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Protest Decision

Matter of: Scientific Technologies Corporation

Case No.: 2019-210

Posting Date: April 3, 2019

Contracting Entity: SC Department of Health & Environmental Control

Solicitation No.: 5400015719

Description: Immunization Information System

DIGEST

Protest that successful bidder was non responsive is dismissed as untimely. Scientific Technologies Corporation's (STC) 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 materials in the procurement file and applicable law and precedents.

BACKGROUND

Solicitation Issued	06/07/2018
Amendment 1 Issued	06/13/2018
Amendment 2 Issued	07/09/2018
Intent to Award Issued	02/22/2019
STC Debrief and FOIA Request	02/28/2019

Award Final	03/05/2019
STC Received FOIA Response	03/20/2019
Protest Received	03/28/2019

The State Fiscal Accountability Authority (SFAA) issued this Request for Proposals on June 7, 2018, to acquire software and professional services to implement and support an Immunization Information System (IIS) to replace an existing agency produced IIS. Envision Technology Partners, Inc. (Envision) and STC submitted proposals. An Intent to Award was posted to Envision on February 22, 2019, and the award became effective on March 5, 2019. STC requested a debriefing by the procurement officer on February 28, 2019 and requested a copy of the winning proposal and scoring data under the Freedom of Information Act that same day, three work days prior to the contract becoming final. STC received a redacted copy of the winning proposal on March 20, 2019. STC's protest was received by the Chief Procurement Officer on March 28, 2019.

ANALYSIS

STC protests that Envision's proposal failed to satisfy three material and essential requirements of the solicitation:

Specifically, Envision failed to satisfy Requirement 23 ("The system must allow for populated forms to be viewed, displayed, printed and saved"); Requirement 46 ("The system must meet relevant South Carolina State privacy and security requirements "); and Requirement 50 ("System utilizes DHEC's Active Directory for DHEC user system access...."). (Ex. B, at 11-14).

STC also argues that, although the Code provides a ten-day window within which to file a protest, its protest is timely. STC argues that the protest statute must be read to include a requirement that the time to protest cannot begin to run before a protestor has or should have knowledge of the grounds for its protest. STC continues that it is a fundamental rule of statutory construction in South Carolina that "regardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly. STC proposes that the ten-day protest window should not begin until the protestant knew or should have known of the

issues giving rise to the issues of protest and since it did not receive a redacted copy of the winning proposal until March 20, 2019, it had until March 30, 2019 to file its protest.

Indeed, the original version of the Code (1981) adopted the position argued by STC, specifying:

The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract.

However, the General Assembly amended Section 11-35-4210(1)(b). It now provides:

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;

The amendment leaves no doubt that the General Assembly intended the time to protest begins to run with the posting of the award statement. In addition, the South Carolina Procurement Review Panel has ruled that the time limits for filing a protest are jurisdictional and may not be affected by the conduct of the parties.

Generally, in the absence of statutory language to the contrary, perfection of a review proceeding within the time limited by statute or rule is jurisdictional. Where the appeal is not taken within the time provided, jurisdiction cannot be conferred by consent or by waiver. See, 4 Am. Jr. 2d, Appeal and Error, 292. The South Carolina Supreme Court has long considered its ten-day period for filing a Notice of Intent to Appeal jurisdictional because "it is important to the administration of justice that there be no uncertainty" about when a matter has come to an end. Palmer v. Simons, 107 S.C. 93, 92 S.E. 23 (1917). The Supreme Court recently affirmed its holding that the ten-day period is jurisdictional even though the statute upon which the rule is based was repealed. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985).

The ten-day period for filing protests of the decisions of the state in procurement matters set forth in section 11-35-4210 is unconditional. There are no qualifying words such as "except for good cause shown." The Panel believes that it is essential to the operation of the government that challenges to its purchasing decisions be limited. If the time for filing protests can be waived, the State will be unable to determine with certainty when it can enter into a contract with one

vendor for vital goods and services without the danger of being liable to another vendor.

The Panel believes that in approving section 11-35-4210 as written the General Assembly recognized that, despite the hardship which might occasionally arise from strict application of the time period, on balance the public is better served if there are definite limits to the right to challenge state procurement decisions. For these reasons, the Panel finds that the time for filing protests set forth in section 11-35-4210 is jurisdictional and may not be waived by conduct or consent of the parties.

