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Protest Decision

Matter of: HUB International Midwest Limited
File No.: 2023-129
Posting Date: June 12, 2023
Contracting Entity: Clemson University
Solicitation No.: 143987574-1
Description: Insurance Broker Services

DIGEST

Protest that the apparent successful bidder is not a responsive bidder is granted. The protest by HUB International Midwest Limited (HUB) 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 | 01/25/2023 |
| Amendment 1 Issued | 02/21/2023 |
| Intent to Award Posted | 04/12/2023 |
| Intent to Protest Received | 04/18/2023 |
| Protest Received | 04/25/2023 |

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

Clemson University (CU) issued this Request for Proposals (RFP) to acquire insurance-brokerage services on January 25, 2023, as Addendum 1. Attached to the Addendum were the Statement of Work (SOW), CU's "Clemson University Standard Bidding Terms and Conditions – Revision D, Effective November 15, 2020" and "Clemson University Standard Terms of Purchase – Revision F Effective November 15, 2020." Addendum 2 was issued on February 21, 2023, and reproduced the SOW in its entirety with corrections and modifications.

The solicitation sought to establish a multi-term contract with a two-year initial term and three one-year options for a total potential term of five years:

... The initial term of the contract shall be for two (2) years with the potential for three (3) optional one-year terms. ...

[Addendum 2, Page 1]

Offerors were to submit their proposals in two parts:

Offerors are required to submit a Technical Proposal and a Financial Proposal (two (2) separate documents) organized in the manner specified below.

[Addendum 2, Page 2]

The Technical Proposal was to include:

An executive summary demonstrating an understanding of the University's requirements.
A description of the Offeror's Qualifications.
A narrative describing the Offeror's Experience.
A narrative explaining the Offeror's plan for Program Fulfillment.

[Addendum 2, Page 2]

The Financial Proposal was to include an annual fee showing a breakdown for all proposed services:

The Financial Proposal must be submitted as a separate document from the Technical Proposal. The University is requesting all Offerors to **submit an annual fee to provide all services included herein.** Your financial proposal shall include a breakdown of your firm's **commission rates and/or annual** fees and charges for brokerage or other services, which shall include all travel and expenses if applicable. **All Offerors must also submit Attachment B_Pricing Schedule as part of your Financial Proposal.**

The University anticipates there will be no charges, outside of normal insurance commissions, for brokerage or other services performed by the contractor.

Your total annual fee must also be entered into the online bid event in the space provided.

[Addendum 2, Page 4] (underlining and highlighting in original, bold italic added)

Offerors were required to propose a firm fixed price for each of the five years of the potential term of the contract:

FIXED PRICING REQUIRED: Any pricing provided by Contractor shall include all costs for performing the work associated with that price. Except as otherwise provided in this solicitation, Contractor's price shall be fixed for the duration of this Contract, including option terms. This clause does not prohibit Contractor from offering lower pricing after award.

[Clemson University Standard Terms of Purchase – Revision F Effective November 15, 2020, Page 4] (emphasis added)

The Bidding Schedule included Bid Attribute number 13 which emphasized the requirement for a firm fixed price:

13 **Submittal Requirements**

Offeror is required to submit a response to the RFP by submitting two separate files. One file should be the technical proposal and contain no financial/pricing information. This file should address the specific requirements noted in the attached Scope of Work document. The other file should be any financial details. However note, that the financial proposal must be a firm fixed price that must also be entered as one dollar value in the line item below. Notwithstanding, should you need to submit a redacted copy of your proposal, you should also attach a copy of the redacted copy of the proposal as described below.

[Bid Schedule, Page 4]

The solicitation included an opportunity for the contractor to request a price increase at least ninety (90) days prior to each renewal after the initial term:

PRICE ADJUSTMENT - LIMITED - AFTER INITIAL TERM ONLY: Unless otherwise prohibited in the solicitation, upon approval of the Procurement Officer, prices may be adjusted for any renewal term. Prices shall not be increased during the initial term. Any request for a price increase must be received by the Procurement Officer at least ninety (90) days prior to the expiration of the applicable term and must be accompanied by sufficient documentation to justify the increase. If approved, a price increase becomes effective starting with the term beginning after approval. Contractor may terminate this Contract at the end of the then current term if a price increase request is denied. Notice of termination pursuant to this clause must be received by the Procurement Officer no later than fifteen (15) days after the Procurement Officer sends Contractor notice rejecting the requested price increase.

PRICE ADJUSTMENTS – LIMITED BY CPI “All Items”: Unless otherwise prohibited in the solicitation, upon request and adequate justification, the Procurement Officer may grant a price increase up to, but not to exceed, the unadjusted percent change for the most

recent 12 months for which data is available, that is not subject to revision, in the Consumer Price Index (CPI) for all urban consumers (CPI-U), “all items” for services, as determined by the Procurement Officer. The Procurement Officers, at their sole discretion, may choose an alternate index if it is deemed more appropriate to the specific procurement. The Bureau of Labor and Statistics publishes this information on the web at www.bls.gov.

[Clemson University Standard Terms of Purchase – Revision F Effective November 15, 2020, Page 7] (emphasis added)

The original SOW included four evaluation criteria: Experience, Program Fulfillment, Financial Proposal, and Qualifications. The Qualifications criterion was deleted in Addendum 2.

