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Protest Decision

Matter of: Integrated Biometric Technology, LLC

Case No.: 2022-207

Posting Date: March 11, 2022

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400021691

Description: Digital Fingerprint Services and CWPS

DIGEST

Protest alleging improper discussions and clarifications is granted. The protest letter of Integrated Biometric Technology, LLC (IBT) is included by reference. (Attachment 1)

AUTHORITY

The Chief Procurement Officer (CPO) 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 | 09/10/2021 |
| Amendment 1 Issued | 09/27/2021 |
| Proposals Received | 10/14/2021 |
| Intent to Award Posted | 12/03/2021 |
| Intent to Protest Received | 12/13/2021 |
| Protest Received | 12/20/2021 |

The State Fiscal Accountability Authority (SFAA) published its Request for Proposals on September 10, 2021, to establish a state-term contract for digital fingerprinting services and a concealed-weapon permitting system. Amendment 1 was published on September 27, 2021, and reproduced the entire solicitation with modifications. The solicitation included two lots. Lot A sought electronic fingerprinting services for qualified agencies, organizations, or individuals that are required to have a state and national fingerprint-based background check. Lot B required a concealed weapon permit application system for the State Law Enforcement Division (SLED). Both Lots were to be awarded to the same offeror. There were three published evaluation criteria: Lot A, Lot B, and Price. There were eight evaluators for Lot A and six of those eight evaluated Lot B.

Proposals were received from IBT and Idemia Identity & Security USA, LLC (IIS). The solicitation authorized the use of discussions, as provided for in SC Code §11-35-1530(6) and Regulation 19-445.2095(I), for the purpose of clarifying ambiguities and correcting suspected mistakes and issues of responsiveness. The procurement officer initially contacted IIS about a suspected mistake in its proposal on November 5, 2021, which was corrected by IIS on the same day. On or about November 10, 2021, IIS was asked to provide clarifications and additional information concerning 25 issues and IBT was asked to clarify 12 issues related to its proposal. The evaluation committees met on November 15, 2021, to discuss the proposals and provide an initial scoring. On November 17, 2021, IIS was asked to respond to 3 additional issues related to the responsiveness of its proposal. On November 19, IIS was asked to clarify an issue related to one of its November 17, 2021, responses. Based on the November 15th scoring, IIS was determined the highest ranked offeror and negotiations were initiated on November 22, 2021. On November 29, 2021, the Procurement Officer reopened discussions with IIS to address

another issue of responsiveness that arose from IIS' November 17th discussions responses. On December 2, 2021, the evaluators reconvened to review and discuss the proposals and provide a final ranking. The evaluators were afforded the opportunity to adjust their November 15th scores and supporting comments based on the discussion exchanges that occurred since the first scoring meeting. Every evaluator reaffirmed their November 15th scores without additional comment. IIS was determined to be the highest ranked offeror on December 2, 2021. The Record of Negotiation was executed by both parties on that same day and an Intent to Award to IIS was posted on December 3, 2021.

IBT filed an Intent to Protest on December 13, 2021, followed by its formal protest on December 20, 2021. IBT protests that the discussions with IIS and subsequent modifications to its proposal were improper, that IIS' proposal was nonresponsive, that there were anomalies in the scoring of its proposal, that the negotiations were conducted improperly, and that, considering the closeness of the scoring, the State should have conducted negotiations with both Offerors.

ANALYSIS

IBT first protests that during discussions the State unfairly allowed IIS to revise its proposal and substantially increase its score:

The State acted improperly and unfairly in its conduct of discussions and clarifications with Idemia as compared to IBT. On the one hand, multiple rounds of discussions with Idemia apparently resulted in an opportunity for Idemia to submit "proposal revisions," revise its price, and revise or clarify approximately 28 issues in its proposal, thus substantially enhancing its score. On the other, the State's single round of discussion with IBT that included far fewer questions offered no similar insights or opportunities to clarify what was only later revealed to be a key issue impacting IBT's proposal scoring....

By giving Idemia multiple chances to revise and clarify its proposal on the issues that concerned the State and on price, the State gave Idemia an opportunity to increase its score substantially, or in any event by more than three points, resulting in a higher score for Idemia than IBT. However, IBT was in no way provided a similar opportunity to lower its price or address any of the concerns the State revealed only after the fact, including the particular concerns of the one evaluator who remarkably gave IBT only half of the points received by Idemia. This process, which resulted in Idemia having meaningful opportunity to revise

and re-price its proposal, prejudiced IBT, was blatantly unfair to IBT, and contrary to South Carolina law.

Section 11-35-1530(6) authorizes discussions for the purpose of clarifying a proposal to assure full understanding of, and responsiveness to, the solicitation requirements in accordance with published Regulations. Regulation 19-445.2095(I) limits those discussions to issues of responsiveness; uncertainties concerning cost or price, technical proposal, and other terms and conditions; and suspected mistakes. The Regulations allow offerors to make 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.

There are no limits on the number of times the State can seek clarifications or the number of issues that can be raised. However, discussions are not intended to generate unrestrained enhancements to, or further development of, proposals. They are conducted for the purpose of clarification of significant ambiguities in the proposal and are limited to the extent necessary to address the ambiguity. Language can be ambiguous either because it can be fairly understood in more than one way or because it expresses its purpose in an indefinite manner. *Penton v. J.F. Cleckley & Co.*, 486 S.E.2d 742 (S.C. 1997).¹

In keeping with the Regulation, the State discovered an incomplete sentence in the IIS proposal and sought clarification on November 5, 2021, and IIS provided some missing information.

