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Protest Decision

Matter of: GlobalPundits Technology Consultancy Inc.

Case No.: 2019-204

Posting Date: January 23, 2019

Contracting Entity: South Carolina Department of Health and Environmental Control

Solicitation No.: 5400012222

Description: Project Staff Support Services

DIGEST

Protest alleging improper awards is denied. GlobalPundits Technology Consultancy's (GP) 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) to include a meeting of the parties on December 20, 2018. This decision is based on materials in the procurement file and applicable law and precedents.

BACKGROUND

Solicitation Issued
Amendment 1 Issued

June 14, 2018
July 12, 2018

Intents to Award Issued	November 16, 2018
Initial Protest Received	November 26, 2018
Amended Protest Received	December 3, 2018

The State Fiscal Accountability Authority (SFAA) issued this Request for Proposals on behalf of the South Carolina Department of Health and Environmental Control (DHEC) on June 14, 2018 to retain up to three contractors capable of providing complete teams of project management consultants to complete projects or project phases on a beginning-to-end basis. Projects would vary, to include, but not be limited to: strategy development, grant-specific initiative execution, process engineering, software implementation and organizational design. Eight proposals were received on July 20, 2018. Intents to Award were posted on November 16, 2018, to Cogent Infotech Corporation, DatamanUSA, LLC, and United Global Technologies. GP filed its initial protest on November 26, 2018 and amended its protest on December 3, 2018. The CPO met with GP and the State on December 20, 2018, to hear arguments and receive information from the parties to assist with the CPO's administrative review.

At the meeting with the CPO and State, GP withdrew its original protest issue 3—namely, that “[t]he awarded vendors were non-responsive to the material, essential requirements of the RFP and should have been rejected from consideration.” GP also withdrew its allegation that the State had failed to provide offerors an opportunity to cure minor informalities.

ANALYSIS

GP raises several issues related to the procurement officer's determination to waive certain minor informalities in accordance with Section 11-35-1520(13). [Attachment 2] GP argues that the Procurement Officer's determinations were “at best vague and nonspecific as to any vendor, and do not meet the requirements of the governing code and regulations pertaining to such waivers and the duty to document procurement actions and decisions sufficient to satisfy external audit.” In documenting the waiver of minor informalities, the Procurement Officer listed the names of all eight bidders and four of the statutory minor informalities. However, the Procurement Officer failed to identify which bidders suffered which deficiencies. The Procurement Officer's documentation of the waiver of minor informalities does not meet the

requirements of the Code. However poor documentation alone is not sufficient grounds to justify cancellation of the awards. This aspect of the protest is denied.¹

GP also protests that several of the issues waived were not minor informalities. A minor informality is defined as:

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 or negligible 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.

S.C. Code Ann. § 11-35-1520(13).

According to the procurement officer's waiver of minor informalities, one or more of the bidders failed to include financial statements and / or references in their proposals. The published evaluation criteria included an evaluation of the Offeror's Qualifications, without elaboration. GP argues that an evaluation of qualifications necessarily includes an examination of the Offeror's financial information and references making the inclusion of this information a material and essential requirement of the solicitation and consequently cannot be a minor informality.

While it might be prudent to consider an Offeror's financial information or references in evaluating the Offeror's qualifications, the evaluation criteria published in the solicitation did not identify any specific information to be considered in evaluating an Offeror's qualifications, leaving it to the discretion of the evaluator what information to consider. In addition, the failure to provide financial information and references are statutory minor informalities. S.C. Code Ann. § 11-35-1520(13)(i) and (j). Under this provision, if an evaluator opted to consider this

¹ Even if the lack of specificity could provide a basis of protest, GP cannot demonstrate that it was somehow prejudiced. It is not enough to show some shortcoming in the process; a protestor must be *aggrieved* by the claimed error. S.C. Code Ann. § 11-35-4210(1)(b).

information, the procurement officer could allow an offeror to cure this informality by supplying the missing information.

