

Posting Date: 12/29/03

Mail Date: 12/29/03

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT OFFICER
CASE NUMBER 2004-211

IN THE MATTER OF:

Venturi Technology Partners vs.
Information Technology Management Office

DECISION

On November 26, 2003, Venturi Technology Partners (VTP) filed a protest of the state's intent to award a contract for solicitation no. 04-s6172 to Beeline under section 11-35-4210. VTP later filed a Supplemental Notice of Protest on December 5, 2003. The Chief Procurement Officer (CPO) for the Information Technology Management Office (ITMO) conducted a hearing on the issues of protest on December 18, 2003. Present at the hearing before the CPO were representatives from both VTP and ITMO. Mr. Jim Rice and Mr. Jamiel Saliba of VTP participated via telephone. In addition, Mr. Frank Fusco, Executive Director of the Budget and Control Board, responded to questions by telephone.

In its entirety, VTP's November letter of protest states as follows:

We believe a letter from Ms Darla Moore addressed to Mr. Frank Fusco, and made part of the RFP response from Beeline, is an inappropriate attempt to influence the outcome of this solicitation and may in fact have influenced the decision to award.

According to Section III of the solicitation, references are to be included in paragraph C. and then only in conjunction with a similar project.

As relief we ask that the solicitation response submitted by Beeline be disqualified.

FINDINGS OF FACT:

- Solicitation 04-S6172, Vendor Management Services for the State of South Carolina, was issued on September 4, 2003.
- Amendments 1, 2, and 3 were issued on September 17, 18 and October 1, 2003, respectively.
- ITMO issued an Intent to Award a contract to Beeline on November 12, 2003.
- CPO received a letter of protest from VTP on November 26, 2003.
- ITMO suspended the Intent to Award a contract on December 1, 2003.
- VTP filed a supplemental Notice of Protest on December 5, 2003, with the CPO.

MOTIONS

The CPO received two motions to dismiss from ITMO, attachments 3 and 4 respectively, and a response from VTP, attachment 5. As reflected in Attachment #3, ITMO moved to dismiss the issues contained in VTP's Supplemental Notice of Protest as untimely under § 11-35-4210(1). ITMO argues that the concerns raised by VTP's Supplemental Notice are directed towards the solicitation. Section 11-35-4210(1) requires that prospective bidders that are aggrieved in connection with the solicitation of a contract protest within fifteen days of the date solicitation documents is issued.

§ 11-35-4210(1) Right to Protest; Exclusive Remedy. Any prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2) below within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment thereto, if the amendment is at issue.

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) below within fifteen days of the date notification of award is posted in accordance with this code.

Under this provision, any protest regarding an issue raised by the solicitation documents is regarded as a protest of the solicitation. Protest by Protest of DP Consultants, Inc. and Horizon Software Systems, Inc., Case No. 1998-6.

In this case, the Intent to Award was posted on November 12, 2003, and the last date to file a timely protest would have been November 27, 2003. However, November 27th was Thanksgiving Day which extended the allowable time to file a protest to the end of the next business day which was December 1, 2003. The CPO received the Supplemental Notice of Protest on December 5, 2003. Accordingly, if the issues raised in the Supplemental Notice regard issues raised by the solicitation documents, VTP's protest of these issues would be untimely.

The first four issues in VTP's Supplemental Notice of Protest address an alleged failure of the proposal to adequately explain the evaluation process including weightings and scoring. All information concerning the evaluation process was included in the solicitation documents and under § 11-35-4210, VTP had 15 days from the issuance of those documents to file a timely protest of those issues. These issues are clearly untimely raised.

Motion to dismiss the first four issues of VTP's Supplemental Notice of Protest granted.

The ITMO also moved to dismiss VTP's original issues of protest (Attachment #4) on the grounds the letter from Ms Moore had no effect on the evaluation and award of the contract. As the effect of the letter was a question of fact, the motion was denied; the issue can only be decided after a review of the relevant facts.

Motion Denied.