On November 10, 2021, the State sought clarification from IIS of 25 issues with its proposal that could render it non-responsive:

We have identified the following uncertainties in your proposal that could render your proposal non-responsive. You may address these uncertainties by submitting revisions to any aspect of your proposal, but only to the extent such revisions are necessary to resolve the uncertainty identified.

Some of these issues are clearly related to an incomplete or ambiguous response to solicitation requirements. For example, issue number 3 seeks clarification of an acronym, ECQC, on page

¹ Competitive Sealed Proposals, Required Procedures and Guidance for Communications After Opening but Prior to Award, Effective: **September 2021**

18 of the IIS proposal. IIS responded that ECQC is its “Enrollment Center Quality Control” program. This exchange is consistent with the intent and purpose of the Discussions and Clarification provisions.

However, other issues asked IIS to elaborate on a compliant response, or sought information not originally requested in the solicitation which invited IIS to improperly enhance its proposal. For example, issue 6 addresses the IIS response to the following solicitation requirement:

Contractor must coordinate and provide AR Agency-Site fingerprinting services at the request of AR Agencies. AR Agency must confirm a minimum of twenty individuals are to be fingerprinted. These AR Agency-Site fingerprinting services **must be held within 10 business days** of AR Agency’s request, unless AR Agency requests a date outside such timeframe.

[Amendment 1, Page19] (emphasis added)

The initial IIS response:

Onsite Mobile Events for groups of 20 Applicants or more are available upon request, for example:

- o Onsite Mobile Events anywhere in South Carolina for groups of 20 or more when requestor is able to provide suitable area for fingerprinting equipment setup, inclusive of security and privacy protocols
- o At Onsite Mobile Events, we are able to propose hours of operation that bridge both standard and non-standard business hours, such as 11:00 am to 6:00 pm. This allows us to better accommodate those who may need our services later in the day in addition to those who prefer more standard availability.
- o All Onsite Mobile Events offer store and forward capability. Additionally, all mobile locations and events use the same trained, credentialed, IDEMIA USA staff as our brick and mortar Enrollment Centers, as well identical live scan equipment meeting all designated security requirements.

Upon award, we will make necessary changes to ensure that all AR Agency requests are met within 10 days.

[IIS Technical Proposal, Page 26] (emphasis added)

The State sought clarification of the “necessary changes” IIS would need to make:

Proposal Content: “File2-TechProposal” pg. 26 “Upon award, we will make necessary changes to ensure that all AR Agency requests are met within 10 days.”
Required Action: Elaborate on the necessary changes you will make to ensure that all AR Agency requests are met within 10 days.

The solicitation required these services be provided within 10 business days. IIS agreed to provide the services within 10 business days. While the IIS response might pique the State's curiosity about the level of effort necessary to meet the requirement, the solicitation did not ask the Offeror to explain how it would meet the requirement and IIS' commitment to meet the requirement is not ambiguous.

Issue number 7 requested IIS elaborate on its response to a solicitation requirement to provide attestation screens. The solicitation requirement states:

The Contractor shall provide the applicant with an attestation screen or verification through the call center to confirm all privacy notifications and policies have been provided to them by the authorized agency prior to continuing the scheduling of fingerprint services.

[Amendment 1, Page 20]

IIS' initial response:

Meets Requirement

We currently provide an attestation screen to confirm all privacy notifications and policies have been provided to the Applicant by the AR Agency as a requirement to schedule fingerprint services. For Applicants who choose to schedule using our Customer Service Call Center, the CSR, will read the privacy notification statement, request verbal agreement and confirm that the AR Agency has provided them with the privacy notifications and policies. When the verbal consent is obtained the CSR will select the "AGREE" box, indicating that the applicant acknowledges the release of information. In the event that the Applicant does not provide verbal consent and acknowledgment of receipt of privacy notifications and policies, the CSR will discontinue the transaction and advise the Applicant to contact the requesting AR Agency.

During discussions, the State requested IIS elaborate on its response and provide references that were not requested in the solicitation:

Proposal Content: "File2-TechProposal" pg. 36 "We currently provide an attestation screen to confirm all privacy notifications and policies have been provided to the Applicant by the AR Agency as a requirement to schedule fingerprint services."

Required Action: Elaborate on your capacity to provide attestation screens and confirm privacy notifications and policies. Where is this currently provided?

The solicitation requirement was to provide attestation screens, IIS agreed to provide the screens. While the requested information might provide some assurance of the initial response, the

solicitation did not ask Offerors for a detailed explanation of their ability to meet the requirement or for references. The IIS response is an improper enhancement to its proposal at the invitation of the State.

Issue number 8 requests IIS to elaborate on its response to the following solicitation requirement:

The applicant should have appropriate documentation from the AR Agency to use in choosing the agency, statute, and agency identifier (ORI) when scheduling fingerprint services. This information is used to determine SLED and FBI fees for the processing of the fingerprint check and also to route the results to the authorized agency for review.