In addition, Regulation 19-445.2125 includes financial information and references as information to be considered determining a offeror's responsibility, required under Section 11-35-1810, and provides for the collection of this information at any time prior to award:

At any time prior to award, the prospective contractor shall supply information requested by the procurement officer concerning the responsibility of such contractor.

The failure of the offerors to provide financial and reference information was properly waived as a minor informality. This issue of protest is denied.

GP next protests that:

The manner in which the State conducted negotiations and discussions was in violation of the SC Procurement Code, including S.C. Code § 11-35-1530(8) and associated regulations and case law. The Code does not permit simultaneous negotiations, but instead requires sequential and serial negotiations. The procurement file documents that simultaneous negotiations were held. Because the process was conducted outside the Procurement Code, the awards must be cancelled and the requirement must be resolicited under *Carter-Goble*.

The solicitation indicated that up to three bidders would be awarded contracts. Once the proposals were evaluated and ranked, the State determined to enter into negotiations with the first, second, and third highest ranked offerors. The negotiation was limited to a request for the offerors to reduce their price. Section 11-35-1530(8)(a) sets forth a sequential process where the State negotiates with the highest ranked offeror and, if those negotiations are unsuccessful, moves to the second highest ranked offeror, then the third, and so on.² Award was to be made to the three offerors so there were three highest ranked offerors and three offerors were eligible for

² Section 11-35-1530(8)(a) states that the procurement officer may “negotiate with the highest ranking offeror on price, on matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both. If a satisfactory contract cannot be negotiated with the highest ranking offeror, negotiations may be conducted, in the sole discretion of the procurement officer, with the second, and then the third, and so on, ranked offerors to the level of ranking determined by the procurement officer in his sole discretion;”

negotiations. There is no violation of the Code by entering into negotiations with all the highest ranked offerors at the same time. In this case negotiations with one of the three highest ranked offerors was unsuccessful and the State moved to the fourth highest ranked offeror as it was next in line. This issue of protest is denied.³

GP next protests:

The evaluation and awards reveal that the state violated the requirement of law under the Procurement Code that the criteria for award shall be published to vendors identifying the order of importance thereof and that the State shall adhere to such criteria and order of importance. Here, the Price factor was “weighted” at 40% and the State was obligated to use such weighting. However, it did not. Instead, after evaluating and ranking vendors in accordance with scores given pursuant to the stated weighting (such scores taking into account the Price factor at 40% in the resulting rankings), the State then proceeded to modify the importance of price alone (with no consequent change in scope) by actually rejecting a top ranked vendor due to its price, without making any finding of price unreasonableness. By doing so, the State improperly added weight to the Price factor. If the State had actually weighted the Price factor as it truly intended, GTC, with a low price, would have scored higher and would have been eligible for award. Instead, the State allowed only certain vendors to offer “Best and Final” Offers (under inaccurate Price factor weighting), also in violation of processes authorized by the Code. Regardless, the RFP must be cancelled and resolicited to be done in accordance with, instead of contrary to, State law.

The Evaluation Criteria were published in the solicitation as follows:

Offers will be evaluated using only the factors stated below. Evaluation factors are stated in the relative order of importance, with the first factor being the most important. Once evaluation is complete, all responsive offerors will be ranked from most advantageous to least advantageous.

Price/Business Proposal	–	40 pts.
Offeror’s Technical Approach to Recruiting_	–	30 pts
Offeror’s Qualifications	–	30 pts

³ Again, GP was not aggrieved by this procedure, as it resulted in the rejection of an offeror who was scored ahead of GP.

[Solicitation, Page 26] In awarding the 40 points for price/business proposal, the total calculated prices were compared using a standard mathematical formula that awarded the lowest calculated price the full 40 points and the other offerors a percentage of the 40 points based on the their calculated price compared to the lowest calculated price. This distribution of points for the price/business proposal was used in determining the ranking of the offerors in compliance with the Code. Once the highest ranked offerors were determined, the State entered into negotiations. More often than not, one of the objectives of a negotiation is to reduce the price of the offer, and this one was no exception. Two of the offerors were asked to reduce their hourly rates. The State was unsuccessful in negotiating an acceptable reduction in the hourly rates of one of the offerors. In accordance with Section 1-35-1530(8) the State moved on to the next highest ranked offeror. The negotiated change in price did not change the points awarded for price in determining the highest ranked offerors. The price/business proposals were evaluated in accordance with the evaluation criteria published in the solicitation.⁴ This issue of protest is denied.

