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CHAIRMAN, HOUSE WAYS AND MEANS

Protest Decision

Matter of: Maximus Health Services, Inc.

Case No.: 2017-106

Posting Date: August 1, 2016

Contracting Entity: Department of Health and Human Services

Solicitation No.: 5400011045

Description: Member Contact Center

DIGEST

Protest of a determination of non-responsiveness prior to issuance of award is dismissed for lack of jurisdiction. Maximus Health Services' (Maximus) letter of protest is included by reference.

[Attachment 1]

AUTHORITY

The Chief Procurement Officer¹ conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on the evidence and applicable law and precedents.

¹ The Materials Management Officer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

BACKGROUND

The South Carolina Department of Health and Human Services (HHS) issued this Request for Proposals on February 18, 2016, to establish a contract for a Member Contact Center vendor to provide comprehensive customer service to Medicaid applicants and members in the most efficient and cost effective delivery model available. Proposals were received on May 3, 2016. HHS issued an Extension of Award Posting #1 on May 26, 2016 extending the award date indefinitely. (Attachment 2)

<i>Event</i>	<i>Date</i>
Solicitation Issued	02/18/2016
Amendment One Issued	03/29/2016
Amendment Two Issued	04/05/2016
Proposals Received	05/03/2016
Extension of Award Posting #1 Issued	05/26/2016
Initial Protest Received	07/21/2016

ANALYSIS

Maximus protests after opening but prior to award, that its proposal was improperly disqualified from consideration during the evaluation process:

MAXIMUS was improperly excluded from competition and disqualified as nonresponsive when it submitted the requested clarifying information well before final ranking was performed.

This firm represents MAXIMUS Health Services, Inc. (“MAXIMUS”) in connection with the above matter and submits this protest of the Solicitation - Determination of Non-responsiveness of MAXIMUS. Although MAXIMUS has not been provided any written notice of such a determination; MAXIMUS was verbally informed on or about July 5, 2016 that such a determination had been made, but no documentation of any such determination has been provided or issued. MAXIMUS herewith requests, under all applicable records laws, a copy of any such determination and all records related thereto. The grounds of this protest are set forth below, and MAXIMUS reserves the rights to timely amend this protest as permitted by law.

In accordance with applicable law, this protest implements the automatic stay governing the process and thus, no further actions in regard to the solicitation

process pay (*sic*) proceed. We hereby put SCDHHS on notice of the automatic stay.

The South Carolina Consolidated Procurement Code provides for the protest of the solicitation of a contract, an amendment to the solicitation of a contract, and the award or intended award of a contract as follows:

Section 11-35-4210 (1) Right to Protest; Exclusive Remedy.

(a) A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. An Invitation for Bids or Request for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this code.

(b) Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(c) The rights and remedies granted in this article to bidders, offerors, contractors, or subcontractors, either actual or prospective, are to the exclusion of all other rights and remedies of the bidders, offerors, contractors, or subcontractors against the State.

Since the time to protest the solicitation and its amendments has passed and no award or intent to award has been posted, the Chief Procurement Officer lacks jurisdiction to decide this matter.²

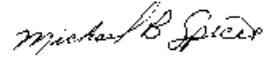
² As an alternative basis for the CPO's decision, Maximus is not "aggrieved" until HHS issues an award statement. *See Appeal by The Computer Group*, Panel Case No. 1992-6 ("Even though most of the alleged deficiencies in SouthTec's proposal that The Computer Group now protests were present and known to The Computer Group after the first Intent to Award was issued, The Computer Group did not have aggrieved status until the State made a final decision to award to SouthTec. That final decision took the form of the second Notice of Intent to Award.")