[Amendment 1, Page 20]

IIS initially responded:

Meets Requirement

Applicants are required to have appropriate documentation from the AR Agency for use in selecting the correct agency, statute, and agency identifier (ORI) when scheduling a web-based appointment via our registration website. Applicants who use our Customer Service Call Center are required to provide the CSR with the agency, statute, and ORI from the AR Agency documentation to complete scheduling for fingerprint services. Applicants who do not have proper documentation and cannot provide the required information to the CSR are asked to contact the AR Agency, obtain the proper documentation, and call back to complete the transaction,

[File2 – Technical Proposal, Page 36]

Even though the original response addressed the requirement and was not ambiguous, the State asked IIS to elaborate:

Proposal Content: “File2-TechProposal” pg. 37-38

Required Action: Elaborate on how you will verify the AR Agencies’ authority/relationship with the applicant prior to collecting the fingerprints for submission.

The IIS response is an improper enhancement of its proposal at the invitation of the State.

Issue number 11 seeks clarification of the IIS response to solicitation requirement 3.2.7.2 which requires:

The “no-show” report shall also be compiled monthly in a Microsoft Excel format. The Contractor shall provide the names and demographic information (which includes, at a minimum: applicant date of birth, agency case number, reason for fingerprinting, ORI, date, and location of scheduled appointment) for

persons that failed to attend a scheduled fingerprint appointment by individual AR Agency. The “no show” report must include grand total of “no shows” by reason fingerprinted.

The SLED Regulatory Department shall receive a copy of this monthly Report for the no shows for CWP enrollees.

[Amendment 1. Page 23]

Response from the IIS proposal:

Meets Requirements

IDEMIA USA will provide a monthly “no-show” report in Microsoft Excel format to the SLED. The report includes the Applicant’s name and demographic information and is sorted by individual AR Agency.

[IIS Technical Proposal, Page 58]

IIS responded that it would provide the report to SLED as required. During discussions, the State asked IIS to explain how it would meet the requirement:

Required Action: Confirm and elaborate on how you will meet all requirements of 3.2.7.2 of Amendment 1 of the Solicitation

This is a request for additional information that was not requested in the solicitation and the IIS response is an improper enhancement of the IIS proposal.

Issue number 12 asks IIS to elaborate solicitation requirement 3.2.12:

Proposal Content: “File2-TechProposal” pg. 62

Required Action: Elaborate on “basic RapBack functionality”.

The original solicitation requirement states:

3.2.12 SLED Backend Updates

During this contract period, it is anticipated that SLED will be upgrading its backend system to accommodate new services available to applicant submissions, specifically RapBack. RapBack allows an AR Agency to elect to store its prints at the FBI so that new arrest information may be automatically forwarded to SLED or the AR Agency. The contractor will be required to perform any updates, enhancements, modifications to their system at no additional cost to the applicants, AR Agencies, or SLED for RapBack and any other enhancements/updates/modifications put in place by SLED. SLED will work with the contractor to provide specification and details concerning required

upgrades/enhancements. SLED may also have fees that will be associated with the RapBack program and the contractor will be required to incorporate both these fees and FBI fees into their solution.

[Amendment 1, Page 24]

IIS's initial response:

Meets Requirements

IDEMIA USA has included basic RapBack functionality in the pricing for the bid response, including the functionality to support the FBI RapBack program. We are currently the only approved FBI Channeler to have successfully implemented RapBack support and will use our expertise to support SLED's RapBack upgrade effort. The added functionality will include:

- Addition of a flag in the agency database table on the proposed SLED EasyPath system that indicates the agency/employer has chosen to participate in the RapBack program
- Addition of agency/employer management options for RapBack as a part of the Administrative Review program
- RapBack result processing functionality to receive unsolicited RapBack responses from the FBI via the SLED Message Switch interface, identifying the applicant record in the EasyPath database, and to place the result into a special processing queue for review and response by SLED authorized personnel
- Reporting that itemizes the fees due to SLED from participating agencies/employers for on-going RapBack maintenance fees
- Mutually agreed-upon specifications for upgrades and enhancements

This response appears to be unambiguous and responsive to the solicitation requirement. It is difficult to discern what additional information the State was seeking since the IIS response was essentially the same. There was no basis for this request for additional information.

There is a thin line between clarifications to achieve a full understanding of an offeror's proposal and assisting an offeror to enhance or further develop its proposal. Providing an offeror the opportunity to improve or amplify a compliant response, or soliciting information beyond that originally required by the solicitation, crosses the line, particularly when both offerors were not given the same opportunity. The IIS proposal was improperly modified. This issue of protest is granted.

IBT protests that the IIS proposal was not responsive, and the State improperly conducted negotiations. IBT alleges the IIS proposal was not responsive to the following solicitation requirement:

Any applicant type shall have the ability to use a public on-line query function to verify the receipt/entry and current minimum status of a new application, renewal, or replacement in the Contractor system. This processing should be a URL link on the SLED web site to the CWP system awarded in LOT B.

[Amendment 1, Page 26]

The initial response from IIS:

Upon transition to UEP, IDEMIA USA will provide a URL link to be posted on the SLED website which will provide an on-line query function to verify the receipt/entry and current minimum status of a new application, renewal, or replacement in the Contractor system.