GP next protests:

The evaluation of proposals was arbitrary and capricious because the justification for use of competitive sealed proposals states that the most important considerations for evaluation are ability to provide “requested services”, including the evaluation of recruitment processes, labor hours, subcontracts, and response times and the quality and effectiveness of the organization’s personnel and overall experience, including the roles of each individual who would be a part of the project management team, however, the evaluation and scoring did not focus on those “most important considerations.” Note the mismatch between the justification’s statement of most important considerations and the evaluation that

⁴ Bidders were required to bid an hourly rate for each of eleven position descriptions. The bidder must adhere to these hourly rates when responding to subsequent Statements of Work. The evaluation of price was based on the sum of these eleven hourly rates. There was no consideration of the potential difference in utilization of the eleven positions. This resulted in evaluated amounts of \$775.00, \$864.00, and \$1,087.15. The total potential value of each award made under this solicitation is \$15,000,000. There is absolutely no correlation between the evaluated price and the total potential value of these contracts and no meaningful price competition upon which to base an award. One solution to this transgression was built into the original solicitation as Offerors were also required to respond to three scenarios that were described as examples of the types of projects that DHEC will undertake in the next few years. In their responses, Offerors were required to identify proposed staffing and hours for each of these scenarios. By evaluating the pricing for these scenarios or creating a more robust scenario to be priced would have provided a more realistic evaluation of price. However, this issue was not protested and is consequently outside the scope of this review.

led to awards renders the evaluation arbitrary and capricious as well as erroneous. In addition, because, as shown below, the actual “requested services” are undefined but are to be defined in separate, subsequent “RFP-like” processes wholly outside the Procurement Code, the ability to provide the “requested services” were not in fact rationally judged, compared or evaluated.

The source selection justification is required by Section 11-35-1530 as follows:

If a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive sealed proposals subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section.

The written source selection determination for this solicitation states:

The best procurement method to establish this contract is the RFP since price is not the only consideration for the award. This method allows for the evaluation of the bidders' responses for the most important considerations, including but not limited to:

- The ability to provide the requested services, including the evaluation of recruitment processes, labor hours, subcontracts, and response times
- The quality and effectiveness of the organization's personnel and overall experience, including the roles of each individual who would be part of the project management team

The published Evaluation Criteria state:

Offers will be evaluated using only the factors stated below. Evaluation factors are stated in the relative order of importance, with the first factor being the most important. Once evaluation is complete, all responsive offerors will be ranked from most advantageous to least advantageous.

Price/Business Proposal	–	40 pts.
Offeror’s Technical Approach to Recruiting	–	30 pts
Offeror’s Qualifications	–	30 pts

The Code only requires that the source selection justification explain why the use of competitive sealed bidding is not practicable or not advantageous to the State. There is no requirement that the justification and the evaluation criteria mirror each other. In this case the most important considerations listed in the justification can reasonably be inferred to the second and third

evaluation criteria with price being the most important consideration. There is no violation of the Code, and this issue of protest is denied.

GP next protests:

The intended contract awards are in violation of law as they were not in fact solicited by an actual Request for Proposals as defined by the Procurement Code (see SC Code § 11-35-310 (28) "Request for proposals (RFP)" means a written or published solicitation issued by an authorized procurement officer for proposals to provide supplies, services, information technology, or construction which ordinarily result in the award of the contract to the responsible bidder making the proposal determined to be most advantageous to the State. The award of the contract must be made on the basis of evaluation factors that must be stated in the RFP.)