Ten proposals were opened on March 6, 2023. A three-member team evaluated the first two criteria, awarding up to 45 points for Experience and up to 35 points for program fulfillment. The financial proposals were “evaluated” by the procurement officer using a mathematical formula to allocate all or a portion of the 20 points available based on the relationship between the five-year proposed price of the offer being “evaluated” and the lowest proposed price.

An Intent to Award was posted to Marsh USA LLC (VS) on April 12, 2023. HUB filed an intent to protest on April 18, 2023, followed by its formal protest on April 25, 2023. HUB alleges that Marsh failed to propose a firm fixed price; that it was allowed to change its price prior to final ranking; that the evaluation was arbitrary and capricious; that the evaluation was not fair and equal; and that a non-evaluator improperly influenced the evaluation and scoring.

DISCUSSION

HUB first protests:

Marsh’s proposal was non-responsive because it failed to offer a firm fixed price for five full years as required by the RFP; instead, Marsh insisted that only three years were firm.

Marsh submitted a price online of \$200,000 per year for each of the five potential years of the contract for a total potential offer of \$1,000,000. In its Financial Proposal, Marsh offered to perform at its proposed price for three years then negotiate the price for the last two years of the contract:

To maximize premium savings to Clemson, we recommend a commission cap of \$200,000, annually. To achieve the commission cap, Marsh would negotiate netting

commissions from the gross premium, where obtainable, until we arrive at our target of \$200,000.

Marsh would agree to hold the annual, capped commission of \$200,000 for three consecutive years. Marsh and Clemson will evaluate the program and services and negotiate a fee structure for the fourth and fifth year renewal options.

[Marsh Financial Proposal, Page 2] (emphasis added)

HUB argues that, based on the highlighted statement above, Marsh's proposal should have been rejected as nonresponsive for failure to propose a firm-fixed price for the total potential term of the contract.

A responsive bidder is defined in Section 11-35-1410(9):

"Responsive bidder or offeror" means a person who has submitted a bid or proposal which conforms in all material aspects to the invitation for bids or request for proposals.

HUB argues that in order to be responsive to the solicitation an Offeror must agree to perform each potential year of the contract at the proposed price.

CU, on the other hand, argues that the price-adjustment clauses included in the solicitation allow the contractor to terminate the contract after the initial term if a requested price increase is denied and that "the language presented by Marsh in their proposal actually just says the same thing as the two Price Adjustment clauses but in other words." CU argues that Marsh proposed a price for the total five-year term of the contract that was used for evaluation noting that "the contract term and the solicitation evaluation piece of the financial proposal are two different things. One is a contractual requirement impacting the contract after award – hold your price for the initial term, while the other is a scenario of the potential value of the contract that we are required to consider as part of evaluation of offers."

As stated above the contract has an initial term of two years with three one-year options to renew. Each renewal will ensue in accordance with the Option to Renew provisions in CU's Standard Terms of Purchase:

OPTION TO RENEW: At the end of the initial term, and at the end of each renewal term, this Contract shall automatically renew for a period one year, unless Contractor receives notice that the University elects not to renew the Contract at least thirty (30) days prior to the date of renewal. Said renewals may be less than, but will not exceed, four (4) additional one-year periods. Regardless, this Contract expires no later than the last date stated on the final statement of award.

(emphasis added)

In order for the contract to “automatically” renew at the end of the initial term and each optional term, an agreed upon price for each potential term of the contract must be included in the contract. The solicitation required a firm fixed price for each potential term of the contract, in part, to facilitate this automatic renewal. The solicitation does include a number of provisions that allow either party to terminate the contract prior to the automatic renewal: Option to Renew, Termination by Contractor, Termination for Convenience, etc. However, each provision requires one party to notify the other party in advance of the automatic renewal. Specifically, a contractor is required to give 90-days’ written notice to terminate before automatic renewal or 90-days’ notice and sufficient documentation to justify a price increase.

Marsh proposed a firm fixed price for only three of the five years of the contract, requiring a negotiation to establish the price for years four and five. Marsh’s proposal does not allow for the automatic renewal of years four and five as required by the solicitation, and takes exception to the requirements for 90-days written notice for termination or rejection of a price increase. Marsh’s proposal is not responsive to a material requirement of the solicitation. This issue of protest is granted.

HUB next protests:

Marsh Alone Was Allowed to Change Its Price Prior to Final Scoring of Proposals and before Final Ranking, Reducing the Price by \$100,000 through a “Record of Negotiation,” and then was Improperly Evaluated and Scored based on the lower negotiated price.

In response to this protest, CU provided the following chronology. Evaluators filed their initial scores on March 29, 2023. Financial proposal scores were added on April 4, 2023. Section 11-35-1530(8) allows negotiations with the highest ranked offeror after final ranking:

Negotiations. After proposals have been ranked pursuant to Section 11-35-1530(7), the procurement officer, in his sole discretion and not subject to review under Article 17, may proceed in any of the manners indicated below, ...:

(a) 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. ...

On April 5, 2023, CU entered into negotiations with Marsh. On April 6, 2023, evaluator Wiley McLane submitted revised scores and comments. The basis for these revisions is discussed below. McLane’s

revisions changed the Offerors' final scores. However, the revised scoring did not change the relative standing of the Offerors. Since the relative standing did not change, entering into negotiations prior to final ranking in a harmless error. *See Appeal by Excent Corporation*, Panel Case 2013-2 (finding an evaluation defective but also finding "that PCG failed to show that this defect affected the outcome of the procurement, making it harmless error and not a basis for ordering relief.")

