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EXECUTIVE DIRECTOR

THE DIVISION OF PROCUREMENT SERVICES

DELBERT H. SINGLETON, JR.  
DIVISION DIRECTOR  
(803) 734-8018

MICHAEL B. SPICER  
INFORMATION TECHNOLOGY MANAGEMENT OFFICER  
(803) 737-0600  
FAX: (803) 737-0639

## Protest Decision

**Matter of:** OpenText, Inc.

**Case No.:** 2022-208

**Posting Date:** January 14, 2022

**Contracting Entity:** University of South Carolina

**Solicitation No.:** 22025

**Description:** Managed Defense Software

### DIGEST

Protest challenging non-responsiveness determination is denied. The protest letter of OpenText is included by reference. (Attachments 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:	10/28/2021
Amendment 1 Issued	11/19/2021
Intent to Award Posted	12/17/2021
Intent to Protest Received	12/22/2022
Protest Received	01/04/2022

The University of South Carolina (USC) issued this Invitation for Bids (IFB) on October 28, 2021, to establish a contract for managed defense software. Amendment 1 was issued on November 19, 2021. Bids were received on November 30, 2021. An Intent to Award was posted to Expel, Inc. on December 17, 2021. OpenText submitted an intent to protest on December 22, 2021 followed by its formal protest on January 4, 2022.

## ANALYSIS

OpenText protests the disqualification of its bid as non-responsive. OpenText included the following statement in its bid:

*Statement of Confidentiality and Exceptions*

*This proposal is provided to University of South Carolina solely for the purpose of its evaluation and is not intended to be used for any other purpose. The information contained in this proposal is confidential. No portion of this proposal may be disclosed to third parties without prior written approval by Open Text.*

*This proposal and the information contained herein is subject to the negotiation and execution of a mutually acceptable written agreement between Open Text and your company and will not create any legal rights or binding obligations on the part of either party except for the confidentiality obligation noted above, even if this document is accepted or executed by your company.*

*The provision and use of software licenses, professional services, hosted services or software support services will be governed solely by the terms of agreements negotiated and executed by the parties. Open Text seeks to enter negotiations with respect to these agreements based on our standard commercial contract documentation which properly describes our unique license and services models for the benefit of both parties. Our standard contract documentation may be modified as negotiated between Open Text and your company following the acceptance of the prices quoted herein. However, our pricing proposals are based upon use of our standard commercial agreements which are available upon request.*

(emphasis added)

Based on this language, the procurement officer disqualified OpenText's bid as non-responsive:

Open Text has been determined non-responsive because they made an exception to the terms and conditions of the solicitation and declared that it is not an official offer as documented in Exhibit 1 (Page 2 of this determination). This statement is in direct conflict to the verbiage of the following clauses from the solicitation:

➤ Page 7 - BID / PROPOSAL AS OFFER TO CONTRACT (JAN 2004) 2A015-1

➤ Page 20 – CONTRACT DOCUMENTS & ORDER OF PRECEDENCE (FEB 2015) 7A015-2

Reference SC Regulation:

19-445.2070.0D. Modification of Requirements by Bidder. (1) Ordinarily a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the State, since to allow the bidder to impose such conditions would be prejudicial to other bidders.

(Attachment 2)

As stated in the procurement officer's determination, the solicitation put bidders on notice that their bid must be a binding offer:

**BID / PROPOSAL AS OFFER TO CONTRACT (JAN 2004)**

By submitting Your Bid or Proposal, You are offering to enter into a contract with the Using Governmental Unit(s). Without further action by either party, a binding contract shall result upon final award. Any award issued will be issued to, and the contract will be formed with, the entity identified as the Offeror on the Cover Page. An Offer may be submitted by only one legal entity; "joint bids" are not allowed.

[Solicitation, Page 7]

By its own language, OpenText did not intend its bid to be a binding offer, and its bid was properly disqualified under the Code and Regulations.

While OpenText offered to remove the offending language, this language cannot be considered a minor informality or irregularity under S.C. Code 11-35-1520(13) and, absent that finding, the Code requires that the bid be accepted unconditionally and without alteration. S.C. Code §11-35-1520(6))

OpenText argues that since the Contract Documents & Order of Precedence clause references a record of negotiations and consequently it should not have been disqualified for conditioning its bid on negotiations. However, Section 11-35-1540 only authorizes negotiations during competitive seal bidding to a limited set of circumstances, none of which exist with this procurement:

When bids received pursuant to an invitation for bids under Section 11-35-1520 are considered unreasonable by the procurement officer, or are not independently reached in open competition, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and it is determined in writing by the chief procurement officer, the head of a purchasing agency, or the designee of either officer above the level of procurement officer, that time or other circumstances will not permit the delay required to resolicit competitive sealed bids, a contract may be negotiated pursuant to this section, provided that:

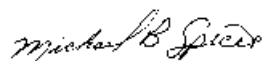
- (1) each responsible bidder who submitted a bid under the original solicitation is notified of the determination and is given reasonable opportunity to negotiate;
- (2) the negotiated price is lower than the lowest rejected bid by any responsible and responsive bidder under the original solicitation;
- (3) the negotiated price is the lowest negotiated price offered by any responsible and responsive offeror.”