[IIS Technical Proposal, Page 89]

It should be noted at this point that proposals were opened on October 14, 2021. The evaluation committee began its evaluation on October 28, 2021. The evaluation committee submitted signed score sheets and comments for each proposal on November 15, 2021. Based on these scores, the State began negotiations with IIS on November 22, 2021. The November 15th scores and comments were affirmed without modification at another scoring meeting on December 2, 2021. The Record of Negotiation was signed and Intent to Award posted the next day, December 3, 2021.

On November 17, 2021, the State asked IIS to clarify this response:

Solicitation Requirement: pg. 26, Amendment 1: *“Any applicant type shall have the ability to use a public on-line query function to verify the receipt/entry and current minimum status of a new application, renewal, or replacement in the Contractor system. This processing should be a URL link on the SLED web site to the CWP system awarded in LOT B.”*

Proposal Content: pg. 89, “File2-TechProposal”: *“Upon transition to UEP, IDEMIA USA will provide a URL link to be posted on the SLED website which will provide an on-line query function to verify the receipt/entry and current minimum status of a new application, renewal, or replacement in the Contractor system.”* and pg. 11 “Proposal Revisions Submittal Date: November 12, 2021”: *“UEP Go-Live Completed - 10/31/2022”*

Questions/Required Actions: If applicable, describe how Idemia will meet the cited Solicitation requirement between the contract effective date and the projected UEP Go-Live date of 10/31/2022.

IIS responded on November 19, 2021:

IDEMIA USA response:

Between the contract effective date and the UEP Go-Live date of 10/31/2022, IDEMIA USA will continue to provide Customer Service Call Center support for applicants to verify the receipt/entry and current minimum fingerprint submission status. Applicants who have been provided with confirmation of a completed fingerprint submission that request additional information will continue to be directed to the SLED Regulatory Department, which is the current required procedure.

[Proposal Revisions, November 19, 2021]

Referring applicants to a call center does not meet the requirement for a public on-line query function. At this point in time the IIS proposal is not responsive.

On November 30, 2021, IIS was offered another opportunity to make its proposal responsive to the requirement of a public online query function:

Required Action: While the discussion response provided cleared up the previously cited ambiguity, it also describes a deficiency that will result in rejection as non-responsive unless corrected. In order to be considered responsive, describe how Idemia will meet the cited Solicitation requirement between the contract effective date and the projected UEP Go-Live date of 10/31/2022.

IIS responded on November 30, 2021, with the following:

IDEMIA USA response:

Upon contract award, IDEMIA USA will establish a URL link on the SLED website that will provide CWP applicant status, using existing interfaces, as an interim solution prior to the proposed UEP migration.

IDEMIA USA provides similar applicant status verification for multiple state customers.

Although Section 11-35-1530(7) requires that only responsive offerors be ranked, Regulation 2095I(3) contemplates situations where discussions sometimes occur after final ranking. *See Appeal by Blue Cross and Blue Shield of South Carolina*, Panel Case No. 2018-2 (“If the

Legislature had meant that in all cases discussions had to take place before evaluation, the word ‘ordinarily’ would not have been used.”) In this case, the evaluators initially scored the proposals on November 15, 2021. IIS was determined the highest ranked offeror, and the State initiated negotiations on November 22, 2021. Discussions with IIS on the online query issue, however, did not conclude until November 30, 2021.

Ideally, the discussions regarding the online query function should have been concluded prior to initial scoring. Nevertheless, an evaluation committee meeting was convened on December 2, 2022, during which the evaluators were given a chance to change their original scores. Each evaluator, however, affirmed that they had reviewed the responses received during discussions and confirmed their original score. At this point, the rankings became final. Although this process was imperfect, it did not violate the Code. This issue of protest is denied.

IBT also alleges that its proposal was unfairly downgraded over staffing concerns which were, in part, attributable to the State’s ambitious implementation schedule, were equally applicable to both Offerors, and the resulting evaluation was unfair and lacked a reasonable and rational basis:

Accordingly, the State's evaluation of this factor was contrary to law, contrary to principles of procurement, unfair, arbitrary, and resulted in actual prejudice to IBT. IBT was prejudiced by the State failure to conduct this procurement on a level playing field and in accordance with law.

IBT argues that it was unfairly downgraded for its staffing transition solution. While nearly every evaluator commented on IBT’s lack of corporate experience and staffing, and several commented on IBT’s lack of a security officer, staffing was not separately scored evaluation criterion. The published evaluation criteria were Lot A, Lot B, and Price. In fact, a majority of the evaluators, five out of eight, scored IBT higher for Lot A while two evaluators scored IIS higher. IBT was scored higher on Lot B by four out of six evaluators while the same two that ranked IIS higher on Lot A, scored IIS higher on Lot B. While the two evaluators awarded IIS enough points to overcome IBT’s price advantage and the scores awarded by the majority, their comments reflect reasonable concerns and are not arbitrary. The Procurement Review Panel has observed:

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As the Panel has previously stated in Case No. 1993-14, In re: Protest of Drew Industrial Division, "the variation of evaluators scores alone, is only proof of the subjective nature of the evaluation aspect of the RFP process." See also, Case No. 1993-16, In re: Protest of NBS Imaging systems. Inc.

