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JOHN ST. C. WHITE
MATERIALS MANAGEMENT OFFICER
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Protest Decision

Matter of: Replica, Inc.
File No.: 2023-123
Posting Date: April 20, 2023
Contracting Entity: South Carolina Department of Transportation
Solicitation No.: 5400022033
Description: Bicycle & Pedestrian Travel Data/Metrics

DIGEST

Protest that the decision to award contract at a cost of more than three times the lowest price is arbitrary and capricious is denied. The protest by Replica, Inc. is attached and included by reference.

(Attachment 1)

AUTHORITY

The Chief Procurement Officer¹ (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	10/18/2022
Amendment 1 Issued	11/22/2022
Intent to Award Posted	03/31/2023
Intent to Protest Received	03/31/2023

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

Protest Received

04/06/2023

The South Carolina Department of Transportation (DOT) issued this Request for Proposals (RFP) to acquire vendors to provide Bicycle and Pedestrian Travel Data/Metrics for the roadways of South Carolina on October 18, 2022. Amendment 1 was published on November 22, 2022. An Intent to Award was posted to Streetlight Data, Inc. on March 31, 2023. Replica filed a timely intent to protest on March 31, 2023, followed by its formal protest on April 6, 2023.

DISCUSSION

Replica first protests:

Replica submitted a responsive proposal to the solicitation and was thoroughly evaluated by staff including a finalist interview. Replica was the lowest, most responsive, responsible proposer to the solicitation, yet SCOOT awarded the bid to a data vendor that priced its bid more than three times the lowest bid. Streetlight Data's bid far exceeds comparable market rate pricing for bicycle and pedestrian travel data. For example, the State of South Carolina has a population of 5 million people yet Streetlight is charging South Carolina three times what they charged the State of Texas, which has a population closer to 30 million people.

This procurement was conducted under Section 11-35-1530. Unlike a procurement conducted under Section 11-35-1520, which requires award made to the lowest priced responsive and responsible bidder, a procurement conducted under Section 11-35-1530 requires award be made as follows:

Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration the evaluation factors set forth in the request for proposals, unless the procurement officer determines to utilize one of the options provided in Section 11-35-1530(8). The award of the contract must be made on the basis of evaluation factors that must be stated in the RFP. The contract file must contain the basis on which the award is made and must be sufficient to satisfy external audit.

S.C. Code Ann. §11-35-1530(9)

Proposals were evaluated and ranked by three evaluators employing four (4) criteria published in the solicitation.

- 1- Project Approach, Schedule, and Technical Proposal – The degree, completeness and suitability of the Offeror's proposed technical solution to meet or exceed the requirements of this RFP. 40 points
- 2- Qualifications and Experience. 30 points

3- Value – For the potential 3-year term contract. Value will be looked at from a Reasonable, Realistic, and Complete perspective. 15 points

4- Proposed Staffing. 15 points

Price was evaluated as part of the third criteria. Replica was the highest ranked offeror for this criterion. However, all three evaluators ranked Streetlight higher overall.

A Request for Proposal does not require award be made to the lowest priced proposal. In fact, price is not even required to be an evaluation factor. S.C. Code Ann. §11-35-1530(5). This issue of protest is denied.

Replica next protests:

Further, SCOOT delayed awarding the bid not once, not twice, but three times without any public explanation and likely prejudicing Replica.

The burden of proof is on the Replica to demonstrate by a preponderance of the evidence that it was aggrieved in connection with an award. Replica has provided no evidence to support its claim of prejudice, without which its claim is mere speculation. Replica has failed to meet its burden of proof and this issue of protest is denied.

Finally, Replica protests:

Moreover, SCDOT's decision to award the bid to Streetlight Data Inc. was arbitrary and capricious as there appears to be no substantiated basis for the decision.

The South Carolina Procurement Review Panel set the standard for review of award determinations:

Under § 11-35-2410, a determination by the State as to which proposal is the most advantageous considering price and the other evaluation criteria is final and conclusive unless such determination is "clearly erroneous, arbitrary, capricious, or contrary to law." The Panel has held numerous times that this section dictates that the Panel will not re-evaluate proposals and will not substitute its judgment for the judgment of the evaluators. See, e.g., Protest of Travelsigns, Case No. 1995-8; Protest of First Sun EAP Alliance, Inc., Case No. 1994-11; Protest of NBS Imaging Systems, Inc., Case No. 1993-16; and Protest of Coastal Rapid Public Transit Authority, Case No. 1992-16.

In the Coastal Rapid Public Transit Authority case, the Panel established the basic framework for review of challenges to evaluators' conduct:

The determination by the State who is the most advantageous offeror is final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law The burden of proof is on [the protestant] to demonstrate by a preponderance of the evidence that the determination in this case has such flaws. . . . The Panel will not substitute its judgment for the judgment of the

evaluators, who are often experts in their fields, or disturb their findings so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased.