OpenText improperly conditioned its bid on the negotiation of terms and conditions not included in the solicitation and its bid was properly disqualified in accordance with the Code and Regulations.

## **DECISION**

For the reasons stated above the protest of OpenText, Inc. is denied.

For the Materials Management Office



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Michael B. Spicer  
Chief Procurement Officer

Dear Clarissa Clark,

OpenText is issuing a formal protest for the award made against solicitation No. 22025 with an award notification being released on December 17, 2021. Below, OpenText outlines detailed explanations for reconsideration of award based upon the following actions:

On December 21, 2021, our sales representative, Lindsay Condon, spoke with Ms. Kristin Moss, Procurement Manager, for University of South Carolina. During that conversation, OpenText was advised of the following:

- The following statement contradicted the RFP issued by the University. No specific explanation of how this statement was contradictory was provided to OpenText:

**Statement of Confidentiality and Exceptions**

*This proposal is provided to University of South Carolina solely for the purpose of its evaluation and is not intended to be used for any other purpose. The information contained in this proposal is confidential. No portion of this proposal may be disclosed to third parties without prior written approval by Open Text.*

*This proposal and the information contained herein is subject to the negotiation and execution of a mutually acceptable written agreement between Open Text and your company and will not create any legal rights or binding obligations on the part of either party except for the confidentiality obligation noted above, even if this document is accepted or executed by your company.*

*The provision and use of software licenses, professional services, hosted services or software support services will be governed solely by the terms of agreements negotiated and executed by the parties. Open Text seeks to enter negotiations with respect to these agreements based on our standard commercial contract documentation which properly describes our unique license and services models for the benefit of both parties. Our standard contract documentation may be modified as negotiated between Open Text and your company following the acceptance of the prices quoted herein. However, our pricing proposals are based upon use of our standard commercial agreements which are available upon request.*

On December 21, 2021, at 8:24 PM OpenText sent an email asking for reconsideration of award based upon our conversation with Ms. Moss. OpenText offered to remove the statement titled Confidentiality and Exceptions. The response from Ms. Moss stated that OpenText had submitted our own Terms & Conditions with our proposal which therefore disqualified us. OpenText did not attach Terms & Conditions to our proposal submission, and we were not made aware of any such claim in our earlier phone debriefing with Ms. Moss. OpenText has attached this email trail for your reference. Furthermore, on page 20 of the RFP The University states it will retain a record of negotiations between the contractor and university. How can OpenText be disqualified for stating we will negotiate with the university?

Per Ms. Moss, the RFP was an "invitation to bid" which means they would award to the lowest bidder that met the technical specifications.

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OpenText was notified that our technical solution was the best fit, as well as pricing – we came in \$45,000 below the awardee, Expel IO.

OpenText then expressed interest in a protest after being informed our technical superiority and pricing and were told by Ms. Moss that we can file a protest but will not change the outcome of the award. Specifically told by Ms. Moss that we wouldn't want to create unnecessary work around the holidays for something that wouldn't be fruitful.

The OpenText solution was referred to as "apples to oranges" versus Expel IO which was apples to apples due to the Statement of Confidentiality and Exceptions OpenText submitted with our response. Is it possible to have this clarified? As outlined above in our Statement of Confidentiality and Exceptions, OpenText is willing to negotiate terms and conditions.

OpenText has reviewed the referenced RFP repeatedly for this effort and in no way can locate any statement that has been contradicted by our standard Statement of Confidentiality and Exceptions language. This language is standard with corporate deliverables and simply states that OpenText is willing to negotiate any terms and conditions needed with our customers.

OpenText values The University of South Carolina as a current customer and does not seek to cause unnecessary strife for the university. However, we are requesting that the university re-evaluate the submitted proposals before making an award for this service. Nowhere in the OpenText response did we take any exception to any term or condition the university listed. We simply stated that we were willing to negotiate terms upon selection. OpenText values every customer and their specific needs. We include the Confidentiality & Exception statement in every response. Based upon our customers environment, SLA's, technologies stack, and support staff we need to be flexible with our terms.