DISCUSSION

Remaining issues of protest in VTP's Supplemental Notice of Protest.

The last two issues of VTP's Supplemental Notice of Protest concerned the evaluation process and scoring . In this case, the Intent to Award was posted on November 12, 2003, and the last date to file a timely protest would have been November 27, 2003. However, November 27th was Thanksgiving Day which extended the allowable time to file a protest to the end of the next business day which was December 1, 2003. December 1, 2003 was the last day to file a timely protest

concerning the evaluation and award of this contract. The CPO finds that these issues were untimely files and these issues are dismissed.

VTP's November 26th protest

In its entirety, VTP's November letter of protest states as follows:

We believe a letter from Ms Darla Moore addressed to Mr. Frank Fusco, and made part of the RFP response from Beeline, is an inappropriate attempt to influence the outcome of this solicitation and may in fact have influenced the decision to award.

According to Section III of the solicitation, references are to be included in paragraph C. and then only in conjunction with a similar project.

As relief we ask that the solicitation response submitted by Beeline be disqualified.

The solicitation provision referenced in VTP's protest reads as follows:

CONTACT LIMITATION

By submission of a response to this RFP, vendor agrees that during the period following issuance of the proposal and prior to the statement of intent to award, vendor shall not discuss this procurement with any party except members of the INFORMATION TECHNOLOGY MANAGEMENT OFFICE or other parties designated in this solicitation. OFFERORS shall not attempt to discuss or attempt to negotiate with the using Agency, any aspects of the procurement without the prior approval of the buyer responsible for the procurement.

Accordingly, the issue of protest is whether or not the letter at issue violates the prohibitions of this provision. In order to violate this provision, a communication (a) must be an attempt to discuss or negotiate aspects of this procurement, (b) must be directed to either the using agency or another prohibited party, and (c) must have been received by the prohibited party between the time the solicitation was issued and the time the notice of intent to award was posted - a blackout period. VTP must present evidence to prove such a violation¹ and must show how the violation effected the outcome of the award.²

¹ Protest of Johnson Controls, Inc., Case No. 1989-9 ("Instead the burden of proof lies with the protestant, which must sustain its allegations by the weight or preponderance of the evidence.").

² Protest of First Sun EAP Alliance, Inc., Case No. 1994-11.

The facts established at the hearing reveal the following. The letter attached as Attachment #1 was submitted to ITMO by Beeline as a part of Beeline's bid. On its face, the letter was addressed to Frank Fusco, copied to the CPO (Mr. Spicer) and Mrs. Dixon, and undated. According to the testimony of Ms. Dixon, she did not receive the letter directly, except as a part of the proposal submitted by Beeline. According to the testimony of Mr. Fusco, Mr. Fusco received the letter, read it, and placed it in a file. Mr. Fusco did not recall when he received the letter. Mr. Fusco also testified that he did not communicate with any of the evaluators regarding either the letter or Beeline's bid. VTP offered no other witnesses, and none of the evaluators were present at the hearing.³ On these facts, and in the absence of any other evidence, the CPO finds that VTP failed to prove that the Moore Letter was directed to a prohibited party, that a prohibited party received the Moore Letter during the blackout period, or that the Moore Letter prejudiced VTP.

1. Prohibited Party

Read literally, the bidding instruction at issue would prohibit a bidder from communicating with "any party." Clearly the instructions were not meant to prohibit any communications with anyone other than ITMO, otherwise a bidder would be prohibited from discussing the bid with potential subcontractors or suppliers. The question become who is a prohibited party. Certainly, a bidder cannot communicate directly with the using agency; the bidding instructions specifically address that scenario. Likewise, a bidder cannot communicate directly with a member of the evaluator panel; such communications would undermine anyone's faith in the process. In this case, the question become whether Mr. Fusco is a prohibited party. Mr. Fusco is the executive director of the agency which houses all three of the state's central purchasing offices. Like the members of the General Assembly, he routinely hears from vendors regarding the procurement process. Some are selling their wares, many are complaining about the public procurement process. Given his position, Mr. Fusco is just the sort of public official one would expect the community to turn to in addressing procurement matters. Accordingly, the CPO finds that the bidding instructions do not, and were not intended to, prohibit communications with Mr. Fusco.