The Panel has held that the evaluation process does not need to be perfect so long as it is fair. *NBS Imaging Systems, Inc.*, cited above. Further, because the Panel will not re-evaluate proposals or substitute its judgment for that of the evaluators, the Panel has held that a claim of superiority by a vendor in certain areas of evaluation, however valid, does not compel the finding that the vendor is the most advantageous to the State. See, Protest of *First Sun EAP Alliance, Inc.*, and *Protest of Coastal Rapid Public Transit Authority*, cited above.

See In Re: *Protest of Transportation Management Services, Inc. Appeal by Transportation Management Services, Inc.*, Panel Case 2000-3

Replica provides no evidence to support its claim beyond a significant difference in price that the award decision was arbitrary and capricious. Replica has failed to meet its burden of proof and this issue of protest is denied.²

DECISION

For the reasons stated above, the protest of Replica, Inc. is denied.



Michael B. Spicer
Chief Procurement Officer

Columbia, South Carolina

² Replica's protest alleges that it will review documents received under FOIA and "will be able to set forth and substantiate our comprehensive grounds for this protest." The CPO, however, never received an amended protest, either before or after the protest deadline.



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Moving law forward.

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April 6, 2023

VIA HAND DELIVERY AND EMAIL

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201
protest-mmo@mmo.sc.gov

APR 6 '23 TH 17:03

MMO OFFICE

**RE: State Procurement Protest
Contract Number: 4400031388
Solicitation: 5400022033
BICYCLE & PEDESTRIAN TRAVEL DATA/METRICS
SC Department of Transportation
BSM File No.: 23211.001**

Dear Mr. White and Mr. Baysden:

This law firm has been engaged to represent Replica, Inc. in their efforts to be awarded the contract referenced above. Replica timely sent notice of its intent to protest on March 31, 2023. Your office has confirmed that notice of Replica's intent to protest was timely received and provided to the SC Department of Transportation and that the award of the subject contract is stayed pending resolution of this protest.

Pursuant to S.C. Code Ann. Section 11-35-4210(1)(b) and (2), Replica now submits this protest of the intended award of the subject contract to StreetLight Data, Inc. Replica is an actual bidder who is aggrieved in the proposed award of the contract to StreetLight Data instead of Replica.

Replica initially protests this award on three grounds:

1. Replica submitted a responsive proposal and was the lowest bidder;
2. SCDOT's unexplained procedural delays in awarding this bid, which then went to the highest bidder, likely prejudicing Replica; and
3. SCDOT's arbitrary and capricious decision to award the bid to Streetlight Data Inc. at a cost of more than three times the lowest bid.

Replica submitted a responsive proposal to the solicitation and was thoroughly evaluated by staff including a finalist interview. Replica was the lowest, most responsive, responsible proposer to the solicitation, yet SCDOT awarded the bid to a data vendor that priced its bid more than three times the lowest bid. StreetLight Data's bid far exceeds comparable market rate pricing for bicycle and pedestrian travel data. For example, the State of South Carolina has a population

Chief Procurement Officer
April 6, 2023
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of 5 million people yet Streetlight is charging South Carolina three times what they charged the State of Texas, which has a population closer to 30 million people.

Further, SCDOT delayed awarding the bid not once, not twice, but three times without any public explanation and likely prejudicing Replica. Moreover, SCDOT's decision to award the bid to Streetlight Data Inc. was arbitrary and capricious as there appears to be no substantiated basis for the decision.

Replica has submitted multiple public document requests pursuant to the South Carolina Freedom of Information Act, including requests for the evaluation scoring documents, bid proposals, and other related documents. These documents are essential to Replica's ability to pursue this protest. Once Replica receives these public records and reviews them, we will be able to set forth and substantiate our comprehensive grounds for this protest. Such analysis may include grounds in addition to those listed above, depending upon what information is developed through review of public documents not yet in our possession. Replica reserves the right to supplement this protest and requests that you withhold rendering any decision on this protest until Replica is able to supplement this protest.

Replica understands that, pursuant Section 11-35-4210(3), you have the authority to administratively settle this matter in negotiation with the parties. If this matter cannot be administratively settled, Replica requests that you issue an administrative decision awarding the contract to Replica or, in the alternative, directing SCDOT to revise the solicitation and rebid it as permitted by Section 11-35-4310(2).

I am not aware of a filing fee for this protest. However, if there is a filing fee or other procedure required, please let me know and we will comply with those requirements.

Sincerely,



Kathleen McDaniel

cc: Replica, Inc. (via email only)

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2022)

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>

FILING FEE: Pursuant to Proviso 111.1 of the 2022 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. *[The Request for Filing Fee Waiver form is attached to this Decision.]* If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 209, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.