Negotiations were finalized on April 12, 2023, reducing the annual cost from of \$200,000 to \$180,000 per year. A spreadsheet was prepared recalculating the final scoring by substituting Marsh's negotiated total of \$900,000 for its original \$1,000,000. HUB argues that this \$900,000 total was used to determine the final ranking. However, a final ranking was necessary in order to determine the highest ranked offeror with whom negotiations were conducted that resulted in the price reduction. The price reduction could not have preceded the negotiations. Even if the price reduction was used to determine the final ranking, the relative standing of these two Offerors remained the same regardless of the proposed price. This issue of protest is denied.

HUB's next alleges that one evaluator's consideration of a litigation disclosure was arbitrary and capricious.

Section II of the SOW, Instructions to Offerors, included a section titled Information for Offerors to Submit. This section included the following general statement:

All proposals shall be submitted as stated below. Failure to include any of the information below shall result in your proposal being deemed as non-responsive.

[Scope of Work, Addendum 2, Page2]

This statement is followed by four subsections the Offeror was requested to address in their Technical Proposal: Executive Summary, Qualifications, Experience, and Program fulfillment. Each subsection included specific information CU asked Offeror to address.

The Qualifications and Experience sections each included the same two items for the Offerors to address:

- A listing of failed projects, suspensions, debarments, and significant litigation, if any.
- The name, title, and experience, including education and training, of the person who will be the service representative for the University account. Include position descriptions of those who will be performing significant activities on behalf or for

of the University. Provide similar information for the specific office that would handle the University's account, if separate. Provide the name of the person(s) with authority to bind the broker/agency (Offeror).

[Addendum 2, SOW, Pages 2 and 3]

In response to the request for information about of significant litigation, HUB disclosed ongoing litigation related to a Berkley County School District's CFO's embezzlement scheme involving a HUB affiliate, explaining that the litigation had no relevance or effect in any way related to the work at issue.

Evaluator Miller referenced this litigation in the explanation of her scoring:

Vendor: HUB International: HUB is the 5th largest broker in the world and licensed in all 50 states. They have some ongoing litigation related to a well-publicized Berkley County School District's CFO embezzlement scheme related to a Knauff insurance company which HUB aquired. The company stated that it is completely unrelated to the profile and work for the Clemson proposed insurance, and would not have any impact on the institution, if they are selected. In addition, rather than providing cyber insurance coverage themselves, they have proposed to partner with RT ProExec. While HUB appears to have strong qualifications in the various areas related to insurance risks relevant to Clemson, I deducted 30% of the total available points in the qualifications section due to the ongoing nature of the lawsuit, and also due to the cyber insurance partnership hieararchy proposal, as these both provide a not immaterial element of uncertainty, with respect to the contingent liability amount that might be imposed on HUB at lawsuit settlement, and also on the efficiency of fulfilling cyber insurance needs when dealing with separate entities as 'partners'. While HUB has an excellent educational suite of product, and clearly has clout when it comes to advocating on behalf of Clemson as well as experience working with us (as indicated through the language in their proposal), they failed to clearly define some responses in the proposal, such as their procedures for handling the day-to-day administration of insurance programs and emergency response supports; I was unable to find any clearly defined service level agreements for their turnaround time, for example.

(emphasis added)

HUB argues:

In response to these requirements, HUB disclosed such litigation in a compliant manner, and made it clear in explanation that the litigation it disclosed had no relevance or effect in any way related to the work at issue. But one evaluator (Miller) arbitrarily and capriciously disregarded this information in the proposal, and instead relied on baseless, and false, inaccurate speculation that the litigation gave rise to "uncertainty, with respect to the contingent liability amount that might be imposed on HUB at lawsuit settlement."

The Procurement Review Panel set the standard for the review of arbitrary or capricious conduct:

The burden of proof is on the appellants to demonstrate by a preponderance of the evidence that the determination made by the procurement officer is clearly erroneous, arbitrary, capricious or contrary to law. *"To prove arbitrary and capricious conduct such as will permit the court to overturn a procurement decision, the aggrieved bidder must demonstrate a lack of reasonable or rational basis for the agency decision or subjective bad faith on the part of the procuring officer or clear and prejudicial violation of relevant statutes and regulations which would be tantamount to a lack of reasonable or rational basis."* Robert E. Derektor of Rhone Island, Inc. v. Goldschmidt, 516 F.Supp. 1085. The Panel finds that the appellants have failed to prove that the procurement officer's determination of APS' responsibility lacked a reasonable or rational basis, or that there was a clear and prejudicial violation of any procurement regulation.

See Appeal by Value Options, Magellan Behavioral Health & Blue Cross and Blue Shield, Panel Case 2001-7

Typically, information about failed projects, suspensions, debarments, and significant litigation is requested to assist in determining an Offeror's responsibility or for evaluation of an Offeror's qualifications. The solicitation stated that failure to provide this information would result in a determination of nonresponsiveness, indicating that this information was intended for evaluation purposes.

The evaluator indicated that the litigation included by HUB contributed to a reduction in the "qualifications section" scoring. On the surface this would appear questionable since the Qualifications evaluation criterion was deleted in Addendum 2. However, this same request for information about significant litigation was requested under the Experience subcategory, and it appears that the deduction was applied to the Experience criterion. The Experience criterion included an assessment of the offeror's experience in providing the services "while providing savings and lowering risks:"

Experience: The Offeror's experience in successfully providing insurance brokerage services and policies to other entities and particularly higher education institutions of similar size and scope to those in this solicitation, while providing savings and lowering risks.

