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Protest Decision

Matter of: Provaliant Holdings, LLC and Provaliant Retirement, LLC

Case No.: 2017-205 (Decision on Remand)

Posting Date: August 18, 2017

Contracting Entity: South Carolina Public Employee Benefit Authority

Project No.: PEBA0122016

Description: Client Services Vendor to Facilitate and Support Program Activities

DIGEST

Protest that proposal was non-responsive and that two evaluators were actually biased is denied. Provaliant Holdings, LLC and Provaliant Retirement, LLC's (Provaliant) letter of protest is attached to the CPO's decision previously filed on April 19, 2017.

AUTHORITY

On April 19, 2017, the Chief Procurement Officer (CPO)¹ issued a decision in this matter dismissing the Protest in part for lack of jurisdiction and denying the remaining protest grounds. On August 4, 2017, the Procurement Review Panel (Panel) issued an order upholding the CPO's determination in part and remanding the following two items of protest for further consideration:

¹ Due to certain representations made by PEBA in its response to the protest, the CPO-ITMO delegated this protest to the CPO on March 3, 2017.

- 1) Provaliant's claim that Linea was non-responsive because it failed to identify and explain any unfair competitive advantage arising from its performance of the Assessment contract; and
- 2) Provaliant's claim that two evaluators were biased because of their work with Linea on the Assessment project and Linea's listing of the two evaluators as references in its proposal.

The CPO's jurisdiction following remand by the Panel is limited to those issues actually remanded for his consideration. *E.g., Ackerman v. McMillan*, 324 S.C. 440, 477 S.E.2d 267 (Ct. App. 1996) (“[I]t is the duty of the trial court to follow the decision of the appellate court.”).

The CPO conducted an administrative review of these two items of protest pursuant to S.C. Code Ann. §11-35-4210(4). In aid of his review, the CPO convened a meeting on August 18, 2017, in which counsel for the protester, PEBA, and Linea Solutions, Inc., were given an opportunity to question evaluators Doug Hislop and Lori Phipps. This decision is based on the information disclosed at the meeting, the procurement file, material in the Panel's Record on appeal in Panel Case No. 2017-4, and applicable law and precedents.

BACKGROUND

The CPO incorporates the factual findings in his April 19, 2017, decision, as supplemented by the Panel's August 4, 2017 Order.

ANALYSIS

Provaliant's Claim that Linea was Non-Responsive

Provaliant's alleges that Linea's proposal was not responsive to the requirements of the RFP. The RFP states:

DISCLOSURE OF CONFLICTS OF INTEREST OR UNFAIR COMPETITIVE ADVANTAGE (FEB 2015): You warrant and represent that Your Offer identifies and explains any unfair competitive advantage You may have in competing for the proposed contract and any actual or potential conflicts of interest that may arise from your participation in this competition or Your receipt of an award. The two underlying principles are (a) preventing the

existence of conflicting roles that might bias a contractor's judgment, and (b) preventing an unfair competitive advantage. If You have an unfair competitive advantage or a conflict of interest, the State may withhold award. Before withholding award on these grounds, an Offeror will be notified of the concerns and provided a reasonable opportunity to respond. Efforts to avoid or mitigate such concerns, including restrictions on future activities, may be considered. Without limiting the foregoing, You represent that your Offer identifies any services that relate to either this solicitation or the work that has already been performed by You, a proposed subcontractor, or an affiliated business of either.

RFP Section 1.12. Provaliant argues that Linea failed to comply with the requirements of this provision because:

Linea's proposal did not disclose its unfair competitive advantage; it did not detail the work that Linea had done under the Assessment RFP; it did not disclose that it had drafted the scope of work, nor did it disclose that it had access to and assisted in setting the budget for the solicitation.

Responsiveness

A "responsive bidder ... means a person who has submitted a bid or offer which obviously conforms in all material aspects to the solicitation." S.C. Reg. 19-445.2080. "Generally speaking, responsiveness is determined at the time an offer is opened and, unless discussions are conducted under section 11-35-1530(6), is based on the information included in an offeror's proposal."

Appeal by Excent Corporation, Panel Case No. 2013-2. Section 1.12 of the RFP requires a representation by the offeror. To be responsive to the requirements of Section 1.12 of the RFP, an offeror simply needs to submit a proposal that does not take exception to Section 1.12.

Provaliant does not claim that Linea took exception to Section 1.12 in its RFP, nor has the CPO been presented with any evidence that Linea did so. Having submitted a proposal that does not take exception to Section 1.12, Linea is responsive to this requirement of the RFP.

Misrepresentation

If an offeror deliberately omits to disclose something required by a solicitation, its omission should be analyzed as a misrepresentation. Though Provaliant does not couch its protest in terms of misrepresentation, in the interest of economy, the CPO will approach the matter as if it had. *See Appeal by Oakland Janitorial Service, Inc.*, Panel Case No. 1988-13 (Panel held that a protest is not to be judged by highly technical or formal standards, it is enough that it in some way alert the parties to the general nature of the grounds for protest).

Misrepresentation is a matter of good faith, not responsiveness. S.C. Code Ann. § 11-35-30 (“Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement...”); *Protest of First Sun EAP Alliance, Inc.*, Case No. 1994-11 (“The Panel notes that the issue [misrepresentation] is not the responsiveness of Family Service.”). A misrepresentation should result in rejection of a proposal when the misrepresentation was made in bad faith **or** materially influenced an agency determination or evaluation. *Appeal by PS Energy*, Panel Case No. 2002-9 (recognizing that a material misrepresentation could be a basis for rejecting a proposal if it is made in bad faith or materially influences an agency determination or evaluation, and that such a claim requires a showing of intent), *cited in Appeal by Heritage Community Services*, Panel Case No. 2013-1(ii), n. 10.