Based on the information provided by Ms. Moss, OpenText feels we were unfairly disqualified from the bidding process for the university and seeks to be re-evaluated. We also request a full debriefing in writing from the university should our request be denied.

Sincerely,

Betsy Desjarlais

Director, Cyber Services

OpenText

## Attachment 2



### Timeline:

- Solicitation Issued: 10/28/2021
- Amendment 1 Issued 11/19/2021
- Bid Opening 11/30/2021
- Notice of Intent to Award for Expel, Inc. Posted 12/17/2021
- Intent to Protest by OpenText Submitted 12/22/2021
- Protest Letter by OpenText Submitted 1/5/2022

The University of South Carolina submits that OpenText's protest letter does not specifically state the basis of their protest and therefore, does not provide the Chief Procurement Officer an actual protest item for consideration. As such, the University of South Carolina assumes that OpenText's assertion is based on the following statement from the protest document:

"OpenText feels we were unfairly disqualified from the bidding process for the university and seeks to be re-evaluated."

In response, the University submits that the foundation for the "protest" is a result of the bidder's lack of understanding of bid process and all related parameters, implications, and statutory requirements. The University of South Carolina determined OpenText's bid was non-responsive because OpenText qualified their bid in their **Statement of Confidentiality and Exceptions**:

"This proposal and the information contained herein is subject to the negotiation and execution of a mutually acceptable written agreement between Open Text and your company and will not create any legal rights or binding obligations on the part of either party except for the confidentiality obligation noted above, even if this document is accepted or executed by your company." (See Exhibit 1 – Determination of Non-Responsiveness)

The sourcing method was an Invitation to Bid. Therefore, the Procurement Officer did not have authority to enter Discussions or Negotiations.

Also, the University of South Carolina submits that the OpenText is not the lowest bidder for this solicitation; and that a different bidder was determined non-responsive because they qualified their bid by striking every clause in sections 7A and 7B of their submittal. Finally, if evaluated, OpenText would be determined non-responsive based on their failure to meet the minimum qualification of being certified by Microsoft to provide these services.

**JUSTIFICATION FOR  
DETERMINATION OF NONRESPONSIVNESS**

Solicitation: GS-ITB-22025

Offeror Managed Defense Software

- (1) Open Text  
Bay Meadows Station 3 Building  
2950 S. Delaware Street; Suite 400  
San Mateo, CA 94430  
lcondon@opentext.com

Based upon the requirements of the above referenced solicitation, the Procurement Officer finds that the Offer is nonresponsive (in part or in whole) as follows:

- (2)
- Open Text has been determined non-responsive because they made an exception to the terms and conditions of the solicitation and declared that it is not an official offer as documented in Exhibit 1 (Page 2 of this determination). This statement is in direct conflict to the verbiage of the following clauses from the solicitation:
- Page 7 - BID / PROPOSAL AS OFFER TO CONTRACT (JAN 2004) 2A015-1
  - Page 20 – CONTRACT DOCUMENTS & ORDER OF PRECEDENCE (FEB 2015) 7A015-2
- Reference SC Regulation:  
19-445.2070.0D. Modification of Requirements by Bidder. (1) Ordinarily a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the State, since to allow the bidder to impose such conditions would be prejudicial to other bidders.

**December 11, 2021**

\_\_\_\_\_  
DATE

**University of South Carolina**

\_\_\_\_\_  
GOVERNMENTAL BODY

***Stacy Gregg***

\_\_\_\_\_  
SIGNATURE

**Procurement Manager**

\_\_\_\_\_  
TITLE



## Statement of Confidentiality and Exceptions

This proposal is provided to University of South Carolina solely for the purpose of its evaluation and is not intended to be used for any other purpose. The information contained in this proposal is confidential. No portion of this proposal may be disclosed to third parties without prior written approval by Open Text.

This proposal and the information contained herein is subject to the negotiation and execution of a mutually acceptable written agreement between Open Text and your company and will not create any legal rights or binding obligations on the part of either party except for the confidentiality obligation noted above, even if this document is accepted or executed by your company.

The provision and use of software licenses, professional services, hosted services or software support services will be governed solely by the terms of agreements negotiated and executed by the parties. Open Text seeks to enter negotiations with respect to these agreements based on our standard commercial contract documentation which properly describes our unique license and services models for the benefit of both parties. Our standard contract documentation may be modified as negotiated between Open Text and your company following the acceptance of the prices quoted herein. However, our pricing proposals are based upon use of our standard commercial agreements which are available upon request.

### Validity

This proposal shall remain valid sixty (60) calendar days from the date of this proposal. Open Text reserves the right to make changes in specifications and other information contained in this proposal.

**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.

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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**

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\_\_\_\_\_  
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: \_\_\_\_\_

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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.**