[Addendum 2, SOW, Page 6] (emphasis added)

The inclusion of an assessment of "risk" in the definition of experience provides a reasonable and rational basis for the evaluator's consideration of these issues in evaluating Experience.

The solicitation asked the Offerors to disclose "significant" litigation. The solicitation provided no definition or parameters to be used to determine significance. Determining the significance of a

litigation was left to the discretion of the Offeror. HUB determined that the disclosed litigation was “significant.” At the same time, HUB claimed that it “had no relevance or effect in any way related to the work at issue.”

HUB argues that the evaluator should have deferred to its analysis of potential risk posed by this litigation rather than relying on her own analysis or HUB’s inferred significance. Evaluators are often experts in their field and bring different perspectives to the evaluation process. The significance an evaluator attributes to particular assertions in a proposal is at their discretion. This is evidence of the subjective nature of the evaluation process so long as they have a reasonable, rational basis and are not actually biased. There is a reasonable and rational basis for the evaluator’s analysis, and there is no evidence of actual bias.

One indication of actual bias is whether the evaluator’s scores are materially unbalanced. Evaluator number one ranked Marsh (77) highest and HUB (57) number four. Evaluator number two awarded the same number of points (77) to Marsh and HUB and ranked them highest. Evaluator number three ranked Palmetto highest (74) and HUB (72) number two and Marsh (62) tied for number three. Individual evaluator scores awarded to Marsh and HUB provide no indication of bias in the ranking. The Panel has stated:

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.

See Appeal by Coastal Rapid Public Transit Authority, Panel Case 1992-16

HUB has failed to prove by a preponderance of the evidence that the determination made by the procurement officer was arbitrary, capricious or actually biased. This issue of protest is denied.

HUB next protests:

The Evaluation was Not Fair and Equal and Marsh Was Non-Responsive to the Litigation Disclosure Requirement.

HUB argues:

At the same time, HUB was open and fully compliant with the RFP in disclosing the litigation and its lack of effect on HUB or its operations, as the RFP requested. By

contrast, the winning bidder, Marsh, failed to likewise actually disclose the many ongoing litigations it is now in the midst of defending and disputing....

Notably, Gallagher and USI Insurance Services also failed to fully disclose ongoing litigation. As a result, the proposals of Marsh, Gallagher USI and HUB were not compared to the requirements of the RFP on an equal basis at all. All three other vendors received a higher point allocation than HUB received from the evaluator in question. One vendor alone, HUB, was judged based on full disclosure, while the others were judged on a total lack of any actual candor and disclosure of their ongoing litigation.³ Clemson and the public were thus deprived of the fair and equal evaluation of proposals. No one can now know what this same evaluator would have “guessed” about the impact of Marsh’s actual ongoing litigations were if Marsh had listed them as required. Thus, Marsh was materially non-responsive, and the evaluation was materially incomplete, unfair and unequal.

As stated above, the solicitation asked the Offerors to disclose “significant” litigation. The solicitation provided no definition or parameters to be used to determine significance. Determining the significance of a particular litigation was left to the discretion of the Offeror. Marsh responded with the following statement about significant litigation:

Marsh USA LLC (“Marsh”) is a national insurance agent and broker and does business in all of the 50 states in the U.S. From time to time, Marsh and its subsidiaries are subject to various claims, lawsuits and proceedings, including those concerning alleged errors and omissions in connection with the placement of insurance and in rendering consulting services. Marsh believes its reputation for providing quality services and its historic performance over the long term speak for itself. Marsh is committed to serving its clients to the highest professional and ethical standards as demonstrated by its long history as the industry's leader.

[Marsh Technical Proposal, Page 9]

HUB complains that other Offerors also did not fully disclose ongoing litigation. However, the solicitation did not request a full disclosure of ongoing litigation, only disclosure of litigation that the Offeror deemed significant. Considering the litigious nature of this business sector, it is highly unlikely and totally unexpected that an Offeror would disclose every matter under litigation. HUB attached a list of legal matters involving Marsh to its letter of protest, but asserts no level of significance to any of these matters.

Evaluators are limited to evaluation of the information provided in the proposals. The evaluators can request additional information or clarifications if they believed the information provided was inadequate. HUB disclosed what it considered significant litigation. The adequacy or level of importance that a

particular evaluator attaches to the information provided in a proposal is a matter of personal discretion based on their experience and expertise. Section 11-35-2410 provides for the finality of determinations under the RFP process unless "clearly erroneous, arbitrary, capricious, or contrary to law." There is no evidence that the evaluators were "clearly erroneous, arbitrary, capricious, or contrary to law." This issue of protest is denied.

HUB next protests:

A Non-Evaluator Improperly and Unequally Influenced Actual Scoring and Evaluation Performed by At Least One Evaluator.

HUB argues:

The records provided by Clemson reveal that *a person who was not an evaluator* interfered with the actual scoring by evaluators by inserting himself into the evaluation and scoring, and suggesting changes to scores given and descriptions of reasoning. It appears from the emails provided through the FOIA, that one evaluator (McLane) was specifically instructed by a nonevaluator (Stanford) *to literally change their documented scoring numbers and content*. The nonevaluator (Stanford) questioned the evaluator's (McLane) allocation of the maximum scores and asked the evaluator if "the proposals of the incumbent suppliers were written to be the maximum score available?" HUB is currently an incumbent supplier. It appears the non-evaluator (Stanford) questioned the scoring of this evaluator's (McLane) initial allocation of maximum points for one or more factors. By contrast, the non-evaluator (Stanford) did not question the maximum points awarded by another evaluator (Miller) to Marsh for the Experience criteria. This is a significant process flaw, and an impermissible failure to treat bidders equally.

