

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

Stanley, Hunt, DuPree & Rhine, a
division of Branch Banking and Trust
Company

B&CB-Employee Insurance Program
RFP Dated February 10, 2012
Provide Administrative Services for the
Flexible Benefits Plan for the State of
South Carolina

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2012-126

POSTING DATE: July 18, 2012

MAILING DATE: July 18, 2012

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Branch Banking and Trust Company (BB&T), on behalf of its subsidiary Stanley, Hunt, DuPree & Rhine (SHDR). With this request for proposals (RFP), the State Employee Insurance Program (EIP) attempts to procure administrative services for the Flexible Benefits Plan for the State of South Carolina. BB&T protested EIP's intended award to Fringe Benefits Management Company, a division of WageWorks, Inc. (FBMC). EIP, joined by FBMC, moved to dismiss the protest for failing to comply with Section 11-35-4210(2)(b) of the Consolidated Procurement Code. The CPO conducted a hearing on the motion to dismiss on July 17, 2012. Appearing before the CPO were EIP, represented by Craig K. Davis, Esquire; SHDR, represented by Marcus A. Manos, Esquire; and FBMC, represented by Henry P. Wall, Esquire.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference. In the letter BB&T states:

Our concern centers on the awarding of a contract to a long-standing incumbent whose fee quote was 25% higher than our fee quote. These fees are paid by South Carolina public employees, so we believe the State has a fiduciary responsibility in considering which proposal to accept. We would appreciate your examination of the facts and circumstances surrounding this RFP. We believe the contract

should be awarded to Stanley, Hunt, DuPree & Rhine (“SHDR”), a division of Branch Banking and Trust Company (“BB&T”).

The RFP your Procurement Office issued on February 10, 2012 established three Award Criteria for evaluating Flex Plan Administrative Services proposals (ranked from most to least important):

- 1 - Approach (subjective)
- 2 - Administrative Fee (objective)
- 3 - Background & Qualifications (subjective)

Flexible Benefits Plan Administration is a highly-regulated and commoditized employee benefit service. As a consequence, we find it difficult to imagine significant differences between providers as to approach. For example, the expenses eligible for reimbursement are established by law. No provider can offer a broader array of eligible expenses versus another. Likewise, the debit card processing technology is uniform across the industry, having been established by government regulation. Thus, we protest any significant difference in evaluating our approach versus the approach proposed by FBMC.

As previously mentioned, our fee quote is significantly less than the fees quoted by FBMC....we protest any significant difference in evaluating our Background & Qualifications versus FBMC.

DISCUSSION

EIP, through counsel, argues the quoted language does no more than offer “an opinion, generally, that under the circumstances [SHDR] should have gotten the award.” Because the protest letter lacks specificity, EIP has “no hint as to the nature or scope of the issue to be litigated.” Unsurprisingly, SHDR interprets the letter differently. According to its attorney, this language “establishes two specific grounds which it requests the Chief Procurement Officer decide:” first, that neither the “Approach” nor the “Background and Qualifications” criterion should have yielded any “significant difference” between offerors; and second, that its lower price entitled SHDR to award of the contract.

Section 11-35-4210(2)(b) requires that “[a] protest ... must set forth both the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be

decided.” See *Appeal by NBS Imaging Systems*, Panel Case No. 1993-16 (challenge to broad areas of the RFP were too vague; more complex solicitations require greater specificity in protest). The Procurement Review Panel has eschewed overly technical analyses of protest letters. The Panel has required that the protest must in some way alert the parties to the general nature of the grounds for protest. *Protest by Sterile Services Corporation*, Panel Case No. 1983-17. An effective way to do this is by alleging that some provision of the solicitation has been ignored, or that the award of the contract has violated some statute or regulation. *Appeals of Logisticare Solutions, LLC, and Medical Transportation Management, Inc.*, Panel Cases Nos. 2011-1 and 2011-2 (Order on motion to dismiss issued May 11, 2011); cf. *Appeal by Coastal Rapid Public Transit Authority*, Panel Case No. 1992-16 (protestant must show the State departed from standards set forth in the Procurement Code and the RFP). This protest letter does neither.