The Code requires a protest of an award to be filed with the Chief Procurement Officer within 10 days of the posting of award. STC's protest was received 34 days after the posting of the Intent to Award and 23 days after the award became effective. STC's protest is untimely.

Since timeliness is jurisdictional, the CPO lacks jurisdiction to address the merits of STC's protest.

DECISION

For the reasons stated above, the protest of Scientific Technologies Corporation is dismissed.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer



Information Technology Management Office (ITMO)
Solicitation Number 5400015719
201 Main Street, Suite 600
Columbia, SC 29201

28 March 2019

Attn: Chief Procurement Officer, and Johanne Sullivan, Procurement Manager
protest-mmo@mmo.state.sc.us

Subj: Protest of Award to Solicitation 5400015719 (the "Solicitation")

Dear Ms. Sullivan:

The documentation provided to Scientific Technologies Corporation ("STC") in response to STC's FOIA request makes clear that Envision Technology Partners Inc.'s ("Envision") proposal failed to satisfy mandatory criteria set forth in the Solicitation. This failure rendered Envision's proposal non-responsive under the terms of the Solicitation *and* South Carolina law. Therefore, STC respectfully requests that ITMO issue a stop-work order on the Immunization Information System ("IIS") award, set aside the IIS award, disqualify Envision from the award process, and grant the IIS award to STC.

I. Background.

STC is an innovative health technology company that submitted a responsive proposal to implement and support an Immunization Information System in South Carolina. On February 22, 2019, ITMO issued a Notice of Intent to Award the IIS contract to Envision. On February 28, 2019, STC requested a debrief from ITMO, which instructed STC to request information regarding the IIS award from a South Carolina FOIA representative. STC made its FOIA request for information related to the IIS award the same day.

The FOIA representative did not send *any* information regarding the IIS award to STC until March 19, 2019. On March 19, the FOIA representative sent the raw award scoring data to STC. Then, on March 20, 2019—20 days after STC submitted its FOIA request—the FOIA representative finally sent Envision's Redacted Winning Technical Proposal to STC. Upon reviewing Envision's proposal, STC realized that the proposal was non-responsive. Specifically, ***Envision's proposal failed to satisfy 3 mandatory, material requirements*** in Section IV.B. of the Solicitation. (*Compare* Solicitation, Ex. A, at 43-47, *with* Envision's Proposal, Ex. B, at 11-14). When STC learned that Envision's proposal was non-responsive, and thus should have been disqualified, STC immediately began preparing this Protest.

II. Envision's Proposal Was Non-Responsive Because It Failed to Satisfy Mandatory Criteria in the Solicitation.

Under South Carolina law, an award will be made "to the lowest *responsive* and responsible bidder[] whose bid meets the requirements set forth in the invitation for bids." S.C. Code Ann. § 11-35-1520(10) (*emphasis added*). A "responsive bidder" is "a person who has submitted a bid or offer which *conforms in all material aspects* to the invitation for bids or request for proposals." S.C. Code Ann. § 11-35-1410(6) (*emphasis added*).

The Solicitation reiterates and builds upon these statutory requirements. It states that “[t]o be considered for award, offerors must be able to provide each of the” Solicitation’s material requirements. (*See* Solicitation, at 24). The Solicitation further provides that “[f]ailure to meet any of the mandatory material requirements . . . will result in disqualification of the proposal,” (*See id.*), and that “[o]fferors will not be given an opportunity to correct any material nonconformity.” (*See id.* at 15). Table 10 in Section IV.B. of the Solicitation lays out 50 “Material Requirements,” and requires offerors to confirm compliance with each requirement by indicating “Yes” or “No” in a column of Table 10 titled, “Offeror is Compliant?” (*See id.* at 43). Section IV.B. also restates the proposition that “[o]fferors who do not comply with the material requirements will be deemed non-responsive.” (*See id.*).

Despite the clear mandates in South Carolina statutes and the Solicitation that bids must be responsive, ITMO nevertheless awarded the IIS contract to a non-responsive bidder. ***Envision’s proposal clearly shows that it failed to satisfy 3 “Material Requirements” in Section IV.B. of the Solicitation.*** (*Compare* Solicitation, Ex. A, at 43-47, with Envision’s Proposal, Ex. B, at 11-14). Specifically, Envision failed to satisfy Requirement 23 (“The system must allow for populated forms to be viewed, displayed, printed and saved”); Requirement 46 (“The system must meet relevant South Carolina State privacy and security requirements”); and Requirement 50 (“System utilizes DHEC’s Active Directory for DHEC user system access. . . .”).¹ (Ex. B, at 11-14). By awarding the IIS contract to a non-responsive bidder, ITMO violated South Carolina law and the terms of the Solicitation. *See* S.C. Code Ann. § 11-35-1520(10).