The non-evaluator (Stanford) was the procurement officer, Rodney Stanford. In his official capacity, Mr. Stanford is responsible for the conduct of the procurement and awarding the contract. Section 11-35-1530(9) requires that the contract file "contain the basis on which the award is made and must be sufficient to satisfy external audit." The Legislative Audit Council has repeatedly advised the state procurement office that numeric scores alone are not sufficient to satisfy this requirement. Ideally there would be some commentary that would explain why a proposal was superior or inferior and warranted a higher or lower score than the other proposals.

Evaluator McLane made his initial evaluation, and below is a sample of the explanations he provided:

Vendor: Palmetto Insurance Associates: Answered all questions, in place coverages and understanding of business

Vendor: HUB International: Answered all questions, comparable (sic) coverages and understanding of business

Vendor: Marsh USA LLC : Answered all questions, heavily based software component, not as specific on support team availability

Vendor: Gallagher: Answered all questions, heavily based software component, not as specific on support team availability

After reviewing these responses Mr. McLane was asked to take another look at his evaluation and better explain why each Offeror warranted the scores he awarded. Mr. McLane revisited his scoring and explanations: Below is a sample of the revised explanations:

Vendor: Palmetto Insurance Associates: Answered all questions, in place coverages and understanding of business. Specific experience with the IRF insurance with the state and the gaps that it presents and specific solutions to those gaps. Spoke specifically to insurance coverages they have helped the University with in the past. Offered numerous experiences with driving savings with the University. Good Evaluation of the Universities insurance risk. Selection method based on examples of similar insurance wrote for the University. Personalized service in insurance selection, assistance with the completion of insurance applications and follow-up with any questions. Great proposal.

Vendor: HUB International: HUB answered all questions, comparable coverages and understanding of business. Experience with the IRF insurance with the state. Driving savings and costs history focusing on business continuity and success of the client. Spoke specifically to insurance coverages they have helped the University with in the past. Extensive list of market access and various options for each type of coverage. Good description of expertise and experience providing broker insurance. Great proposal.

Vendor: Marsh USA LLC: Answered all questions, heavily based software component, not as specific on support team availability. Experience with different clients in higher education. Lacked disclosure on driving risks however assured the University through their approach (standard insurance approach to identifying risks and solutions based off other proposals) that they were effective. Great list of companies and markets to meet insurance needs. Focused on software approach to solving and managing insurance aspects (Analytics Suites / Service 365). Good proposal but not as suited to the University needs per answers to proposal questions.

Vendor: Gallagher: Gallagher answered all the questions presented. Experience with the IRF insurance with the state noted and experience with filling the IRF coverage gaps with clients. Specific examples in driving savings was focused on their "CORE360 toolbox" and not as oriented to the business as other proposals. Markets listed was briefer than some of the other proposals. Communication with Gallagher stipulated more formalized standards. Great experience with the IRF and policy gaps however responses were lacking in specifics that we were looking for in this proposal.

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While these revised explanations are not the desired comparative analysis of the proposals, they do provide more insight into the factors Mr. McLane considered in evaluating the proposals. During this analysis, Mr. McLane also changed some of the scores awarded. However, the relative standing of the Offerors did not change. There is no evidence that the procurement officer tried to influence Mr. McLane's scoring. The procurement officer was only asking Mr. McLane for additional justification to support his scoring. This is well within the duties and responsibilities of the procurement officer and there is no indication of undue influence. This issue of protest is denied.

DECISION

For the reasons stated above, the protest of HUB International Midwest Limited is granted



Michael B. Spicer
Chief Procurement Officer

Columbia, South Carolina

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April 25, 2023

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

Re: Protest of Award, Solicitation # 143987574 _1 Insurance Broker Services

Dear Chief Procurement Officer:

This firm represents HUB International Midwest Limited (“HUB”), a bidder in the above solicitation. This Protest is being provided to you as Chief Procurement Officer pursuant to S.C. Code Ann. § 11-35-4210, with respect to the above-referenced solicitation and process and the Notice of Intent to Award issued to Marsh USA LLC Information (“Marsh”) in connection with, *Insurance Broker Services, Solicitation #143987574 _1*. The Notice of Intent to Award was posted April 12, 2023. HUB protests as follows.

- 1. Marsh’s proposal was non-responsive because it failed to offer a firm fixed price for five full years as required by the RFP; instead, Marsh insisted that only three years were firm.**

The Bid Sheet in Addendum 1 required each bidder to state a set dollar price for the proposed price **for each of five years**:

Bid Lines

1. Enter your total annual Revenue for Insurance Broker Services as requested in SOW Year 1 of 5

*Quantity: 1 UOM: Lot Price: \$ _____ Total: \$ _____ Item
Notes: See scope of work for more information.*

See Marsh Supplier Response, Bid Sheet, Ex. 1. The RFP “Submittal Requirements” clearly stated:

The other file should be any financial details. However note, that the financial proposal must be a firm fixed price that must also be entered as one dollar value in the line item below.

