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Protest Decision

Matter of: Infosys Public Services, Inc.

Case No.: 2018-206

Posting Date: February 22, 2018

Contracting Entity: South Carolina Department of Health and Human Services

Solicitation No.: 5400013203

Description: Cúram Global Income Support (CGIS) Services for South Carolina's Medicaid Member Eligibility & Enrollment System

DIGEST

Protest of a non-responsive determination is denied. Protest of the responsiveness of the apparent successful bidder is granted. Infosys Public Services' (IPS) letter of protest 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 a review of the procurement file, applicable law, and precedents.

BACKGROUND

Key Events

| | |
|------------------------|------------|
| Solicitation Issued | 05/15/2017 |
| Amendment 1 Issued | 05/26/2017 |
| Intent to Award Posted | 12/06/2017 |
| Protest Received | 12/15/2017 |

The South Carolina Department of Health and Human Services (HHS), pursuant to authority delegated by the Chief Procurement Officer, issued this solicitation for Cúram Global Income Support (CGIS) Services for South Carolina's Medicaid Member Eligibility & Enrollment System on May 15, 2017. Neither the solicitation nor the amendment included any clause limiting the contractor's liability for breach. There were no questions from offerors about a limitation of liability. Proposals were received from IPS and International Business Machines Corporation (IBM) on June 30, 2017. The procurement officer determined that IPS' proposal was non-responsive. HHS posted its Intent to Award to IBM on December 6, 2017. IPS protested, alleging that its proposal was in fact responsive. Alternatively, IPS claimed that IBM's proposal was non responsive in the same manner as IPS.

ANALYSIS

IPS argues that its proposal was improperly deemed non responsive. IPS included the following statement in its proposal:

“Section G. Negotiations
Regarding Section 7.37 INDEMNIFICATION - THIRD PARTY CLAIMS, Infosys would like to make its offer contingent on defining a limit to liability. We understand there is no requirement under South Carolina Consolidated Procurement Code for unlimited liability. As you are probably aware, unlimited liability is a standard unacceptable term for large companies, ours included. Per Section 6.4 DISCUSSIONS AND NEGOTIATIONS: Ordinarily, nonresponsive proposals will be rejected outright without prior notice. Nevertheless, the State may elect to conduct discussions, including the possibility of limited proposal revisions, but only for those proposals reasonably susceptible of being selected for award. [11-35-1530(6); R.19-445.2095(1)]. Infosys respectfully requests you elect to conduct discussions regarding a mutually acceptable solution to liability. We

believe you will find our proposal both reasonably susceptible of being selected for award and also the best solution with the lowest risk and total enterprise cost of ownership.”

Infosys Technical Proposal, Page 377 (emphasis added).

The procurement manager rejected IPS proposal as non-responsive in accordance with Regulation 19-445.2095(J)(1)(b) which states:

(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:

(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....

IPS argues that making its proposal contingent on the successful negotiation of a limitation of liability was not a material change to the solicitation.

The Procurement Review Panel has addressed materiality in *Appeal by Coastal Rapid Public Transit Authority and Anderson-Oconee Council on Aging*, Panel Case 2000-4:

A “responsive bidder or offeror” is defined in § 11-35-1410(7) as “a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or requests for proposals.” Section 11-35- 1520(13) of the South Carolina Consolidated Procurement Code provides for the waiver or curing of minor informalities and irregularities in bids and proposals. [FN2] That section provides in relevant part:

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State.

Section 11-35-1520 then sets forth a non-exclusive list of examples of minor informalities or irregularities.

The Panel has read these two sections of the Procurement Code together to arrive at the following conclusions:

In order to be responsive, a proposal need not conform to all of the requirements of the RFP; it must simply conform to all of the essential requirements of the RFP....[B]ecause the Code requires rejection of a proposal when it fails to meet an essential requirement but allows waiver of an immaterial variation from exact requirements, a requirement is not “essential” if variation from it has no, or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured. Waiver or correction of a variance from such a requirement is appropriate under the Code when relative standing or other rights of the bidders are not prejudiced.

Protest of National Computer Systems, Inc., Case No. 1989-13.