Protest Decision, page 4
Case No. 2017-106
August 1, 2016

DECISION

For the reasons stated above, the protest of Maximus Health Services, Inc. is dismissed.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1



John E. Schmidt, III
803.348.2984
John.Schmidt@TheSCLawfirm.com

Melissa J. Copeland
803.309.4686
Missy.Copeland@TheSCLawfirm.com

July 21, 2016

Via Email to protest-mmo@mmo.sc.gov and protest-mmo@mmo.state.sc.us

Mr. Michael B. Spicer
Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

RE: Protest of Solicitation - Determination of Non-responsiveness of MAXIMUS Health Services, Inc.
Solicitation Number: RFP # 5400011045
Description: Member Contact Center

Dear Mr. Spicer:

This firm represents MAXIMUS Health Services, Inc. ("MAXIMUS") in connection with the above matter and submits this protest of the Solicitation - Determination of Non-responsiveness of MAXIMUS. Although MAXIMUS has not been provided any written notice of such a determination; MAXIMUS was verbally informed on or about July 5, 2016 that such a determination had been made, but no documentation of any such determination has been provided or issued. MAXIMUS herewith requests, under all applicable records laws, a copy of any such determination and all records related thereto. The grounds of this protest are set forth below, and MAXIMUS reserves the rights to timely amend this protest as permitted by law.

In accordance with applicable law, this protest implements the automatic stay governing the process and thus, no further actions in regard to the solicitation process may proceed. We hereby put SCDHHS on notice of the automatic stay.

This letter is intended to provide notice of the issues to be decided. Accordingly, it does not purport to set forth all facts and evidence in support of the protest issues. MAXIMUS reserves the right to offer facts, evidence and argument in support of the protest at any time as may be permitted by law. MAXIMUS requests due notice and a hearing at which it will present facts, evidence and argument on these issues and any others as may be properly raised under law. If for any reason a hearing will not be held, MAXIMUS requests that the CPO advise of any deadlines for the submission of evidence and argument in support of this protest.

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 2 of 8

BACKGROUND

This protest concerns the procurement of the State of South Carolina to solicit proposals for SCDHHS Member Call Center. MAXIMUS initially submitted a timely and fully responsive proposal. Thereafter, during the solicitation process, after close of business on Thursday, June 2, 2016, MAXIMUS was sent an e-mail by the Procurement Officer in which the State asked MAXIMUS to respond to one question as a part of "discussions" under the RFP. The letter asked MAXIMUS to provide the response *by June 6, 2016 at 4pm*. The next day, when the Procurement Officer had heard nothing in reply to her e-mail, she sent another e-mail *to the same e-mail address*, evidently suspecting, correctly, that the e-first e-mail had not been received. Unfortunately, MAXIMUS did not receive a copy of either of the e-mails due to a technical glitch. Even though no response was provided at all, the Procurement Officer did not call or make contact with any individuals from MAXIMUS including Barbara Foley, who had spoken with the Procurement Officer regarding this very solicitation process from time to time by phone and in person, or Gina Padilla, the MAXIMUS employee specifically designated in the proposal as "the Contractor Representative with regard to technical matters associated with this proposal."

In transmittal letter, MAXIMUS stated that Gina Padilla, not Bruce Caswell or Ilene Baylinson, was the contact for technical proposal matters:

We identify Gina Padilla, a Vice President at MAXIMUS Health Services, Inc., as the Contractor Representative with regard to technical matters associated with this proposal. Ms. Padilla's contact information is:

Gina Padilla, Vice President MAXIMUS Health Services, Inc. Phone:
720.987.8733

Fax: 303.295.0244

email: ginampadilla@maximus.com

Transmittal Letter of MAXIMUS.

Further, Ilene Baylinson, identified on page 2 of the RFP Cover Page, was never given "notice" as defined under the "Notice" provision of the RFP:

NOTICE (JAN 2006)

(A) After award, any notices shall be in writing and shall be deemed duly given (1) upon actual delivery, if delivery is by hand,

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 3 of 8

(2) upon receipt by the transmitting party of automated confirmation or answer back from the recipient's device if delivery is by telex, telegram, facsimile, or electronic mail, or (3) upon deposit into the United States mail, if postage is prepaid, a return receipt is requested, and either registered or certified mail is used. (B) Notice to contractor shall be to the address identified as the Notice Address on Page Two. Notice to the state shall be to the Procurement Officer's address on the Cover Page. Either party may designate a different address for notice by giving notice in accordance with this paragraph. [07-7A050-1]

Despite never having received confirmation or response to her requests, and despite her evident suspicion that the request were not received, the Procurement Officer did not call or e-mail to confirm that the discussions letter was received, and made no other contact.

