biased against SourceCorp. This is particularly true with DOR’s decision abruptly to halt negotiations and not even attempt to engage in meaningful dialogue with SourceCorp to reach an agreement.

5) The use of “subjective price evaluation” did not fulfil the intent of the General Assembly to *increase economy* in state procurement activities and to *maximize to the fullest extent practicable the purchasing values*. The Panel “Briefing” Instructions to the Evaluation Panel mandated that the price be evaluated subjectively. We are unaware of any State Law regulation or policy that allows the evaluators to evaluate price subjectively. The price is what it is. Further, absent a regulation governing “subjective price evaluation, the decision to use subjective price evaluation violates the General Assembly’s intent to have *explicit and thoroughly considered procurement policies and practices*.

B. That award exceeds the maximum available price.

⁴ Iron Mountain’s negotiated price is still approximately \$8 million dollars higher than SourceCorp’s proposed price.

In its second Negotiation Letter to Iron Mountain, the PO stated: SCDOR has reviewed Iron Mountain's update (sic) price proposal. Although the SCDOR appreciates that Iron Mountain has reduced their price proposal, the current total value is unacceptable. **The maximum amount available for this perspective contract is \$30M.**" EX. 17, E., p. 2. In *Andersen*, the perspective offeror would not agree to the dollar value of the contract liability requirement and the State went to the next offeror to negotiate. Iron Mountain refused to agree to the \$30,000,000 contract amount and instead of going back to negotiate with SourceCorp, DOR inexplicably agreed to accept a price \$1,478,833.49 higher than the maximum amount available for the contract. Ex. 21.

C. The Determination and Findings do not comply with § 11-35-1530(9).

Section 11-35-1530((9) requires that "[t]he contract file must contain the basis on which the award is made and must be sufficient to satisfy external audit." Instead of containing the basis upon which the award was made, the "Finding" simply regurgitates the Code language for award. (Taking into consideration both price and the evaluation factors set forth in the Request for Proposal, the evaluation panel has determined, ..., that the proposal submitted by [Iron Mountain Information Management, LLC to be the most advantageous to the State. This statement is not sufficient to satisfy external audit.⁵

D. Bias by and undue influence on members of the Evaluation Panel.

1) Evaluator Bias. There are 5 named evaluators: (#1) Joy Causey (#2), Jennifer Jenkins Bitzky (#3), Matthew Norman (#4), Sabrina Preston and (#5), Jonte Colclough. There were 7 subject matter experts (SME): Julia Smith, Alex Jackson, Devin Martin, David Thompson, Mark Fox, Sherrie McTeer and Susan Rushing. The SME attended the charging session and the 3 evaluation sessions, including the scoring session. Among those attending included the Sherri McTeer, the Deputy Director, Taxpayer and Business Services, and on information and belief, others who were superiors of some of the evaluation panel members.

At the Evaluation Panel charging meeting, the PO explained to each of the prospective panel members that they had to read and sign the Procurement Integrity Representations and Restrictions (PIRR). Each did. EX. 23. The PIRR required that each member certify that he/she had read the PIRR and the representations and statements are true and correct and each agrees

⁵ SourceCorp is aware of the Procurement Review Panel's (PRP) dicta in *Provaliant*. However, courts are required, where possible, to give meaning for all legislative enactments. In seeking the intention of the legislature, we must presume that it intended by its action to accomplish something and not to do a futile thing. *State ex rel. Walker v. Sawyer*, 104 S.C. 342, 88 S.E. 894.

with the terms. *Id.*, p. 2. The members certified that they had no conflicts of interest. In considering whether there is a conflict of interest, the members considered:

In determining whether any conflict of interest exists, I have considered all of the following factors that might place me in a position of conflict, actual or apparent, with my official responsibilities regarding this procurement: (a) my relationship with all offerors, (c) my employment and business arrangements (past, present, and under consideration); ... I am not aware of any circumstances which would (a) impair my exercise of independent judgment or my impartiality with respect to my duties in support of the above cited acquisition, or (b) prevent me from evaluating any proposals submitted solely on their merits and in accordance with the evaluation criteria.

Id., p. 1 *Personal Conflicts of Interest/Ethics Act*.

On information and belief, members of the evaluation panel in fact had conflicts of interest based on their working relationship with SourceCorp as the incumbent vendor for DOR's existing forms processing services contract. Apparently, one of the panel members, Joy,⁶ after the charging discussion dealing with, *inter alia*, how to deal with past performance, brought the issue up with Bob Thomas, State Tax Attorney, who then forwarded the questions about using past performance as an evaluation criterion to the PO and suggested that they may need to talk with Joy. Ex. 24, email dated January 28, 2021 (the day of the charging meeting). The PO responded on January 29, 2021, with an explanation of the process and stated that DOR should let him know if there needs to be a conversation about the past performance with Joy and prospectively the rest of the evaluation panel. *Id.* Then, again on February 3, the DOR attorney Thomas brought the issue up again, stating:

I remain uncomfortable with the rule that we have to accept certain claims, when we know them to be false based on our prior experience, at face value when scoring. I can sense that our scorers don't like it either.