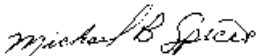
In Re: Protest of TRAVELSIGNS; Appeal by TRAVELSIGNS, Panel Case 1995-8

This issue of protest is denied.

DECISION

The Idemia Identity & Security USA, LLC proposal was improperly modified through clarifications and discussions and the determination of the highest ranked offeror and negotiations were improper. The protest of Integrated Biometric Technology is granted. The award to Idemia Identity & Security USA, LLC is cancelled. However, because the improper modifications came at the invitation of the State and were not initiated by Idemia Identity & Security USA, LLC, the CPO finds that the proper remedy is to remand the procurement to the State Fiscal Accountability Authority for resolicitation in accordance with the Code.

For the Information Technology Management Office



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December 20, 2021

Via Electronic Mail & Hand Delivery
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NMO OFFICE

DEC 20 '21 MO 15:22

Chief Procurement Officer
Information Technology Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

RE: **Solicitation No. 5400013926 - STC Digital Fingerprint Services & Concealed Weapons Permit System (CWPS) for the South Carolina State Law Enforcement Division (SLED)**

Protest of Integrated Biometric Technology, Inc.

Dear Chief Procurement Officer:

As indicated in our letter dated December 13, 2021 (the "Notice of Intent to Protest"), I and my firm have been engaged to represent Integrated Biometric Technology, Inc. ("IBT") in a post-award protest pursuant to South Carolina Code § 11-35-4210 relating to an award made to Idemia Identity & Security USA, LLC ("Idemia") in response to Solicitation No. 5400013926 (the "RFP"). In brief, the State intends to award a multi-million, multi-year contract to Idemia notwithstanding that IBT stands ready and able to perform at a better price using an approach almost universally preferred by the State's evaluators. As explained further below, IBT has been prejudiced by the outcome of this biased and improperly conducted procurement. Therefore, it is contrary to law, procurement principles, and the State's interests to proceed with the current intent to award. This letter more particularly sets forth and explains IBT's grounds for protest known at this time and its requested relief.

Background

IBT is a renowned and respected name in the applicant fingerprint processing industry, and the Company's President and CEO is a pioneer in the world of digitizing and automating criminal history record checks. IBT's commitment to provide world-class

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services for SLED is reflected in its carefully crafted proposal. Unfortunately, IBT has been unfairly denied the opportunity to provide SLED and state taxpayers with the best and most affordable solution. But for the improprieties and unreasonable actions of the State, IBT would have received the award.

IBT's proposal was widely regarded as the better proposal, having been rated more highly than Idemia's by seven out of the nine evaluators on non-price factors. In addition, IBT scored more highly than Idemia on price **even after** Idemia was offered a chance to change its price (discussed below). Based on debrief information provided by the State, the State scored IBT only three points below Idemia (743 to 746). **IBT contends that its proposal should have been scored more highly than that of Idemia, but more fundamentally, the State should have conducted the procurement on a level playing field but did not.** In particular:

Summary of Protest Grounds

- (1) The State acted improperly and unfairly in its conduct of discussions and clarifications with Idemia as compared to IBT. On the one hand, multiple rounds of discussions with Idemia apparently resulted in an opportunity for Idemia to submit "proposal revisions," revise its price, and revise or clarify approximately 28 issues in its proposal, thus substantially enhancing its score. On the other, the State's single round of discussion with IBT that included far fewer questions offered no similar insights or opportunities to clarify what was only later revealed to be a key issue impacting IBT's proposal scoring.
- (2) Idemia's proposal indicates that it does not plan to implement its offered UEP/FlexCheck solution for approximately one year but Idemia's proposal was not rejected for this. Further, in response to State questions as part of the discussions and clarifications process, Idemia failed to respond directly to a question from the State about whether Idemia had secured access to two solutions proposed by Idemia to meet the State requirements—namely, the Tailored Solutions FlexCheck and EasyPath products.
- (3) The State unfairly downgraded IBT for its staffing transition solution even though IBT proposed a clear and effective solution at considerable expense to IBT, and the State's own decision to make an award less than two weeks before the contract was to start created the timing crunch for which IBT was downgraded. Moreover, the State's proffered explanation for the downgrade—a tight nationwide hiring market—was arbitrary and irrational in light of the fact that the State itself created any staffing challenges and did not consider the approach IBT proposed to overcome those challenges. Also staffing challenges could apply to Idemia as well as IBT, as it was proposing to expand its network.
- (4) In the alternative, the State improperly conducted post-evaluation negotiations with Idemia even though IBT itself was or should have been rated more highly and should have had an opportunity to negotiate with the State first.
- (5) In the alternative, given how extremely closely the State scored IBT and Idemia, it was unreasonable for the State not to conduct negotiations with both bidders.

Detailed Statement of Protest Grounds

(1) The State acted improperly and unfairly in its conduct of discussions and clarifications with Idemia as compared to IBT.

In response to IBT requests, the State provided IBT a copy of Idemia's initial October 14, 2021 proposal, as well as documents showing that the State asked Idemia at least 29 questions relating to its proposal during the discussions/clarifications process. Although three rounds of discussion questions and responses were provided, most notably, the State provided a redacted version of the Idemia "Proposal Revision" dated November 19, 2021 that includes responses to three of the State's questions. The Proposal Revision dated November 19, 2021 and Proposal Revision dated November 12, 2021 both refer to themselves as "proposal revision" in the header.