Anything that has a cost consequence is a material change to the contract. The purpose of a limitation of liability is to cap the contractor’s financial liability. IPS conditioned its proposal on a negotiation to cap its financial liability under this contract. This is a material change to the State’s published requirements. In making its proposal contingent upon successful negotiation of a limitation of its liability to the State, IPS took exception to a material requirement of the solicitation and was properly disqualified as non-responsive. This issue of protest is denied.

IPS argues that the state violated the Code and Regulations by negotiating with IBM and not IPS.

Section 11-35-1530(8) provides for negotiations beginning with the highest ranked offeror.

Section 11-35-1530(7) only allows responsive offerors to be ranked. IPS was determined to be non-responsive and consequently was not ranked and thereby was ineligible for negotiation.

This issue of protest is denied.

IPS also argues that it indicated in two places in its proposal that it intended to fully comply with the State’s terms and the statement making its proposal contingent upon successful negotiation of a limitation of liability should be treated as an ambiguity needing clarification rather than an exception to the terms and conditions of the bid. IPS clearly stated that it was making its proposal contingent on successful negotiation of a limitation of liability. Even if the IPS

proposal is somehow read as being ambiguous on this point, ambiguity on a material requirement of the solicitation renders a proposal non-responsive.¹ In addition, any opportunity for discussions and clarifications under Section 11-35-1530(6) and Regulation 19-445.2095(I) are at the sole discretion of the procurement officer, which in this case was not exercised.² This issue of protest is denied.³

¹ In “Guidance & Best Practices for Permissible Communications in a Competitive Sealed Proposal After Opening but Prior to Award,” Procurement Policy Statement 2008-2 (April 28, 2008), the Division of Procurement Services announced:

Clarifications may be conducted only with offerors who have submitted proposals that are obviously responsive to the solicitation's material requirements. [R.19-445.2080] A proposal is not obviously responsive if the determination of responsiveness is dependent on the vendor's resolution of an ambiguity in its proposal.

(citing *Protest of Cannon Associates, Inc.*, Case No. 2000-13 (bid); *Protest of Abbott Laboratories*, Case No. 1997-4 (bid); *Protest of Two State Construction Co.*, Case No. 1996-2 (bid); *Protest of United Testing Systems, Inc.*, Case No. 1991-20 (bid); *Protest of Value Options*, Case No. 2001-7 (RFP); and John Cibinic, Jr. and Ralph C. Nash, Jr., FORMATION OF GOVERNMENT CONTRACTS 569 (George Washington University 3d ed. 1998) (“Bids that are indefinite, uncertain, or ambiguous are normally rejected as nonresponsive.”))

² Section 11-35-1530(6) states: “All offerors whose proposals, in the procurement officer's sole judgment, need clarification must be accorded that opportunity.”

³ Given the value, complexity, importance, and overall circumstances involved, the CPO is concerned that the agency did not avail itself of the opportunity to address those issues that could have been resolved through discussions. The CPO encourages HHS to heed the Panel’s exhortation in *Appeals of The Carolinas Center for Medical Excellence; Qualis Health; and Georgia Medical Care Foundation d/b/a Alliant ASO*, Panel Case No. 2010-4:

The current statutory and regulatory scheme governing competitive sealed proposals expressly allows discussions with offerors “for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements.” S.C. Code Ann. § 11-35-1530(6) (2009); see also S.C. Code Ann. Regs. 19-445.2095(I) (2009). As previously noted, the State did not conduct discussions with any offerors with regard to this solicitation. Such a discussion prior to evaluation and ranking could have provided the clarification needed here and would have given the State an evidentiary basis for finding CCME's proposal responsive. However, once the proposals have been evaluated and ranked, it is too late for such clarification, and allowing it after those stages would be unfair to the other offerors. Cf. *In re: Protest of Express Scripts, Inc.*, Case No. 2005-8 (October 6, 2005) (wherein the Panel found that a clarification allowed after opening, but before evaluation and award, was fair because the vendor had no way of knowing at the time of clarification whether it had the winning proposal). **Here again, if the State wishes to take full advantage of the flexibility afforded competitive sealed proposals, it should consider conducting the discussions allowed by the applicable Procurement Code provisions and the corresponding regulations. Clarification would seem especially critical when, as is the case in this solicitation, the State is procuring services for the first time and is looking for “innovative” solutions.**

Id., n. 8 (emphasis supplied).