Here, the awards are not to supply actual supplies, services, information technology or construction, but are merely awards to vendors of the right to participate in future RFPs to supply then identified supplies, services, or technology.³ Likewise, the contract awards do not meet the requirements of the Procurement Code for "Term Contracts" because similarly, such contracts must be for "specific supplies and services" which is in no case the same as an opportunity to compete for future defined supplies or services for which is it mandatory for governmental bodies to use during the term. Indeed, here, one or more awarded vendors will not necessarily receive any awarded business despite the state agencies "buying" under the contracts. As such, any award under these terms is a specific violation of the Procurement Code and State law, in that the relevant contract opportunities are to be solicited pursuant to open competitive procurement solicitations, unless exempted under law.

The manner in which the contract would be administered was set forth in the original solicitation:

The South Carolina Department of Health and Environmental Control's (DHEC) Project Management Office (PMO) has the lead role in the ensuring that the Agency's multiple projects are supported and managed. In many circumstances, DHEC and/or the PMO do not have the personnel resources readily available to address the distinctive needs of specific projects. DHEC is seeking qualified Offerors to provide all required personnel ("Team Personnel") to address particular project duties as assigned. This may include overseeing the project from start to finish or a specific phase of the project where this individual or team has subject matter expertise. The purpose of this solicitation is to meet these needs by establishing an, indefinite delivery, Job Order (an order for services placed

against this contract), multiple award, fixed-price, deliverables-based contract framework. With such a contract, the DHEC hopes to reduce cost, accelerate acquisition time, and facilitate a complete, detailed and documented project....

DHEC will create a Scope of Work (SOW) for each individual project, which will be forwarded to the Contractors. Based on the scope, the Contractor will estimate the number and of type of personnel required and provide a timeline to complete the work. DHEC will review the estimates and select the project team based on the most advantageous offer.

[Solicitation, Page 17] Section 11-35-4210(1)(b) provides:

(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.

(emphasis added)

This issue could have been raised as a protest of the solicitation and consequently cannot be raised as a protest of the award. This issue of protest is denied.

DECISION

For the reasons stated above, the protest of GlobalPundits Technology Consultancy Inc. is denied.

For the Information Technology Management Office



Michael B. Spicer
Chief Procurement Officer



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November 26, 2018

Via Email to protest-mmo@mmo.sc.gov

Chief Procurement Officer
Materials Management Office
SFAA
1201 Main Street, Suite 601
Columbia, South Carolina 29201

RE: Solicitation: 5400012222
Description: Project Staff Support Services
Agency: SC Department of Health & Environmental Control

Dear Chief Procurement Officer:

This firm represents GlobalPundits Technology Consultancy Inc. ("GTC") in connection with the above matter and submits this initial protest of the Notice of Intent to Award contracts posted November 16, 2018. This protest is timely filed. GTC reserves the right to timely amend this protest as permitted by law. In accordance with applicable law, this protest 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. GTC reserves the right to offer facts, evidence and argument in support of the protest at any time as may be permitted by law. GTC requests due notice and any hearing at which it will present facts, evidence and argument on these issues and any others as may be properly raised under law. If a hearing will not be held, GTC requests that the CPO advise of any deadlines for the submission of evidence, argument and reply by GTC to any arguments against GTC's position and in support of this protest.

ISSUES OF PROTEST

1. The State improperly waived "minor informalities" as noted in the Memorandum for Record dated September 7, 2018. In fact, the items were not minor informalities, but in fact affected price, quality, quantity and delivery and should have resulted in rejection of the proposals of Cogent Infotech Corporation, DATAMAN USA, LLC, and United Global Technologies. Further, the State failed to properly document the waiver of minor informalities as required by the Code and regulations.

2. The manner in which the State conducted negotiations and discussions was in violation of the SC Procurement Code, including S.C. Code § 11-35-1530(8) and associated regulations and case law.

3. The awarded vendors were non-responsive to the material, essential requirements of the RFP and should have been rejected from consideration.

4. The evaluation of proposals was arbitrary and capricious because the justification for use of competitive sealed proposals states that the most important considerations for evaluation are ability to provide requested services, including the evaluation of recruitment processes, labor hours, subcontracts, and response times and the quality and effectiveness of the organization's personnel and overall experience, including the roles of each individual who would be a part of the project management team, however, the evaluation and scoring did not focus on those "most important considerations."