Based on the State's questions in the three rounds of questions with Idemia, the State clearly had major concerns with the Idemia proposal. In the November 19, 2021 Proposal Revision, Idemia quotes the State as giving the following notice and instructions:

REQUESTED PROPOSAL REVISION INFORMATION

We have identified the following uncertainties in your proposal that could render your proposal non-responsive. You may address these uncertainties by submitting revisions to any aspect of your proposal, but only to the extent such revisions are necessary to resolve the uncertainty identified.

Idemia November 19, 2021 Proposal Revisions p. 3 (**Exhibit A** hereto) (emphasis added).

As revealed by the November 19, 2021 Proposal Revision and questions that preceded it, the concerns expressed by the State in its discussions with Idemia ranged from Idemia's ability to offer certain software solutions for the duration of the contract, to questions about the number of licenses to be provided to use certain portals, to how Idemia planned to meet certain requirements in the near term before it implemented a new system in October of 2022. Id.

In addition to revisions identified in the redacted Proposal Revision, the award notice document provided to IBT also clearly shows that these revisions allowed Idemia at some point to change its proposal price in the course of the procurement. Here, Idemia's initially proposed unit pricing (Lot A \$14.00/Lot B \$14.00) identified on page 3 of its price proposal, is higher than the pricing stated in the award notice (Lot A \$13.50/Lot B \$13.75). (See Exhibit B hereto.) Unlike Idemia, IBT was never provided an opportunity to lower its price.

South Carolina law does not allow the State to conduct unequal discussions or clarifications with one offeror but not with others where proposal revisions are permitted.

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Fundamentally, offerors must be accorded fair and equal treatment with respect to any opportunity for discussions. S.C. Code Ann. § 11-35-1530(6); Reg. 19-445-2095(l)(3).

In this case, the State purported to engage in discussions with IBT; however, the substance and impacts of the discussions with Idemia versus IBT are hardly the same. In the case of IBT, it was asked a handful of questions by the State regarding its proposal. Among them, the State blandly asked for confirmation about the role of a staffing agency and whether personnel working for IBT would be employees. IBT confirmed that personnel would be employees of IBT directly. No other confirmation or information as to staffing was requested.

Later, however, IBT was informed that it was not selected and that it was evaluated a mere three points lower than Idemia despite essentially all evaluators grading IBT's proposal as the winner. What factor made the difference? Remarkably, during debriefing, the State confirmed that perceived concerns over IBT's staffing – this despite near unanimity among evaluators that IBT was the better proposal at a better price. In other words, the one factor that was only later revealed to be determinative, was never identified by the State as an area of concern or an area needing further discussion aside from a single question confirming what IBT's proposal already said.

In contrast with IBT, the State afforded Idemia at least two opportunities to clarify and supplement its proposal and ultimately change the price.

By giving Idemia multiple chances to revise and clarify its proposal on the issues that concerned the State and on price, the State gave Idemia an opportunity to increase its score substantially, or in any event by more than three points, resulting in a higher score for Idemia than IBT. However, IBT was in no way provided a similar opportunity to lower its price or address any of the concerns the State revealed only after the fact, including the particular concerns of the one evaluator who remarkably gave IBT only half of the points received by Idemia. This process, which resulted in Idemia having meaningful opportunity to revise and re-price its proposal, prejudiced IBT, was blatantly unfair to IBT, and contrary to South Carolina law.

(2) Idemia's proposal indicates that it does not plan to implement its offered UEP/FlexCheck solution for approximately one year but, Idemia's proposal was not rejected or severely downgraded for this. In addition, in response to State questions as part of the discussions and clarifications process, Idemia failed to respond directly to a question from the State about whether it had secured access to two solutions required by the RFP, namely the Tailored Solutions FlexCheck and EasyPath products.

Idemia proposed a "transition to our new UEP/FlexCheck solution" on page 46 of its technical proposal (PDF p. 60) and indicated that it would transition to this solution by December 28, 2021 at page 111 of its technical proposal (PDF p. 125). This was

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confirmed again in Idemia's November 12, 2021 Proposal Revision (page 11, PDF p. 192).

As part of the discussions and clarifications process, the State asked Idemia to describe how Idemia would meet the RFP's requirement that "Any applicant type shall have the ability to use a public on-line query function to verify the receipt/entry and current minimum status of a new application, renewal, or replacement in the Contractor system. This processing should be a URL link on the SLED web site to the CWP system awarded in LOT B." (November 19, 2021 Proposal Revision at 5.) Idemia responded as follows:

Between the contract effective date and the UEP Go-Live date of 10/31/2022, IDEMIA USA will continue to provide Customer Service Call Center support for applicants to verify the receipt/entry and current minimum fingerprint submission status. Applicants who have been provided with confirmation of a completed fingerprint submission that request additional information will continue to be directed to the SLED Regulatory Department, which is the current required procedure.

Id.

This non-answer failed to address the State's stated concern that Idemia's UEP/FlexCheck system would not be available for approximately a year. The State's decision to accept that a call center could satisfy a requirement for an "on-line query function" constituted relaxation of the RFP's requirements for Idemia alone.