Section 1.12 requires two things. First, an offer must “identif[y] and explain[] any unfair competitive advantage.” Second, it must “identif[y] any services that relate to either this solicitation or the work that has already been performed by [the offeror], a proposed subcontractor, or an affiliated business of either.”

As Provaliant recognized in its unsuccessful protest, an unfair competitive advantage that is not properly mitigated may result in an agency’s disqualifying an offeror from the competition. PEBA knew of the prior relationship with Linea, as it discussed the Assessment contract in some detail in Amendment 4, PRP182. When it announced in the same amendment that Linea would be allowed to participate in the CSV RFP, PEBA plainly signaled its belief that Linea’s work did *not* constitute an unfair competitive advantage. It beggars belief that Linea’s disclosure would have changed the agency’s considered decision to allow Linea to compete for the CSV contract.

Similarly, it beggars belief that Linea's omission to identify the services it performed under the Assessment contract had any effect on PEBA's administration of the CVS RFP. PEBA included the deliverables from Linea's Assessment contract throughout the RFP itself. *See* PEBA Operational System Modernization Roadmap, PRP197; PEBA Future State IT and Operational Research & Development Demand fulfillment, PRP237; and PEBA Future State Organization, PRP253. Each of these documents bears Linea's name on its first page.

PEBA could not have been misled by Linea's failure either to "identify and explain" or to "disclose," since PEBA necessarily knew about these matters before ever issuing the RFP. *Cf. Appeal by PS Energy, ante* ("This is a case where the State already has a contract for gasoline that includes the use of the WEX card, and the State knows the facilities where the WEX card is accepted.... The State having knowledge of what facilities in the State accept the WEX card is credible evidence that asking for a complete listing of such facilities in the current RFP is a matter of form."). Therefore, to the extent that Linea omitted any disclosure from its proposal, such omission could not have been made with the intent to deceive PEBA and could not have materially influenced PEBA's determination or evaluation.

Provaliant's Second Ground of Protest – Evaluator Bias

Provaliant's second ground of protest alleges bias of two evaluators, Lisa Phipps and Doug Hislop. Specifically, Provaliant alleges that:

they were actually biased – as at least two evaluators worked with Linea on the Assessment RFP project and were listed as references for Linea in its proposal.

PRP44] In his previous decision, the CPO dismissed this ground of protest as untimely and for Provaliant's failure to carry its burden of proof. The Panel rejected the CPO's decision and remanded the matter for the CPO to further develop the facts surrounding Provaliant's evaluator bias claim.

As a preliminary matter, the CPO notes that the State routinely issues solicitations for supplies and services which are already under contract and the existing contract is soon to expire. The

Panel expects the State to choose evaluators for “his or her experience and judgment.” *Protest of Tri-County Citizens Against Sexual Assault*, 1989-24. Frequently, such employees will be those involved in the current contract working with the incumbent vendor. This contact is simply a function of these individuals doing their job. If such a relationship in and of itself gives rise to a claim of bias, the procurement process can be brought to a standstill unless the State relies on inexperienced evaluators who have no context in which to fairly evaluate which proposals are the most advantageous to the State.

Despite the foregoing conclusion, the CPO did allow the parties to question the two evaluators in his presence and finds no evidence of bias. When questioned specifically about their role as evaluators, both Hislop and Phipps unequivocally stated (a) they did not score any proposal before the procurement officer convened the scoring meeting; (b) they recalled no discussions among the evaluators in which proposals of different offerors were compared to other proposals; (c) they evaluated each proposal against the requirements of the RFP and not against other proposals; and (d) they arrived at their scores independently, without discussing those scores with other evaluators. Ms. Phipps said that she did not realize Linea had listed her as a reference until she saw its proposal; Mr. Hislop indicated he did not know that until even later in the procurement process. Apparently, Linea asked neither for permission to include them as references. Finally, both confirmed that their work with Linea on the Assessment contract did not bias them for or against Linea or any other offeror.

For many years the Panel has hewed to the same standard for judging evaluator conduct:

The determination by the State [of] who is the most advantageous offeror is final and conclusive unless clearly erroneous, arbitrary, capricious or contrary to law ... The burden of proof is on [the protestant] to demonstrate by a preponderance of the evidence that the determination in this case has such flaws ... The Panel will not substitute its judgment for the judgment of the evaluators, who are often experts in their fields, or disturb their findings so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased.

Appeal by Coastal Rapid Public Transport Authority, Panel Case No. 1992-6. The only information in this case confirms that evaluators Hislop and Phipps did exactly as the Panel has prescribed. Provaliant's protest that these evaluators were biased is denied.

DECISION

For the forgoing reasons, Provaliant's protest is denied.⁹


John St. C. White
Chief Procurement Officer

Columbia, South Carolina

⁹ Rather than reject Provaliant's claim on the grounds that Provaliant failed to carry its burden of proof, the CPO should have explicitly rejected it on the grounds that a bare allegation that an evaluator is biased simply because he or she worked with a vendor on another State contract, **absent some document or allegation of fact tending to indicate actual bias**, fails to state a claim. Similarly, the mere fact that a vendor responding to the RFP lists an evaluator as a reference does not, without more, state a claim of bias. In his alternative holding, the CPO relied on the Panel's decision in *Protest of ACMG, Inc.*, Panel Case No. 1990-4. Effectively, though not expressly, the CPO dismissed the bias claim for failing to state a violation of the Procurement Code. Understood in this sense, the Panel's remand to the CPO is consistent with decades of precedent where it has returned to the CPO matters which he has not determined on their merits.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2017)

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 2016 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.