CONCLUSION

Based on the grounds set forth herein, GTC asks that the automatic stay be imposed and that the CPO cancel the notices of intent to award the contract.

GTC also requests an opportunity to be heard at any hearing in this matter. If the CPO determines that a hearing will not be held, GTC requests that the CPO provide GTC and all other parties a deadline by which they may provide evidence (to be shared with GTC for reply) for the CPO to consider in reaching its decision, and the date on which the CPO's review will be completed.

GTC also asks that, to the extent not already provided, the CPO immediately require that the entire procurement file and all records of or related to the procurement in the hands of the using agency and the SFAA be provided to the undersigned on behalf of GTC as required by S.C. Code § 11-35-410, the South Carolina Consolidated Procurement Code and under the S.C. Freedom of Information Act.

Very truly yours,



John E. Schmidt, III



Attorneys and Counselors at Law

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December 3, 2018

Via Email to protest-mmo@mmo.sc.gov

Chief Procurement Officer
Materials Management Office
SFAA
1201 Main Street, Suite 601
Columbia, South Carolina 29201

RE: Solicitation: 5400012222
Description: Project Staff Support Services
Agency: SC Department of Health & Environmental Control

Dear Chief Procurement Officer:

This firm represents GlobalPundits Technology Consultancy Inc. (“GTC”) in connection with the above matter and submits this amended protest of the Notice of Intent to Award contracts posted November 16, 2018. This protest is timely filed. GTC reserves the right to further timely amend this protest as permitted by law. In accordance with applicable law, this protest 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. GTC reserves the right to offer facts, evidence and argument in support of the protest at any time as may be permitted by law. GTC requests due notice and any hearing at which it will present facts, evidence and argument on these issues and any others as may be properly raised under law. If a hearing will not be held, GTC requests that the CPO advise of any deadlines for the submission of evidence, argument and reply by GTC to any arguments against GTC’s position and in support of this protest.

ISSUES OF PROTEST

1. The State improperly waived “minor informalities” as noted in the Memorandum for Record dated September 7, 2018. In fact, the items were not minor informalities, but in fact affected price, quality, quantity and delivery and should have resulted in rejection of the proposals of Cogent Infotech Corporation, DATAMAN USA, LLC, and United Global Technologies. Further, the State failed to properly document the waiver of minor informalities as required by the Code and regulations. Under SC Code § 11-35-1520 (13) “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. Such communication or **determination** shall be in writing. “

Any waivers in the record here are inadequate as a matter of law. They are at best vague and nonspecific as to any vendor, and do not meet the requirements of the governing code and regulations pertaining to such waivers and the duty to document procurement actions and decisions sufficient to satisfy external audit. SC Code § 11-35-210 provides that “Written determinations expressly required by the code or regulations must be retained in an official contract file of the governmental body administering the contract. *These determinations must be documented in sufficient detail to satisfy the requirements of audit as provided in Section 11-35-1230.*” Because the process was conducted outside the Procurement Code, the awards must be cancelled and the requirement must be resolicited under *Carter-Goble*.

2. The manner in which the State conducted negotiations and discussions was in violation of the SC Procurement Code, including S.C. Code § 11-35-1530(8) and associated regulations and case law. The Code does not permit simultaneous negotiations, but instead requires sequential and serial negotiations. The procurement file documents that simultaneous negotiations were held. Because the process was conducted outside the Procurement Code, the awards must be cancelled and the requirement must be resolicited under *Carter-Goble*.

3. The evaluation of proposals was arbitrary and capricious because the justification for use of competitive sealed proposals states that the most important considerations for evaluation are ability to provide “requested services”, including the evaluation of recruitment processes, labor hours, subcontracts, and response times and the quality and effectiveness of the organization’s personnel and overall experience, including the roles of each individual who would be a part of the project management team, however, the evaluation and scoring did not focus on those “most important considerations.” Note the mismatch between the justification’s statement of most important considerations and the evaluation that led to awards renders the evaluation arbitrary and capricious as well as erroneous. In addition, because, as shown below, the actual “requested services” are undefined but are to be defined in separate, subsequent “RFP-like” processes wholly outside the Procurement Code, the ability to provide the “requested services” were not in fact rationally judged, compared or evaluated.