Further, as part of the discussions and clarifications process (which was only meaningfully conducted with Idemia), the State asked Idemia the following question and received the following evasive response:

Required Actions: *Further describe nature of Idemia's relationship with Tailored Solutions. Confirm Idemia will be able to provide access to EasyPath and FlexCheck for the maximum potential duration of the contract. Provide a copy of the referenced user licensing agreement between IDEMIA and Tailored Solutions.*

IDEMIA USA response: IDEMIA USA contractual relationship is described in the attached licensing agreement, Appendix A. Please treat this document as confidential. The nature of the relationship provides for perpetual licenses for usage rights for any licensed software installation that IDEMIA USA implements using Tailored Solution's software packages. The agreement also provides for software configuration and customer support services for implementing and maintaining the licensed software in good working condition for our customers. The term of the agreement provides access into perpetuity with clear legally binding obligations placed on the software supplier for warranties, termination, escrow, confidentiality, and indemnification to ensure the software will remain available to IDEMIA to support customer requirements.

Idemia Proposal Revision at 3 (emphasis added).

This answer is a non-answer and should have been rejected in light of Idemia's express statement that FlexCheck would not be implemented for at least twelve months. In the alternative, Idemia should have been severely downgraded for this issue. The RFP stated that "It is the responsibility of the Offeror to ensure all elements of the RFP have been responded to in accordance to the RFP." RFP at 32 (Section IV Information for Offerors to Submit). The State had a serious concern about Idemia's proposal on this point and asked Idemia specifically about two named software solutions. Idemia failed even to name them in its response. The State tried multiple times to obtain information about this issue and Idemia provided only a confused and inconsistent response.

Given the non-answer on the part of Idemia, its proposal should have been disqualified from further consideration. It is axiomatic that under law, only responsive offerors may be considered for award. See S.C. Code 11-35-1520(10) (requiring award to the "lowest responsive and responsible bidders"); S.C. Code 11-35-1530(7) (requiring "responsive" offerors to be ranked). The State warned Idemia of this in requesting clarifications. See Idemia Proposal Revision at 3 ("We have identified the following uncertainties in your proposal that could render your proposal non-responsive.") (emphasis added). Despite that necessity of fully and directly responding to the State's request, Idemia's response did not address the Agency's question directly. Failing to respond to the State's question, Idemia's proposal was non-responsive to the RFP and should not have been ranked or further considered for award. In the alternative, it should have been downgraded severely.

IBT was prejudiced by the State's failure to conduct this procurement on a level playing field and in accordance with law.

(3) The State unfairly downgraded IBT for its staffing transition solution even though IBT proposed a clear and effective solution at considerable expense to IBT, and the State's own decision to make an award less than two weeks before the contract was to start created the timing crunch for which IBT was downgraded.

During the debriefing, the State stated that the most significant weakness in the IBT proposal was the risk of inability to provide sufficient staffing. However, in its proposal, IBT unequivocally confirmed its ability to meet the staffing requirements on the requested timeline. IBT had retained Roper Staffing and was actively hiring, at great cost to both IBT and Roper, in order to meet the exceptionally short implementation period (less than two weeks from the 12/3 Award to 12/15 anticipated go-live). For example, IBT stated that "[i]n preparation for award, IBT has already begun to operationalize our plan including site selections and staffing to meet these time frames." IBT Clarification Response at 2.

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IBT submits that any risk associated with staffing transition is a function of the unreasonably short implementation period established by the Agency (which is typically around three months but was reduced to less than two weeks in this procurement). This short transition timeframe was a result of the State's own planning and approach and potentially other factors, and had nothing to do with any actual deficiencies in the IBT proposal.

If the State had any concerns with IBT's staffing approach, it should have raised those in discussions or clarifications with IBT given that it conducted discussions. The State could also have followed the links provided to the videos that IBT incorporated into its proposal relating to staffing issues. IBT has confirmed through electronic means that the State failed to review these videos. The State did ask IBT about the role of Roper Staffing in a clarification question but did not ask whether sufficient personnel could be hired on time, but only whether personnel "will be employed by IBT directly. IBT confirmed that personnel would be employed by IBT directly. *Id.* at 3.

In any case, IBT began implementation process pre-award in order to deliver on the provided timeline. The risk unfairly assessed on this item would have more than made up for the 3 point difference between IBT and Idemia, because it appears that the one evaluator who scored IBT the lowest gave IBT only half the points of Idemia on non-price evaluation factors. Given that this was the State's biggest concern with IBT's proposal, it is clear that if even this one evaluator had properly and fairly evaluated IBT's proposal on this point, IBT would have received the award.

The South Carolina Procurement Code is designed to foster competition and fair and equitable treatment to all participants. S.C. Code Ann. § 11-35-20 (b) and (f). Moreover, the State has an obligation of good faith (meaning "honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing") in its negotiations and dealings with parties. S.C. Code Ann. § 11-35-30. Here, where the State literally created the very condition which it then used to punish and downgrade IBT, the State failed to foster competition, unfairly advantaged the incumbent Idemia, and by no means dealt with IBT fairly or in good faith.