IPS next protests that IBM's proposal included a similar contingency and should have been rejected as non-responsive. In its cover letter IBM included the following statement:

In accordance with the South Carolina Procurement Code, including Sections 11-35-30 and 11-35-1530, and without modifying any of the material requirements of the Solicitation, the IBM price includes the right to work with SCDHHS on modifications of certain liability based terms included in the Solicitation which will be modified in the final contract.

Despite IBM's pronouncement to the contrary, it expressly conditioned its price on a "right" to negotiate a limitation of its liability in the final contract. There is no "right" to negotiate modifications to the final contract and the solicitation puts offerors on notice of this fact in Section 6.4 of the solicitation which states:

Submit your best terms from both a price and a technical standpoint. Your proposal may be evaluated and your offer accepted without any discussions, negotiations, or prior notice. ...

If negotiations are conducted, the State may elect to disregard the negotiations and accept your original proposal.

Solicitation, Page 55

IBM plainly intended that it would not contract with the State without a limit on its liability. This amounted to an exception to a material term of the solicitation, and IBM's proposal was non-responsive in exactly the same way as IPS. This issue of protest is granted.⁴

IPS also argues that:

IBM's proposal contains other terms that self-admittedly do not comply with the RFP required terms and conditions. In IBM's Technical Proposal Section A.5., IBM states: "Pursuant to those terms, IBM would like to communicate to the Procurement Officer that it does not carry the exact insurance requested in Section 12.8⁵". Yet, IBM was not found Non-Responsive.

This statement is found on page 46 of IBM's Technical Volume in Section A.5 Summary of Insurance Policies. The procurement officer did not acknowledge or address IBM's notation that

⁴ During negotiations, the State in fact agreed to limit IBM's liability.

⁵ The references to Section 12.8 are in error as the solicitation has no Section 12. The appropriate section is 7.28.

its proposal did not meet the requirements of the solicitation but restated these solicitation requirements with minimal modifications in the Record of Negotiations.

When faced with a statement by a vendor that its offer does not comply with the terms of the RFP, a procurement officer has three options. First, to the extent the reservation goes to a material requirement of the RFP, she may accept the offeror's statement at face value and deem the proposal non-responsive. *See* S.C. Code Ann. Reg. 19-445.2095(J)(1)(b). Second, she can determine that the non-compliance is a minor informality and waive it. S.C. Code Ann. §11-35-1520(13).⁶ Third, assuming that the offer is reasonably susceptible of award, she can conduct discussions to cure the non-compliance. S.C. Code Ann. §11-35-1530(6). She cannot, however, do nothing, as the procurement officer did here.

Comparing the RFP requirements with IBM's response convinces the CPO that the expressed concern "that it does not carry the exact insurance requested in Section [7.28]" should have been waived as a minor informality.

Section 7.28 of the solicitation sets out requirements for network security and privacy insurance, commonly called "cyber liability insurance." As the clause acknowledges, the market for this insurance product is evolving. There is no standard form or even name for a network security and privacy insurance policy. Accordingly, Section 7.28 describes in general terms the types of risks for which insurance will be required. It expressly admonishes offerors to raise any concerns "well in advance of opening:"

[ASK QUESTIONS NOW: For products providing the coverages required by this clause, the insurance market is evolving. Our research indicates that the requirements stated herein reflect commercially-available insurance products. Any Offeror having concerns with any specific requirements of this clause should communicate those concerns to the Procurement Officer well in advance of opening.]

[Solicitation, Page 63]

The solicitation describes the risks for which coverage is required as follows:

⁶ Section 11-35-1520(13) is made applicable to the request for proposal process by Regulation 19-445.2095(E).