4. The intended contract awards are in violation of law as they were not in fact solicited by an actual Request for Proposals¹ as defined by the Procurement Code (*see* SC Code § 11-35-310 (28) "Request for proposals (RFP)" means a written or published solicitation issued by an authorized procurement officer for proposals *to provide supplies, services², information*

¹ SC Code § 11-35-1530. Competitive sealed proposals. (1) Conditions for Use. If a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive sealed proposals subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section.

² SC Code § 11-35-310 (29) "Services" means the furnishing of labor, time, or effort by a contractor not required *to deliver a specific end product*, other than reports which are merely incidental to required

technology, or construction which ordinarily result in the award of the contract to the responsible bidder making the proposal determined to be most advantageous to the State. The award of the contract must be made on the basis of evaluation factors that must be stated in the RFP.)

Here, the awards are not to supply actual supplies, services, information technology or construction, but are merely awards to vendors of the right to participate in future RFPs to supply then identified supplies, services, or technology.³ Likewise, the contract awards do not meet the requirements of the Procurement Code for "Term Contracts" because similarly, such contracts must be for "*specific supplies and services*" which is in no case the same as *an opportunity to compete for future defined supplies or services* for which is it *mandatory* for governmental bodies to use during the term. Indeed, here, one or more awarded vendors will not necessarily receive any awarded business despite the state agencies "buying" under the contracts. As such, any award under these terms is a specific violation of the Procurement Code and State law, in that the relevant contract opportunities are to be solicited pursuant to *open competitive procurement* solicitations, unless exempted under law. Under SC Code § 11-35-20, "The underlying purposes and policies of this code are:... (b) to foster effective broad-based competition for public procurement within the free enterprise system...." Regulation 19-445.2140 (B) states "It is the policy of the State that specifications permit maximum practicable competition" Here, the purported contract awards are nothing more than unlawful

performance. This term includes consultant services other than architectural, engineering, land surveying, construction management, and related services. This term does not include employment agreements or services as defined in Section 11-35-310(1)(d).

³ The RFP at pages 20-21 states: as follows:

31. DHEC shall provide each Contractor a fair opportunity to be considered for each SOW. In meeting this obligation, DHEC shall act in good faith. The law defines good faith as 'honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

32. DHEC will use the following Evaluation Factors to award the Job Order: technical approach to the module, qualifications of workers being offered, implementation schedule, allocation of hours, and proposed Job Order price. Only the criteria identified in the SOW shall be evaluated. Proposed Job Order price must be weighted no less than 50% of the total points. In evaluating each Job Order price, the following formula must be applied: the Lowest Job Order Price Received divided by Proposed Job Order Price being evaluated multiplied by 50 ((LJOP/PJOR)*50).

33. DHEC shall document the responses received, the price quoted, the evaluation methodology used in selecting the contractor to receive the order, and a determination of reasonableness regarding price to be paid and the hours to be worked. When selection is made on a best value basis, rather than price alone, a written statement shall be prepared that documents the basis for award, the relative importance of quality and price factors, and the rationale for any tradeoffs in making the selection. Award must be approved by DHEC's procurement officer, unless the amount exceeds the Agency's certification. Projects in excess of Agency certification must be approved by the SFAA Chief Procurement Officer."

limitations on competition for the award of future, unspecified contract opportunities which have never been noticed or solicited. The actions of the State in so doing are unlawful and void ab initio. The Procurement Code recognizes that maximizing open competition is to be the goal. SC Code § 11-35-2730 is even entitled “Assuring competition.”

It is further evident from the Notices of Intent to Award, coupled with the above, that the pseudo RFP process here was, or can be, used to circumvent DHEC’s legal authority limit for direct issuance of contracts. Here, each Intent to Award Notice states that the potential value that can be awarded by DHEC under the subsequent RFPs is \$15 Million for each vendor, a total of \$45 Million. On information and belief, DHEC’s authority limit is less than \$15 Million, and is certainly not as much as \$45 Million.