Additionally, the State's evaluation of this factor was further arbitrary and without basis in that the claimed weakness as to IBT—that staffing would be difficult given the nationwide employment market—would apply just as easily to Idemia. *In Re: Protest of Value Options*, Panel Case No. 2001-7 (equating "arbitrary and capricious" with "a lack of reasonable or rational basis"). In other words, the critique proves nothing as to IBT. And to the extent IBT's staffing risk was somehow greater in this market, that risk was solely the result of the conditions created by the State.

In addition, any such staffing concerns should have been applied equally to Idemia, because Idemia proposed that, "In order to meet the requirements of this RFP, we will expand our Enrollment Center coverage to provide eight (8) additional sites..." Idemia Technical Proposal at 18 (PDF p. 31). And "Upon award, we will further expand our

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enrollment center network, including the addition of PRINT N GO capability at every fixed site, to meet the full requirement of four (4) fixed locations in each region.” Idemia Technical Proposal at p. 22 (PDF p. 36). Idemia further stated that it would be “hiring additional SC enrollment agents to provide flexibility throughout the state in ensuring adequate staffing...” Id. at 6 (PDF p. 19). To the extent staffing trends were a real issue for the State, it should have downgraded Idemia as well as IBT.

Accordingly, the State’s evaluation of this factor was contrary to law, contrary to principles of procurement, unfair, arbitrary, and resulted in actual prejudice to IBT. IBT was prejudiced by the State failure to conduct this procurement on a level playing field and in accordance with law.

(4) In the alternative, the State improperly conducted post-evaluation negotiations with Idemia even though IBT itself was or should have been rated more highly and should have had an opportunity to negotiate with the State first.

In the alternative, if the State allowed Idemia to change its price after evaluation and scoring of proposals, then it failed to follow the law in doing so.

South Carolina statutes provide that an agency may conduct negotiations with the “highest ranking offeror on price.” S.C. Code Ann. § 11-35-1530(8). First, as explained above, to the extent Idemia was initially ranked above IBT on an overall basis, it was the result of an arbitrary, irrational evaluation contrary to law. Second, even with the erroneous evaluation of proposals, IBT’s proposal was the highest-ranking offer with respect to price as per the statute. IBT’s offer led on pricing by a margin of 14 points. With individual evaluators, IBT’s offer was ranked highest on technical approach by seven evaluators (against only two favoring Idemia). Of those two in the minority, one stands out for its grossly unreasonable evaluation. Despite favorable rating from nearly all evaluators, evaluator no. 6 marked IBT at half the score of Idemia. But for this single, facially implausible rating, IBT would have been deemed the high-ranking offeror on aggregate points as well. However, the arbitrary rating of this single individual was so damaging that it resulted in IBT’s superior proposal falling a mere three points short of Idemia.

To have the thoughtful consideration of an entire panel baselessly discarded due the whim of a single individual is the definition of arbitrary and is contrary to the purposes of the Procurement Code. *Contra In Re: Protest of First Sun Eap Alliance, Inc.; Appeal By First Sun Eap Alliance, Inc., 1994 WL 16006480, at *3* (“If an evaluator’s score is erroneous, arbitrary, capricious or even biased, but it does not effect the outcome of the award, than it may not effect the finality of the award.”)

IBT was clearly the highest-ranking offeror on price and should have been the highest-ranking offeror all factors considered, if the State had fairly evaluated proposals. Further, even if the technical evaluation was not corrected, IBT would have been the highest-

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ranking bidder overall if Idemia had not received an opportunity to lower its price. Thus, if the State conducted negotiations with any bidder, it should have been IBT. IBT was prejudiced by the State's failure to conduct this procurement on a level playing field and in accordance with law.

(5) Given how extremely closely the State scored IBT and Idemia, it was unreasonable for the State not to conduct negotiations with both bidders.

Among the Procurement Code's purpose, it is intended to foster competition and ensure that the State receives the lowest price and most advantageous offers, while also providing fair and equitable treatment to all participants. S.C. Code Ann. § 11-35-20(a), (b), and (f). Even if Idemia was the higher-ranking overall offeror—which IBT denies—the State should have engaged in negotiations with IBT. Here, IBT had what unquestionably was the lowest-priced proposal favored by the overwhelming majority of evaluators. But for a single, inexplicable evaluation, IBT would also have had the most aggregate points. Given the overwhelmingly favorable ratings of IBT's proposal, it should have been included in the negotiation process. Failing to do so was arbitrary and unreasonable, and resulted in the State of South Carolina paying more for a widely regarded inferior proposal.

IBT was prejudiced by the State's failure to conduct this procurement in a fair and rational manner and in accordance with law.

Request for Relief

Based on the above, IBT respectfully requests that the award to Idemia be cancelled, that the State disqualify Idemia to the extent it did not fully meet the RFP's requirements, or re-evaluate proposals fairly, rationally, and consistently with the RFP's stated requirements. In the interim, IBT further requests that any award, planned award, or other contract action as to Idemia be immediately stayed. S.C. Code § 11-35-4210(7).

At this exceptionally early stage in the proceeding, IBT is continuing to investigate the matter and may uncover additional facts and grounds in support of its protest. Accordingly, IBT reserves the right to amend, supplement, and add to its protest. IBT further requests a hearing on its protest before the State's Chief Procurement Officer or other appropriate official.

Thank you for your attention to and work on this protest.

Very truly yours,


Courtney E. Walsh

Enclosures

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.