(b) Coverage must include claims for:

(i) information security risks, including without limitation, failure to prevent unauthorized access to, tampering with or unauthorized use of a computer system; introduction of malicious codes, computer viruses, worms, logic bombs, etc., into data or systems; or theft, damage, unauthorized disclosure, destruction, or corruption of information in whatever form;

(ii) privacy risks, including (A) failure to properly handle, manage, store, destroy, or otherwise control non-public personally identifiable information in any format; (B) loss or disclosure of confidential information; and (C) any form of invasion, infringement or interference with rights of privacy, including breach of security/privacy laws or regulations;

(iii) contractual liability for the Contractor's obligations described in the clauses titled "Indemnification - Third Party Claims - Disclosure Of Information" and "Information Use And Disclosure;" and

(iv) errors, omissions, or negligent acts in the performance, by the Contractor or by any entity for which the Contractor is legally responsible, of professional services included in the work.

(c) If the work includes content for internet web sites or any publications or media advertisements, coverage must also include claims for actual or alleged infringement of intellectual property rights, invasion of privacy, as well as advertising, media and content offenses.

(d) If the work includes software, coverage must also include claims for intellectual property infringement arising out of software and/or content (with the exception of patent infringement and misappropriation of trade secrets).

Id. It also required minimum limits of \$5 million per claim and \$10 million in the aggregate. *Id.*

In its proposal IBM described the coverage it believed met the requirements of Section 7.28:

IBM would like to communicate to the Procurement Officer that it does not carry the exact insurance requested in Section 12.8, but we do carry Errors and Omissions Insurance that includes Cybersecurity, and our language regarding the policy is found below. Any liabilities beyond what we carry for this type of insurance would be self-insured.

Professional Errors & Omissions insurance coverage for actual or alleged breach of duty, neglect, error, misstatement, misleading statements or omission, solely for acts or omissions committed by IBM in providing professional services for

Client with a minimum per claim and aggregate limit of USD 10,000,000.
Coverage includes network security, unauthorized access, unauthorized use, receipt or transmission of a malicious code, denial of service attack, unauthorized disclosure or misappropriation of private information, privacy liability, notification costs, credit card monitoring, and fine & penalties incurred by the Client.

IBM shall maintain, at its sole expense, the following insurance:

d) Professional Errors & Omissions insurance coverage for actual or alleged breach of duty, neglect, error, misstatement, misleading statements or omission, solely for acts or omissions committed by IBM in providing professional services for South Carolina with a minimum per claim and aggregate limit of USD 10,000,000. **Coverage includes network security, unauthorized access, unauthorized use, receipt or transmission of a malicious code, denial of service attack, unauthorized disclosure or misappropriation of private information, privacy liability, notification costs, credit card monitoring, and fine & penalties incurred by the customer.**

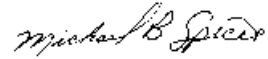
IBM Technical Proposal, page 46 (emphasis supplied). IBM's response indicated that it would provide coverage, with limits as specified, for the network security risks described in the RFP. Its summary of insurance policies and coverages substantially complied with the solicitation requirements. Any differences did not create a "gap" in coverage, and should have been waived as a minor informality. In fact, there were no meaningful changes to the state's requirements even in the Record of Negotiations. Once the minor informality is waived, IBM was responsive to the solicitation requirements. This issue of protest is denied.

DECISION

For the reasons stated above, the protest of Infosys Public Services, Inc. with regard to its proposal's disqualification as non-responsive is denied. Infosys Public Services' protest with regard to the responsiveness of International Business Machines, because it qualified its offer on negotiation of a liability limit, is granted. The award to IBM is canceled and the solicitation is

remanded to the Division of Procurement Services for further proceedings in accordance with the Code, presumably immediate re-solicitation.⁷

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

⁷ This is an extraordinarily complex, expensive acquisition of a management information system to administer a large and fundamental part of the Department's overall mission. The RFP required a contingency ("modification pool") of \$2 million, suggesting that HHS recognized the resulting contract would run into the tens of millions. The negotiated contract price exceeded \$26 million. This kind of solicitation demands sufficient research so that agency procurement staff can understand the realities of the marketplace. If that had happened here, HHS would have recognized that few, if any, sophisticated IT vendors will undertake performance of a contract like this one where liability is unlimited. It should have considered alternative approaches, like including a limitation on liability clause in the solicitation and using the clause titled "Discussions and Negotiations-Required," so vendors understand they will have an opportunity to negotiate something less than unlimited liability. Failure to make a realistic evaluation of the vendors' and agency's risks attached to the contract, and to adopt a reasonable allocation of those risks, will drive otherwise qualified bidders away, and cause those who do bid to offer pricing that reflects their unlimited exposure. The circumstances here also present an issue of fairness, even if IBM's proposal had not been conditioned on a limitation of its liability. The Department disqualified one offer for insisting on a limitation provision. It then negotiated exactly that term with another. Finally, but for the protest the opportunity for meaningful competition would have been lost. And because it never evaluated either offer, the agency would not have known if IPS's proposal would have provided a better solution. If an acquisition is complex enough that the agency determines to use a solutions-based approach, the agency must also consider whether traditional approaches to risk allocation are appropriate.