Id., Item 13 (*Emphasis added.*) The successive lines of the bid page were set forth for each year. Marsh's response was deceptive and non-responsive. Marsh's submitted bid form and its proposal contained contradictory and equivocal statements on its evaluated pricing.

Marsh inserted in the bid lines a price of \$200,000 into each of the five years to be priced and recited a \$1 Million dollar "Response Total." *Id.* Thus, Marsh's price per year was \$200,000 for each of five years. As shown below, Marsh was actually scored as if it had offered a fixed five years – but not at \$1 Million as bid (\$200,000 per year) but at a lower \$900,000 total fixed price total for five years, when in fact whichever number was chosen, Marsh offered no five year fixed price at all. *See infra.*

However, in the text of its financial proposal, Marsh clearly and impermissibly withdrew any offer for five years' firm fixed pricing, stating:

Marsh would agree to hold the annual, capped commission of \$200,000 for three consecutive years. Marsh and Clemson will evaluate the program and services and negotiate a fee structure for the fourth and fifth year renewal options.

Marsh Financial Proposal, Ex. 2 at page 2 (emphasis added). These statements are contradictory to the RFP, and have the effect that Marsh did not provide a responsive five year fixed price, but instead only a three year fixed price. There is no written record (as required by law) that Marsh was ever asked to withdraw or correct this serious defect. Marsh improperly held back the right to negotiate the last two years, when no other bidder did so. This price hedging approach is strictly forbidden by South Carolina Procurement law and decisions; such hedging affects price, quantity, quality or delivery. *See S.C. Code Regs. 19.445.2070D; See also In Re: Protest of Value Options, Magellan Behavioral Health & Blue Cross and Blue Shield, Appeal by Value Options, Magellan Behavioral Health & Blue Cross and Blue Shield, 2001 SC CPO LEXIS 3.* Nothing in the RFP allowed vendors to protect themselves against future changes that might materially affect pricing beyond three years. Marsh alone took that unique advantage. Such a proposal, limiting a vendor's risk, liability and commitment, require that it be rejected. *In re Appeal of Blue Cross and Blue Shield of South Carolina, 2019 SC CPO LEXIS 67.*

The proposal of Marsh should have been rejected and HUB, as the top ranked responsive offeror should have been awarded the contract.

HUB asks that the contract be awarded directly to HUB. If the CPO agrees with this protest issue, and awards the contract to HUB, HUB would withdraw the below issues of process.

- 2. Marsh Alone Was Allowed to Change Its Price Prior to Final Scoring of Proposals and before Final Ranking, Reducing the Price by \$100,000 through a "Record of Negotiation," and then was Improperly Evaluated and Scored based on the lower negotiated price.**

In the Determination and Findings, Clemson's buyer stated:

The team was instructed to evaluate each proposal to the SOW and how well they answered[sic] each evaluation criteria. The evaluators completed the RFP evaluation scoring on 04/11/2022. With Marsh being identified the best proposal for Clemson by the evaluation team [sic].

I negotiated a 10% price reduction from the Top scorer Marsh and received a signed record of negotiation on 4/12/2023.

Determination and Findings, Ex. 3. This record shows that Marsh was "evaluated" and "scored" based on a later "negotiated" price of \$900,000, rather than the \$1 Million in its bid. See also *Record of Negotiations, Ex. 4.* It shows that Marsh was the only bidder permitted to modify pricing numbers prior to overall scoring and ranking. This is prohibited by S.C. Code Ann. § 11-35-1530. Negotiations (which the procurement officer states he engaged in) are not allowed before scoring and ranking. Here the procurement officer states he ranked the proposers then negotiated with Marsh as the highest ranked, but he then did the scoring evaluation (shown on his Determination and Findings and "RFP Calculations") based on the negotiated, reduced price. S.C. Code Ann. § 11-35-1530 prohibits the action of the procurement officer here.¹ Regardless, nothing shows that Marsh ever retracted or withdrew its fatal caveat that:

Marsh would agree to hold the annual, capped commission of \$200,000 for three consecutive years. Marsh and Clemson will evaluate the program and services and negotiate a fee structure for the fourth and fifth year renewal options.

Ex. 2, page 2.

3. The Evaluation was Arbitrary and Capricious.

HUB fell short of being the highest ranked vendor by only 2.51 points of the total 100 points allocated, even disregarding the improper evaluation of Marsh on its lower "negotiated" price. *Ex. 3.*

Unlike its competitors, HUB was fully responsive to the requirements of the RFP regarding disclosure of litigation, but HUB was penalized for that by virtue of one evaluator's wild, impermissible and inaccurate speculation contrary to the content of HUB's proposal. HUB openly disclosed certain litigation which would have no material or even minimally consequential effect on HUB's services, its financial standing, or any other relevant aspect of the work. HUB disclosed this ongoing litigation because the RFP specifically requested twice that respondent list significant litigation:

¹ The RFP Calculations shows that Marsh was awarded 12 points on cost for a "price" of \$900,000, rather than the \$1 Million bid. *Determination and Findings Ex. 3.*

2. *Qualifications b.: A listing of failed projects, suspensions, debarments, and significant litigation, if any.*

RFP SOW, Ex. 4 at 2.

3. *Experience - Provide a narrative which explains and/or addresses the following:*

a.: *A listing of failed projects, suspensions, debarments, and significant litigation, if any.*

RFP SOW, Ex. 4 at 3.