Id., February 3 email from Bob Thomas to Zachary Yarbrough. In reply, the PO stated, *inter alia*, "[t]o answer your question, we can only evaluate the information we have received in response to our solicitation (to include the references). If there are issues with past performance, this will be addressed in negotiations or in our responsibility check." *Id.*, February 3 email from Zachary

⁶ Joy Causey is one of the panel members. On information and belief, the Joy referenced in Mr. Thomas' email is Ms. Causey. Without the opportunity to examine Ms. Causey, there is no way to know whether she was speaking for herself or other panel members.

Yarbrough to Bob Thomas. Bob Thomas attended all but two of the Panel meetings. On information and belief, there was no other discussions about the evaluation panel members' concerns about SourceCorp's past performance on the current contract. In fact, it is clear that panel members scoring, particularly price, was based on past performance of the current contract. For example, Sabrina Preston, in her technical evaluation explanation summary, states "many of the questions were answered in general but did not provide details to show how they would *or have incorporated many of the tasks requirements.*" EX. 24, Evaluation Panel Scoring Sheets, Sabrina Preston, Exela Technical.

SourceCorp's performance under its current contract with DOR was used by the evaluators in scoring SourceCorp's proposal. See Id. (Evaluation sheets). "Proposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously." The panel members, or some of them, did not evaluate the SourceCorp's proposal based only on the criteria stated in the RFP.

E. Iron Mountain does not meet the Mandatory Minimum Qualifications stated in the RFP.

On information and belief, Iron Mountain does not meet the qualification requirements for the Solicitation, including the special standards for responsibility. EX. 1, p. 32, H. and p. 35, V. "Qualifications", pp. 35-36. Among other things, Iron Mountain does not have three (3) comparable contracts with regard to providing the type of complex tax return processing required under this RFP. Iron Mountain has limited to no experience processing complex tax returns whereas SourceCorp is the only company processing returns at a high volume for multiple states for the past 20 years. In addition, it appears that DOR was aware that Iron Mountain's Certificate of Compliance was denied twice prior to entering into negotiations with Iron Mountain. See Ex. 26, Email from Yarbrough to Funches, April 12, 2021. The PO erred in determining that Iron Mountain is a responsible offeror under § 11-35-1410(8),

One of Iron Mountain's "comparable contracts" was the Commonwealth of Pennsylvania Office of Unemployment Compensation. It is not a "comparable contract." An Unemployment Claim is not complex—it is nothing more than processing notification forms to the state (for example the capturing of unemployment start dates, reasons for the claim, etc. The past performance example put forth by Iron Mountain is not comparable in complexity to South Carolina's Tax Form Services involving a payment "remittance" process (a fiduciary responsibility) and the processing of tax returns and forms -- which can include such tasks as data validation, matching of payment to correct tax payer accounts, and potentially using national banking system's ACH payment clearing house. In fact, Iron Mountain has no experience in processing

tax forms, complex or otherwise, or presumably it would have submitted such experience to DOR for consideration and evaluation.

F. Iron Mountain is not responsive.

Iron Mountain is not responsive to the RFP requirement that it must have three “comparable” contracts it has performed and must explain “how the supplies or services provided are similar to those requested by this solicitation, and how they differ.” Ex. 1, p. 35, Qualifications – Required Information. A responsive vendor is one that meets the material and essential requirements of the RFP. § 11-35-1410(9). An essential requirement is a requirement of the RFP is one that has more than more than “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.” See § 11-35-1520(13). The lack of experience in providing services for a comparable services contract can effect price, quality and delivery of services.

In this case, Iron Mountain’s lack of experience with comparable contracts of the complexity of the Tax Forms Services has already manifested itself in a submitted pricing proposal of almost \$10,000,000 more than SourceCorp. As Evaluator # 1, Joy Causey stated in her qualification evaluation justification: “Iron Mountain has extensive experience with shredding and processing of documents. There is no specific experience mentioned with tax processing to include returns and remittances.” Ex. 24, Panel Scoring Sheet, Joy Causey, Iron Mountain Technical. The determination to find Iron Mountain responsive is arbitrary and capricious.

CONCLUSION

We request that the CPO hold a hearing on this protest. Given the probability of bias on behalf the evaluation panel, SourceCorp expressly requests that a hearing be held and that the evaluation panel members particularly be available to testify. This is not a hearing that can be decided on the SFAA/DOR record. We request that the CPO overturn the Intent to Award to Iron Mountain and remand the matter to SFAA to conduct a full and fair negotiation with SourceCorp. SourceCorp also requests that CPO determine that the Iron Mountain proposal is not responsive in that it does not meet the mandatory and essential qualification requirements of the RFP.

If you chose not to conduct a hearing, please give us the opportunity to provide additional evidence regarding the issues we have raised.

Michael B. Spicer
June 17, 2021
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Yours very truly,

A handwritten signature in cursive script, appearing to read "M. Elizabeth Crum".

M. Elizabeth Crum

MEC

cc: Manton M. Grier Jr. Esquire
Zach Yarbrough
Melissa J. Copeland, Esquire
John E. Schmidt III, Esquire
Pamela A. Baker, Esquire

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised May 2020)

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>

FILING FEE: Pursuant to Proviso 111.1 of the 2020 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 367, 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.