Attachment 1

INFOSYS PUBLIC SERVICES, INC.
800 King Farm Blvd
5th Floor
Rockville, Maryland 20850
www.infosyspublicservices.com



December 15, 2017

Via E-mail

PROCUREMENT PROTEST

[\(protest-itmo@itmo.sc.gov\)](mailto:protest-itmo@itmo.sc.gov)

Chief Procurement Officer
Information Technology Management Office
1201 Main Street
Suite 601
Columbia, South Carolina 29201

Re: Solicitation 5400013203 "Curam Global Income Support (CGIS) Services for South Carolina's Medicaid Member Eligibility & Enrollment System" - Protest of South Carolina Department of Health & Human Services' (SCDHHS) Determination of Non-Responsiveness and the issuance of a Notice of Award to IBM.

Dear Ms. Mahon:

On behalf of my client, Infosys Public Services, Inc. ("IPS"), we protest, pursuant to S.C. Code Ann. § 11-35-4210 (Supp. 2006), both the determination of the South Carolina Department of Health and Human Services (SCDHHS) in finding IPS non-responsive to the RFP and the determination to issue the Notice of Intent to Award (Notice) a contract resulting from the RFP, to IBM. The Notice was posted on December 6, 2017.

TIMELINESS

Pursuant to S. C. Code Ann. § 11-35-4210 (1) (b), this protest is being filed within ten (10) days of the date of award or notification of intent to award. IPS received a notification of intent to award on December 5, 2017.

FACTS

SCDHHS issued RFP Solicitation number 5400013203 on or about 5/15/2017 for the above referenced services. IPS submitted a fully-compliant Offer on or about 30 June 2017, in accordance with the S.C. Code Ann. § 11-35-10 et. seq.

At various times from and after June 30, 2017, IPS inquired as to the status of, and a "time frame for reaching a decision" on the procurement. SCDHHS responded, consistently, on these occasions, including but not limited to the response from Ms. Michele Mahon to Mr. Rick Brady on September 7,

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2017, and to Mr. Chris Veal on November 29, 2017, that the procurement "is still in evaluation". (Attachment 1)

Notwithstanding SCDHHS' above statements and seeming indications to IPS that its proposal is still being evaluated, SCDHHS, as contained in Ms. Mahon's "Written Determination Regarding Which Solicitation by a Responsible Offeror is Most Advantageous to the State and Record of Basis for Award" dated October 20, 2017, stated that on or about July 5, 2017, Ms. Mahon (as the Program Manager) already made a determination that IPS' offer "was determined to be non-responsive". (Attachment 2) No reason was given in her Written Determination, and no communication or other Notice was provided to IPS informing IPS of such Non-Responsive Determination.

Notwithstanding Ms. Mahon's Written Determination of Non-Responsiveness, Ms. Erin Boyce, on 13 July 2017, (8 days after Ms. Mahon's Written Determination of Non-Responsiveness) made her written determination that "Based on my review of the submitted financials, ESystems, Inc. (sic) appears to have fairly presented their financial performance and cash flows." And that, "... ESystems, Inc. (sic) appears to be a financially sound company with no material issues noted." (Attachment 3) (Note: Several documents received from SCDHHS inexplicably references "ESystems, Inc." instead of IPS, and in Ms. Mahon's own "Written Determination" (Attachment 2) references IPS as "Infosys Public Services (aka eSystems).") This raises some serious questions regarding the efficacy and accuracy of the State's review.)