III. STC’s Protest Is Timely.

STC’s protest is timely for at least two reasons. *First*, S.C. Code Ann. § 11-35-4210(1)(b), the timeliness statute, must be read to include the requirement that, before the 10-day protest timeline begins to run, a protestor has or should have knowledge of the grounds for its protest. It is a fundamental rule of statutory construction in South Carolina that “regardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly.” *Duke Energy Corp. v. S.C. Dep’t of Revenue*, 415 S.C. 351, 355 (2016); *see also Kiriakides v. United Artists Commc’ns, Inc.*, 312 S.C. 271, 275 (1994).

Here, finding that STC’s protest is time-barred under § 11-35-4210(1)(b) would yield an absurd result. The South Carolina FOIA representative did not send *any* of Envision’s bid documents to STC for *20 days*—well outside the 10-day protest period provided by § 11-35-4210(1)(b). Without Envision’s bid documents, STC had no way of knowing whether it had a ground to protest the IIS award. Under these circumstances, dismissing this Protest on timeliness grounds would render the entire protest procedure meaningless by depriving STC of the right to protest before it was even aware of that right. This would be an absurd result, as the General Assembly could not have intended to create an unusable bid protest procedure. *See Duke Energy*, 415 S.C. at 355. Because South Carolina statutes may not be interpreted to yield absurd results, a knowledge requirement should be read into § 11-35-4210(b)(1). If a knowledge requirement is read into the statute, then this Protest is timely because STC learned that Envision’s proposal was non-responsive on March 20—8 days ago.

¹ In addition, Envision failed to satisfy 107 “Desired” requirements in Table 3 (“Functional Areas”), whereas STC only failed to satisfy 27. (*See* Ex. B, at 41-100).

Second, if a knowledge requirement is not read into § 11-35-4210(b)(1), then that statute violates the constitutionally protected due process rights as applied to STC. “Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951)). “Rather, the phrase expresses the requirement of ‘fundamental fairness,’ a requirement whose meaning can be as opaque as its importance is lofty.” *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 24 (1981). The Fourteenth Amendment further requires “an opportunity . . . granted at a *meaningful time and in a meaningful manner* . . . for [a] hearing appropriate to the nature of the case.” *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (emphasis added). These state administrative procedures are subject to the requirements of the Constitution’s Due Process Clause. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

In addition, companies that bid for government contracts have a legally cognizable property interest for purposes of the Due Process Clause. *See Kendrick v. City Council of Augusta, Ga.*, 516 F. Supp. 1134, 1138-39 (S.D. Ga. 1981) (“(The protected property interest) was the right of the lowest responsible bidder in full compliance with the specifications to be awarded the contract once the [government] in fact decided to make an award.” (internal quotations omitted)); *see also Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118, 1131 (W.D. Pa. 1980) (same).

Here, it would be fundamentally unfair to deprive STC of the ability to enforce its constitutionally-protected property right. Upon information and belief, STC was the lowest responsible bidder that fully complied with the specifications of the Solicitation. *See Kendrick*, 516 F. Supp. at 1138-39. Because of the slow response time of South Carolina FOIA officials, STC did not receive the information it needed to enforce its right until after the 10-day timeline in § 11-35-4210(b)(1) had already expired. To comport with the Constitution’s requirement that state administrative proceedings be fundamentally fair, and to ensure that STC has the opportunity to be heard “at a meaningful time and in a meaningful manner,” STC’s protest must be considered timely. *See Boddie*, 401 U.S. at 378.

IV. Conclusion.

Envision’s bid was non-responsive because it plainly failed to satisfy mandatory criteria set forth in the Solicitation. Therefore, STC respectfully requests that ITMO issue a stop-work order on the IIS award, set aside the IIS award, disqualify Envision from the award process, and grant the IIS award to STC.

Respectfully,



Michael Popovich
Scientific Technologies Corporation
CEO
4835-7302-8239

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.