In response to these requirements, HUB disclosed such litigation in a compliant manner, and made it clear in explanation that the litigation it disclosed had no relevance or effect in any way related to the work at issue. But one evaluator (Miller) arbitrarily and capriciously disregarded this information in the proposal, and instead relied on baseless, and false, inaccurate speculation that the litigation gave rise to “uncertainty, with respect to the contingent liability amount that might be imposed on HUB at lawsuit settlement.”² *Miller Evaluation, Ex. 5, Sheet 2.*

² Evaluator Miller also expressed that she lacked the needed time to do the proposal review adequately (*Ex. 6*), and in her review (*Ex. 5*) she made comments indicating that her review was indeed cursory at best. For example, she stated that she also deducted another “round” 30% from HUB’s other technical score “Program Fulfillment” because she said HUB failed to clearly define some responses in the proposal, such as their procedures for handling the day-to-day administration of insurance programs and emergency response supports; I was unable to find any clearly defined service level agreements for their (HUB’s) turnaround time. But HUB did have such content in its proposal, which Miller plainly overlooked:

- (pg. 18) *HUB’s local team (Greenville) available to provide all required coverages on short notice with quick turn-around time for special events/playoffs. We have the necessary binding authority to get the coverages in place in the most efficient way possible.*
 - (pg. 22) *HUB understands that our higher education clients must have effective day-to-day service. Clients like Clemson constantly face new challenges and exposures and need a consultive advisor and partner to help you respond efficiently and appropriately.*
 - (pg. 23) *Our local, Greenville office allows HUB a unique advantage in our ability to provide top quality service to Clemson as your insurance broker.*
 - (pg. 23) *HUB’s day to day administration of the University’s insurance program starts with our Values and Service Commitment. Service Commitment: Respond timely and professionally to fellow employees and company partners*
 - (pg. 23) *Our goal will be to provide the application 90 days before renewal allowing ample time for completion*
 - (pg. 38) *Our local team understands the need to respond to quick turn-around requests particularly with respect to special events such as athletic post-seasons. HUB’s team is available at any time and has the binding authority required to get coverage placed quickly.*
 - We clearly understand the uncertainty and quick turn-around times related to post-season planning and the various insurance requirements that bowl games, playoffs or tournament invitations can present. We will develop a plan and strategy to ensure that all of the insurance requirements are met and in the short period of time allowed for these unique events.*
 - (pg. 52) *Our consulting approach is designed to be timely, results-oriented, and focused where it counts*
 - (pg. 26) *HUB listed Emergency Management as part of our Risk Control & Specialty Services.*
- Apart from Miller’s unfounded scoring, HUB handily won the RFP.

Unlike competitors, HUB disclosed the litigation; but naturally it did not disclose all of the details of the litigation, instead summarizing that the litigation was not significant or material. The evaluator made a substantial deduction to HUB's points due to her baseless and inaccurate speculation that the litigation was indeed a significant and material risk, creating concern about the "contingent liability imposed on HUB" without any information whatsoever regarding any such potential liability. This evaluator stated that she deducted 30% of the total available points for "Qualifications" due in substantial part to such inaccurate speculation. This same evaluator deducted a share of the "Qualifications" points from HUB due to HUB's use of RT ProExec as a partner in the fulfillment of the "cyber" insurance component of the work. HUB clearly explained their purpose in partnering with RT ProExec, RT ProExec's experience and qualifications, the other South Carolina universities and entities in which HUB and RT ProExec partner and the value that the RT ProExec has and will continue to bring to Clemson. Nothing in HUB's bid suggested any possible risk or complexity from such association. Even so, the evaluator inaccurately speculated that the work with RT ProExec might somehow affect "efficiency" in some unarticulated way. *Ex. 5.* Such a speculative conclusion cannot be justified in any possible factual way. By deducting 30% of the "Qualifications" points for HUB due to these two wholly baseless speculations, this one evaluator's score for HUB was significantly lower than every other scorer's points awarded to HUB for this factor. If her score had not deducted an extreme percentage of total points for these speculative items, and was instead in line or even slightly lower than the other evaluators (even though her notes provide no basis in fact for any such non-speculative reductions) HUB would have won the bid, particularly after removing Marsh's unlawful revised scoring advantage. As a result, one Evaluator effectively supplanted the judgment of all other evaluators collectively. This one, wildly speculating evaluator overrode the entire process through sheer and unfounded false guesswork, and by doing so, appointed herself the sole decision-maker. This is arbitrary and capricious. An evaluator's reliance on false information from outside the vendor's own proposal or the process is arbitrary and capricious. *Cf. Appeal by Excent Corporation, Panel Case No. 2013- 2.*

4. The Evaluation was Not Fair and Equal and Marsh Was Non-Responsive to the Litigation Disclosure Requirement.

At the same time, HUB was open and fully compliant with the RFP in disclosing the litigation and its lack of effect on HUB or its operations, as the RFP requested. By contrast, the winning bidder, Marsh, failed to likewise actually disclose the many ongoing litigations it is now in the midst of defending and disputing. The RFP requested:

2. *Qualifications:*

b. *A listing of failed projects, suspensions, debarments, and significant litigation, if any.*

* * *

3. *Experience- Provide a narrative which explains and/or addresses the following:*

a. *A listing of failed projects, suspensions, debarments, and significant litigation, if any.*

RFP SOW Ex. 4 at 2, 3. In its response, Marsh merely dodged, stating that:

b. A listing of failed projects, suspensions, debarments, and significant litigation, if any.