Since only two Offerors responded - IPS and IBM - SCDHHS' removal of IPS as non-responsive, left only IBM as the sole offeror. Ms. Mahon stated in her October 20, 2017 Written Determination that, "On August 10, 2017, a select committee entered into *negotiations* with IBM." (emphasis added) And stated, "A select committee conducted negotiations with the sole responsive offeror, culminating in a signed Record of Negotiations on October 20, 2017." (IPS was not provided a copy of this Record of Negotiation in response to its FOIA request, and thus does not know what items were negotiated).

Only on December 12, 2017, upon receipt of SCDHHS documents in response to IPS' FOIA request, did IPS learn that it was determined to be Non-Responsive, and the reason therefore.

On December 5, 2017, SCDHHS sent an E-mail to Mr. Rick Brady informing IPS that award will be made to IBM and posted on December 6th. In response to IPS' request for a de-brief to determine why it lost and to determine if there were any grounds for a protest, Ms. Mahon responded that the requested debrief will not be provided until "after the protest period is over". (Attachment 4)

CLAIMS

A. SCDHHS Erroneously Determined IPS Non-Responsive. IPS protests SCDHHS' finding that IPS was non-responsive on the grounds set forth below.

1. The South Carolina Consolidated Procurement Code, S.C. Code Ann. § 11-35-20 states in part:

"The underlying purposes and policies of this code are:

(a) to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements

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are the most advantageous to the State and in compliance with the provisions of the Ethics Government Accountability and Campaign Reform Act;

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

...

(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; (Emphasis Added)

(g) to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process..."

Since only two vendors submitted offers, and one was eliminated for alleged non-responsiveness, proceeding with only one vendor on a negotiated sole source basis, when neither vendor was fully evaluated (in accordance with the terms of the RFP) or 'rated' as called for under the Code, is contrary to fostering broad-based competition, treats IPS disparately and does not provide the State with a vendor which assures competition to achieve the best terms and pricing. It is widely held that absent strict circumstances, one offeror is not "competition".

Further, IPS is unaware of any formal determination made that would justify accepting IBM on a sole source basis. (See, 11-35-1530). Section 11-35-1530, and consistent with 11-35-20 goals (as well as other Code sections), place a priority on retaining and conducting discussions with "offerors who submit proposals determined to be reasonably susceptible of being selected for award...". As stated in the below arguments, IPS is a responsible Offeror and its Offer was "responsible" and susceptible of being selected for award, and should at least have been provided the opportunity to clarify any issue through discussions. Subsection "(f)" of 11-35-20 would demand no less to ensure full, fair and equitable treatment and competition.

2. In Ms. Mahon's "Justification for Determination of NonResponsiveness", dated "7/5/2017" (Attachment 5), SCDHHS states that IPS' inclusion of Section G its Offer, as stated below, "conditioned" its offer and thus was determined non-responsive:

"Section G. Negotiations

Regarding Section 7.37 INDEMNIFICATION - THIRD PARTY CLAIMS, Infosys would like to make its offer contingent on defining a limit to liability. We understand there is no requirement under South Carolina Consolidated Procurement Code for unlimited liability. As you are probably aware, unlimited liability is a standard unacceptable term for large companies, ours included. Per Section 6.4 DISCUSSIONS AND NEGOTIATIONS: Ordinarily, nonresponsive proposals will be rejected outright without prior notice. Nevertheless, the State may elect to conduct discussions, including the possibility of limited proposal revisions, but only for those proposals reasonably susceptible of being selected for award. [11-35-1530(6); R.19-445.2095(l)]. Infosys respectfully requests you elect to

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conduct discussions regarding a mutually acceptable solution to liability. We believe you will find our proposal both reasonably susceptible of being selected for award and also the best solution with the lowest risk and total enterprise cost of ownership."

Section 6.4 of the RFP states, in pertinent part, "Submit your best terms from both a price and a technical standpoint". Subsumed in that statement is that it allows an Offeror to propose its terms (and those affecting 'price') and make such a request for discussions/negotiations, as IPS did in its Section G. "Terms" and "price" are inter-related and certain terms affect price, and thus as part of being competitive and providing the State with the best combination of terms and price, an Offeror may point out terms that affect price – just as allowed in Section 6.4.