This procurement is not exempt but is subject to these laws. SC Code § 11-35-40 provides that “This code applies to every procurement or expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds....”

5. The evaluation and awards reveal that the state violated the requirement of law under the Procurement Code that the criteria for award shall be published to vendors identifying the order of importance thereof and that the State shall adhere to such criteria and order of importance. Here, the Price factor was “weighted” at 40% and the State was obligated to use such weighting. However, it did not. Instead, after evaluating and ranking vendors in accordance with scores given pursuant to the stated weighting (such scores taking into account the Price factor at 40% in the resulting rankings), the State then proceeded to modify the importance of price alone (with no consequent change in scope) by actually rejecting a top ranked vendor *due to its price*, without making any finding of price unreasonableness. By doing so, the State improperly *added weight* to the Price factor. If the State had actually weighted the Price factor as it truly intended, GTC, with a low price, would have scored higher and would have been eligible for award. Instead, the State allowed only certain vendors to offer “Best and Final” Offers (under inaccurate Price factor weighting), also in violation of processes authorized by the Code. Regardless, the RFP must be cancelled and resolicited to be done in accordance with, instead of contrary to, State law.

CONCLUSION

Based on the grounds set forth herein, GTC asks that the automatic stay be imposed and that the CPO cancel the notices of intent to award the contract. SC Code § 11-35-1710 provides that “Any solicitation under this code may be cancelled, or any or all bids or proposals may be rejected in whole or part as may be specified in the solicitation, when it is in the best interest of the State.” Without a doubt, it is in the best interests of the State to conduct procurements in accordance with the law. This procurement was conducted wholly contrary to the law. It is the CPO’s responsibility to assure compliance with the Procurement Code, and not to condone purchasing activities outside the Code. Further, under applicable regulations, “[a]fter an award or notification of intent to award, whichever is earlier, has been issued but before performance has

Chief Procurement Officer
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begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:

- (1) Inadequate or ambiguous specifications were cited in the invitation;
- (2) Specifications have been revised;

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- (7) Administrative error of the procuring agency discovered prior to performance, or
- (8) For other reasons, cancellation is clearly in the best interest of the State.

S.C. Code Reg. § 19-445.2085(C).

GTC requests such cancellation so the above may be corrected.

GTC also requests an opportunity to be heard at any hearing in this matter. If the CPO determines that a hearing will not be held, GTC requests that the CPO provide GTC and all other parties a deadline by which they may provide evidence (to be shared with GTC for reply) for the CPO to consider in reaching its decision, and the date on which the CPO's review will be completed.

GTC also asks that, to the extent not already provided, the CPO immediately require that the entire procurement file and all records of or related to the procurement in the hands of the using agency and the SFAA be provided to the undersigned on behalf of GTC as required by S.C. Code § 11-35-410, the South Carolina Consolidated Procurement Code and under the S.C. Freedom of Information Act.

Very truly yours,



John E. Schmidt, III

Memorandum for Record

Solicitation # 5400012222
Project Staff Support Services
SC Department of Health & Environmental Control

September 7, 2018

SUBJECT: WAIVER OF MINOR INFORMALITIES

In accordance with SC Code Section 11-35-1520(13), the following Minor Informalities (a, h, i, and j below) are hereby waived the following Offerors who submitted a Proposal to the referenced solicitation above:

- Cogent Infotech Corporation (Cogent)
- CNC Consulting, Inc. (CNC)
- Ernst & Young, LLP (E&Y)
- Global Pundits Technology Consultancy Inc. (GP)
- Companion Professional Services, LLC (TM Floyd)
- DATAMANUSA, LLC (Dataman)
- United Global Technologies (UGT)
- Public Consulting Group (PCG)

(a) failure of a bidder to return the number of copies of signed bids required by the solicitation;

(h) failure of a bidder to furnish certificates of insurance;

(i) failure of a bidder to furnish financial statements;

(j) failure of a bidder to furnish references;

Michael Dalton
Procurement Officer

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2018)

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 2018 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.