Marsh USA LLC (“Marsh”) is a national insurance agent and broker and does business in all of the 50 states in the U.S. From time to time, Marsh and its subsidiaries are subject to various claims, lawsuits and proceedings, including those concerning alleged errors and omissions in connection with the placement of insurance and in rendering consulting services. Marsh believes its reputation for providing quality services and its historic performance over the long term speak for itself. Marsh is committed to serving its clients to the highest professional and ethical standards as demonstrated by its long history as the industry's leader.

Marsh Technical Proposal, Ex. 7 at page 9. Obviously, HUB could have failed to respond to what the RFP requested in the same way, and if it had done so, the evaluator would have been unable to deduct such a large percentage of points from HUB’s score. Marsh failed to respond to what the RFP requested, failing to specify its current litigation and addressing its consequence or lack thereof, as HUB did. Inexplicably, the same evaluator who negatively speculated about HUB’s disclosed litigation, contrary to HUB’s bid content, gave Marsh 100% of all available points for the same factor, even though Marsh disclosed none of its numerous litigations at all. Notably, Gallagher and USI Insurance Services also failed to fully disclose ongoing litigation. As a result, the proposals of Marsh, Gallagher USI and HUB were not compared to the requirements of the RFP on an equal basis at all. All three other vendors received a higher point allocation than HUB received from the evaluator in question. One vendor alone, HUB, was judged based on full disclosure, while the others were judged on a total lack of any actual candor and disclosure of their ongoing litigation.³ Clemson and the public were thus deprived of the fair and equal evaluation of proposals. No one can now know what this same evaluator would have “guessed” about the impact of Marsh’s actual ongoing litigations were if Marsh had listed them as required. Thus, Marsh was materially non-responsive, and the evaluation was materially incomplete, unfair and unequal. The end result is that Clemson and the public are adversely impacted because HUB has been penalized for being forthright, compliant and complete, and Marsh is rewarded for being incomplete. This contradicts the objectives of the law of public purchasing.

³ Just a few of the possible ongoing litigations and contingent risks to Marsh readily located by a quick search may include those listed in the Attachment hereto, “List of Claims and Risks.”

5. A Non-Evaluator Improperly and Unequally Influenced Actual Scoring and Evaluation Performed by At Least One Evaluator.

The records provided by Clemson reveal that *a person who was not an evaluator* interfered with the actual scoring by evaluators by inserting himself into the evaluation and scoring, and suggesting changes to scores given and descriptions of reasoning. It appears from the emails⁴ provided through the FOIA, that one evaluator (McLane) was specifically instructed by a non-evaluator (Stanford) *to literally change their documented scoring numbers and content*. The non-evaluator (Stanford) questioned the evaluator's (McLane) allocation of the maximum scores and asked the evaluator if "the proposals of the incumbent suppliers were written to be the maximum score available?" HUB is currently an incumbent supplier. It appears the non-evaluator (Stanford) questioned the scoring of this evaluator's (McLane) initial allocation of maximum points for one or more factors. By contrast, the non-evaluator (Stanford) did not question the maximum points awarded by another evaluator (Miller) to Marsh for the Experience criteria. This is a significant process flaw, and an impermissible failure to treat bidders equally. The *Evaluator Instructions* specifically state:

Your responsibility is to provide an independent, impartial, unbiased evaluation of each and every proposal according to the evaluation criteria contained in the RFP. You must arrive at your scores independently, without influence. Do not allow other or prior knowledge, to influence you.

Evaluator Instruction Sheet, Wiley McLane Ex. 9. As a matter of law, this interference and influence in evaluation scoring is improper and renders the evaluation null and void. Only evaluators are to score and non-evaluators are prohibited from influencing the scoring as it is done. *See, e.g., Louisiana Protest Decision 1/24/2023, Ex. 10.* A process that is disrupted by outside influence on evaluator scoring simply cannot stand.

HUB requests a stay, a hearing on its issues, and a decision that the Marsh proposal was non-responsive; that HUB should be granted the contract award as the highest scored responsive and

⁴ Emails provided by Clemson (*Exhibit 8*) in response to a records request show the following:

3/24 McLane submits scores and comments.

4/5 Stanford emails McLane, stating "Currently if protested the suppliers will question. For example Gallagher's summary and Marsh are identical. Were the proposals of the incumbent suppliers written to be the maximum score available? This is a proposal to proposal evaluation." Stanford requests in person discussion.

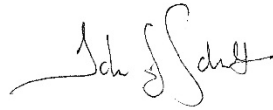
4/6 McLane emails Stanford new scores and states: "Based off the conversation with you and Sam this morning in your office on Scoring and Explanation of Scoring, I have attached my revised sheet per your direction. I have added more detail and changed the scoring. This is my proposal to proposal evaluation." It literally changes the scores for the relevant proposers.

4/7 McLane sends Stanford an email with still new score sheet with revised explanations, and asks "See if this is better."

Chief Procurement Officer
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responsible vendor, and, if the CPO does not grant a direct re-award to HUB, a determination that the RFP and award notice should be canceled, and such other relief as allowed by law.

Very truly yours,

A handwritten signature in black ink, appearing to read "John E. Schmidt, III". The signature is fluid and cursive, with the first name "John" and last name "Schmidt" being the most prominent parts.

John E. Schmidt, III

Cc: Manton Grier, Esquire
Rod Stanford, stanfo2@clermson.edu
Mike Nebesky, mnebesk@clermson.edu

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.