Further Section 6.4 states, "Nevertheless, the State may elect to conduct discussions, including the possibility of limited proposal revisions, but only for those proposals reasonably susceptible of being selected for award. [11-35-1530(6);...]" While the State may elect NOT to conduct discussions regarding proposal revisions, it may not arbitrarily, capriciously and inequitably choose to conduct discussions and negotiations with ONE Vendor and eliminate the other vendor who was equally determined to be "responsible" and susceptible of being awarded a contract. As will be shown in the below argument, the State must comply with both the Procurement Code mandates, its policies and goals, as well as its own RFP terms with regard to conducting negotiations.

SCDHHS erred by not affording IPS the opportunity to clarify any issue that SCDHHS had with regard to IPS' Section "G". IPS clearly replied in its proposal (by checking the 'box' on its submission) that it was IPS' intent to, and did, fully comply with the State's terms, but included Section "G" as its intent and request to enter into discussions and negotiations (pursuant to the State's own Section 6.4) regarding the issue of "liability" as it may affect its price (as did IBM, see Argument below).

IPS submitted a proposal that, at least twice, stated that it agrees to comply with the State's terms and conditions, and arguably once (Section G) raised an issue in the State's mind. The State should have raised this ambiguity, clarified it via discussions or negotiations and given IPS the opportunity to explain or remove the offending statement, as it did with IBM. IPS was treated unequally and unfairly.

Section 11-35-1410 (7) states: "(7) "Responsive bidder or offeror" means a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals." IPS' contends its offer did conform in all material aspects to the RFP.

Further, S.C. Code Ann. Reg. 19-445.2080 provides: "Apparent responsive bidder as used in the source selection process, means a person who has submitted a bid or offer which obviously conforms in all material aspects to the solicitation. A procurement officer's decision regarding whether a bid is apparently responsive is final unless protested." (Emphasis added)

IPS maintains that: (a) its Offer was compliant in all material aspects; (b) it did state that it would comply with the RFP Terms and Conditions; (c) its Section G may have raised an issue or ambiguity that the State should have raised and clarified in discussions or negotiations; (d) the State violated both the S.C. Procurement Code and S.C. Procurement Regulations, by engaging in negotiations with IBM and not IPS; and (e) did not treat IPS equitably or fairly as required by the Code by determining IPS was non-responsive.

Section 11-35-30 states: "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." SCDHHS' actions did not comply with this provision.

3. IBM's Proposal Should Have Been Considered Non-Responsive

- A. IPS protests the award of a contract to IBM because IBM's proposal contains the following "Conditional" language and should have been determined Non-Responsive:

"In accordance with the South Carolina Procurement Code, including Sections 11-35-30 and 11-35-1530 and without modifying any of the material requirements of the Solicitation, the IBM price includes the right to work with SCDHHS on modifications of certain liability based terms in the Solicitation which will be modified in the final contract". (Emphasis Added) (Attachment 6)

(IBM made the above statement integral to and a part of its proposal by stating: "I am authorized by IBM to commit IBM contractually to all statements, including services and prices, contained in the proposal".)

- B. IBM's conditional language contained in its reservation of its "right to work with SCDHHS" and its requesting discussions and/or negotiations on "certain liability based terms" is no different than IPS' "Section G". SCDHHS erred in not declaring IBM Non-Responsive.
- C. IBM's proposal contains other terms that self-admittedly do not comply with the RFP required terms and conditions. In IBM's Technical Proposal Section A.5., IBM states: "Pursuant to those terms, IBM would like to communicate to the Procurement Officer that it does not carry the exact insurance requested in Section 12.8". Yet, IBM was not found Non-Responsive.
- D. SCDHHS further erred and violated S.C. Procurement Code by engaging in negotiations with IBM and not IPS.

Chief Procurement Officer
December 15, 2017

CONCLUSION

For the above stated reasons, the Procurement Officer's determination that IPS is non-responsive should be reversed, the award to IBM should be overturned and SCDHHS should be required to either resolicit the RFP or IPS placed back in the competition and both proposals scored and negotiated.

Sincerely,



Kenneth Kopf, Esq.
General Counsel for Infosys Public Services, Inc.
(kenn_kopf@infosys.com)

Cc: Mr. Eric Paternoster, CEO

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.