As soon as MAXIMUS learned of the requests, on July 5, 2016, MAXIMUS did timely and repeatedly request permission to submit a response. MAXIMUS actually called to follow up with the Procurement Officer several times, asking permission to provide responsive information. These requests were arbitrarily denied even though, *even as of the date of this protest, there has been no final ranking of proposals.*

Despite the actions of the Procurement Officer in suppressing MAXIMUS' efforts to respond to the inquiry after the short, arbitrary deadline had passed, MAXIMUS eventually did submit a response on July 15, 2016. MAXIMUS was discouraged from submitting a response earlier because it was informed orally that its proposal had been rejected as non-responsive. In response to the request from the State, MAXIMUS addressed all of the issues raised by the State before proposals were evaluated and final ranking performed; yet, the State refused to consider the responses and instead has evidently removed MAXIMUS' proposal from further consideration, even excluding MAXIMUS from demonstrations which had not been set or conducted until after MAXIMUS provided fully responsive data.

The State's wrongful disqualification of MAXIMUS is a great loss to the State because the State is unlawfully, improperly and unnecessarily limiting competition, contrary to the mandate of the Consolidated Procurement Code.

ISSUES OF PROTEST

The issues of protest as identified to date are set forth below:

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 4 of 8

1. **MAXIMUS was improperly excluded from competition and disqualified as non-responsive when it submitted the requested clarifying information well before final ranking was performed.**

Any determination that MAXIMUS was non-responsive was arbitrary, capricious, and violated the applicable law and regulations as well as the purposes and principles of the Consolidated Procurement Code.

The relevant governing law is as follows:

SECTION 11-35-30 Obligation of good faith

Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty in fact in the conduct or transaction concerned and the *observance of reasonable commercial standards of fair dealing*.

SECTION 11-35-20 Purpose and policies

The underlying purposes and policies of this code are:

* * *

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

* * *

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

SECTION 11-35-1530. Competitive sealed proposals.

* * *

(6) Discussion with Offerors. As provided in the request for proposals, and under regulations, discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. All offerors whose proposals, in the

procurement officer's sole judgment, need clarification must be accorded that opportunity.

(7) Selection and Ranking. Proposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously. Once evaluation is complete, all responsive offerors must be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the request for proposals. If price is an initial evaluation factor, award must be made in accordance with Section 11-35-1530(9) below.

19-445.2095 Competitive Sealed Proposals.

* * *

I. Discussions with Offerors

(1) Classifying Proposals.

For the purpose of conducting discussions under Section 11-35-1530(6) and item (2) below, proposals shall be initially classified in writing as:

- (a) acceptable (i.e., reasonably susceptible of being selected for award);
- (b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or
- (c) unacceptable.

(2) Conduct of Discussions.

If discussions are conducted, *the procurement officer shall exchange information with all offerors* who submit proposals classified as acceptable or potentially acceptable. The content and extent of each exchange is a matter of the procurement officer's judgment, based on the particular facts of each acquisition. In conducting discussions, the procurement officer shall:

- (a) Control all exchanges;
- (b) Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;

- (c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;
- (d) Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.
- (e) ***Provide the offeror a reasonable opportunity to submit*** any 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 under items (2)(b) through (2)(d) above.

(3) Limitations. ***Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. Ordinarily, discussions are conducted prior to final ranking.*** Discussions may not be conducted unless the solicitation alerts offerors to the possibility of such an exchange, including the possibility of limited proposal revisions for those proposals reasonably susceptible of being selected for award.

(4) Communications authorized by Section 11-35-1530(6) and items (1) through (3) above may be conducted only by procurement officers authorized by the appropriate chief procurement officer.

J. Rejection of Individual Proposals.

(1) Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the State's stated requirements may be clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

- (a) the business that submitted the proposal is nonresponsible as determined under Section 11-35-1810;
- (b) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the State in some material respect; or
- (c) the proposed price is clearly unreasonable.