Even if the CPO accepts SHDR’s interpretation of the protest letter, it makes two, or three, separate claims. First, it complains generally that SHDR’s proposal was most advantageous to the State. The Panel has consistently refused to entertain such claims, at one point characterizing them as “fruitless.” *Appeal by Travelsigns*, Panel Case No. 1995-8, n. 2. Second, SHDR claims it should have received the contract because its price was lower. As a matter of law, this ground of relief fails to state a claim. *Protest of Cathcart and Associates, Inc.*, Panel Case No. 1990-13; *Protest of Wometco Food Services, Inc.*, Panel Case No. 1991-14, n.5. Finally, SHDR alleges that the two “subjective” criteria should have resulted in a near tie between offerors. Implicitly, in the protest letter, and explicitly, in SHDR’s return to the motion to dismiss, that claim challenges the use of these criteria in the RFP. SHDR states in its motion response:

[G]overnment regulation and debit card technology dictate the exact approach which each vendor must take. As a result, there cannot be a significant difference in evaluation between the two.

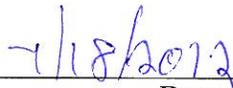
This is a challenge to the selection criteria themselves. Since this ground of protest was not asserted within fifteen days of issuance of the RFP, it is untimely. Section 11-35-4210(1)(a); *see Appeal by Today's Business Systems*, Panel Case No. 1994-2.

CONCLUSIONS OF LAW

For the foregoing reasons, the protest is dismissed.



R. Voight Shealy
Chief Procurement Officer
For Supplies and Services



Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2012)

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: procurement.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2012 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, an incorporated business must retain 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).

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, 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.

June 14, 2012

Retirement & Institutional Services

State of South Carolina
Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

1901 Assembly Street, Ste. 275
Columbia, SC 29201
Fax (803) 251-1773

VIA HAND DELIVERY

Dear Sir/Madam:

We are writing in accordance with Section 11-35-4210 of the South Carolina Consolidated Procurement Code to protest the award of Administrative Services for the Flexible Benefits Plan for the State of South Carolina to Fringe Benefits Management Company ("FBMC"), a division of WageWorks, Inc.

Our concern centers on the awarding of a contract to a long-standing incumbent whose fee quote was 25% higher than our fee quote. These fees are paid by South Carolina public employees, so we believe the State has a fiduciary responsibility in considering which proposal to accept. We would appreciate your examination of the facts and circumstances surrounding this RFP. We believe the contract should be awarded to Stanley, Hunt, DuPree & Rhine ("SHDR"), a division of Branch Banking and Trust Company ("BB&T").

The RFP your Procurement Office issued on February 10, 2012 established three Award Criteria for evaluating Flex Plan Administrative Services proposals (ranked from most to least important):

- 1 - Approach (subjective)
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- 3 - Background & Qualifications (subjective)

Flexible Benefits Plan Administration is a highly-regulated and commoditized employee benefit service. As a consequence, we find it difficult to imagine significant differences between providers as to approach. For example, the expenses eligible for reimbursement are established by law. No provider can offer a broader array of eligible expenses versus another. Likewise, the debit card processing technology is uniform across the industry, having been established by government regulation. Thus, we protest any significant difference in evaluating our approach versus the approach proposed by FBMC.

As previously mentioned, our fee quote is significantly less than the fees quoted by FBMC. In current economic times, South Carolina public employees would certainly appreciate more than \$325,000 in additional pay – which is the estimated annual difference in the fees proposed.

Furthermore, if awarded this contract, SHDR would hire an estimated 15-20 employees in South Carolina. We estimate the economic impact of these new jobs to be over \$500,000 per year for South Carolina. WageWorks, Inc., the parent company of FBMC, is based in San Mateo, CA, while FBMC is based in Jacksonville, FL.

Regarding our background, SHDR previously provided the administrative services for the State's Flexible Benefits Program from 1988 – 2001. Since that time, SHDR has become a division of BB&T. With over 36,000 employees and \$170 billion in assets, BB&T is currently the 10th largest bank in the country and one of only three US banks to be named among the 20 safest banks in the world. With the backing of BB&T, the State can rest assured that SHDR will bring to bear whatever resources are necessary to satisfactorily perform the duties required under the contract. Given our specific experience with the South Carolina Flexible Benefits Plan and our resources, we protest any significant difference in evaluating our Background & Qualifications versus FBMC.

In the tough economic environment that we are all enduring, we feel that our proposal is in the best interests of the State, its constituent organizations and their employees. We request that the Intent to Award the contract for providing administrative services for the Flexible Benefits Plan for the State of South Carolina to FBMC be revoked and a new Intent to Award be issued in favor of SHDR.

Thank you for your consideration. Please let us know if you have any questions or require additional information.

Sincerely yours,



Robert E. Metcalfe

Vice President & Business Development Officer