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 7 of 8

(2) The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

The CPO recently recognized the proper process for discussions in *Decision In re Data Recognition Corp. Protest*, CPO 2015-210 (2014) SC CPO LEXIS 68. In note 3 of that decision, the CPO recognized the importance of the ongoing opportunity to clarify as a part of the process of maximizing competition, stating: “The procurement officer may conduct additional discussions, **prior to final ranking**, to resolve any concerns over responsiveness raised by an evaluator.”

Here, when the State conducted discussions with MAXIMUS, it was obligated to, but did not, make the request in a way that was commercially reasonable, fair and equitable, and on concert with the requirements of the Consolidated Procurement Code, which mandates the promotion of competition. Here, though the governing provisions of the Consolidated Procurement Code mandate that the Procurement Officer exchange information with an offeror in discussions, the Procurement Officer did not do so.

Here, after close of business on Thursday, June 2, 2016, the Procurement Officer asked MAXIMUS to respond to one question as a part of “discussions” under the RFP. The letter asked MAXIMUS to provide the response *by June 6, 2016 at 4pm*. The next day, when the Procurement Officer had heard nothing in reply, she sent another e-mail *to the same e-mail address*, evidently suspecting, correctly, that the e-first e-mail had not been received. Unfortunately, MAXIMUS did not receive a copy of either of the e-mails due to a technical glitch. Even though no response was provided at all, the Procurement Officer did not call or make contact with any of the individuals involved to that point.

Nonetheless, as soon as it learned of the request, on July 5, 2016, MAXIMUS did timely and repeatedly request permission to submit a response. MAXIMUS actually called several times. These requests were arbitrarily denied even though, *even as of the date of this protest, there has been no final ranking of proposals*. MAXIMUS eventually did submit a response on July 15, 2016. There would have been no harm whatsoever in accepting the response actually provided, the Procurement Officer – without first making a written determination – has apparently excluded MAXIMUS’ proposal from further consideration and from evaluation and final ranking.

As shown above, the guidepost for the Procurement Officer’s actions is set out in Code Section 11-35-20 and 30. These include commercial reasonableness, fairness and most importantly, “**to foster effective broad-based competition for public procurement**.” It was improper, arbitrary and capricious, clearly erroneous and in violation of these very laws for the Procurement Officer to exclude MAXIMUS’ responsive proposal from competition. The Procurement Officer’s action violated the Code’s essential mandate of fostering competition by needlessly excluding a

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
Page 8 of 8

responsive competitor when the response was actually received to establish responsiveness well before the evaluators conducted the final ranking of proposals.

CONCLUSION

Based on the grounds set forth herein, MAXIMUS requests that the CPO stay any further action under the solicitation until this protest can be decided. MAXIMUS requests that any determination that it was non-responsive be rescinded and that MAXIMUS be allowed to fully and fairly participate in the solicitation process. MAXIMUS also requests a hearing in this matter. If the CPO determines that it will not hold a hearing, MAXIMUS requests that the CPO provide MAXIMUS a deadline by which MAXIMUS may provide evidence for the CPO to consider in reaching its decision.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John E. Schmidt, III".

John E. Schmidt, III

Attachment 2

	<p style="text-align: center;">State of South Carolina</p> <p style="text-align: center;">EXTENSION OF AWARD POSTING # 1</p>	<p>Solicitation Number : 5400011045 Procurement Officer : Michele P. Mahon, CPPB Date : 05/26/2016 Phone : (803) 898-1863 E-Mail Address : Michele.mahon@scdhhs.gov Address : 1801 Main Street, 6th Floor Columbia, SC 29201</p>
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DESCRIPTION: **MEMBER CONTACT CENTER**

USING GOVERNMENTAL UNIT: **SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES**

In accordance with the Regulation, Section 19-445.2090 (B), the Posting Date for the referenced solicitation is extended until further notice. Once a final posting date is determined, offerors will be notified one (1) business day in advance of the posting of the Notice of Award.

Demonstrations, as noted in the solicitation, will be scheduled with all responsive Offerors. Offerors will be notified in writing two weeks in advance of the scheduled Demonstration date.

Michele P. Mahon, Procurement Manager

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised September 2015)

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>

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

FILING FEE: Pursuant to Proviso 111.1 of the 2015 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
1105 Pendleton Street, Suite 209, 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.