³ While the CPOs do not issues subpoenas, state employees and others involved in the procurement process usually respond to an invitation to attend a CPO hearing. VTP neither invited the evaluators to attend nor

2. Blackout Period.

The bidding instructions address communications taking place between the time the solicitation is issued and the time the notice of intent to award is posted - a blackout period. In this case, the blackout period ran from September 4, 2003 to November 12, 2003. The letter from Ms. Moore is undated and unsigned. Mr. Fusco has no record nor recollection of the date the letter was received by his office. Arguably, the text of the letter suggests that it was written during the time between the cancellation of a prior solicitation and the issuance of this solicitation.

This month a Request for Proposals will be issued by Michael Spicer, Chief Procurement Officer for ITMO. Beeline was a finalist in the prior Request for Proposals before that initiative was terminated.

VTP argues that the reference to “This month” would restrict creation to the month of September. VTP then suggests that it is improbable that the letter was written and delivered between September 1, 2003, and September 4th; however, VTP offered no evidence, testimony, or proof to substantiate its belief that the letter was either written during the month of September 2003 or delivered to Mr. Fusco after the 4th of September. If one were to assume that there were delays in issuing the first (cancelled) solicitation, the reference to “this month” could easily have been August or perhaps July and the letter delivered to Mr. Fusco well in advance of the issuance of the solicitation.

3. Harmless Error

Even assuming VTP had provided evidence that Beeline violated the bidding instructions, VTP has failed to provide any evidence whatsoever that the alleged violation effected the outcome of the award. In order to prevail, a protester must show not simply a significant error in the procurement process, but also that the error was prejudicial. A vendor is not prejudiced by an error which does not effect the outcome of the award,⁴ and such harmless error is not grounds for upsetting an award.⁵

requested that the CPO secure their attendance.

⁴ GTE Sprint Communications Corp. v. Public Service Commission of South Carolina, 341 S.E.2d 126 (S.C. 1986) ("Where a party shows no prejudice, the error, if any, is harmless.").

⁵ Protest of PS Energy, Case No. 2002-9 ("This motion was based on Panel precedent and long standing law that harmless error is not grounds to reverse or in this case not grounds to find the evaluation arbitrary and capricious."). See also Protest of Conway Child Development Center, Case No. 1988-11 (denying a protest when the alleged error "would not have changed the outcome"). Also Appeal of Danrenke Corp., 93-1 BCA

The Panel's position on harmless error is illustrated by its opinion in Protest of First Sun EAP Alliance, Inc., Case No. 1994-11.

First Sun questions the lack of bias of Dr. Frank Raymond, one of the evaluators. However, the Panel does not need to determine the issue of Dr. Ramond's alleged bias, because with or without bias, the outcome of the award is not effected. Nor has First Sun shown that Dr. Raymond's alleged bias is any way effected the scores of the other evaluators. Even if Dr. Raymond is biased, his scores do not make a difference in the outcome of the award. . . . If an evaluator's score is erroneous, arbitrary, capricious or even biased, but it does not effect the outcome of the award, then it may not effect the finality of the award.

Protest of First Sun EAP Alliance, Inc.

In order to determine which proposal is most advantageous, the state - as it did here - routinely relies on a panel of evaluators to score proposals for their technical merits. Had the Moore Letter been mailed directly to an evaluator, prejudice might be found. Here, the communication was made with Mr. Fusco, not an evaluator. Had Mr. Fusco - after receiving the letter - called an evaluator and lobbied on Beeline's behalf, prejudice might be found. However, Mr. Fusco was not an evaluator and, by his own testimony, did not communicate with the evaluators regarding the letter. In fact, there is no evidence whatsoever that the communication to Mr. Fusco had any impact at all on any aspect of the procurement process.

At the hearing, VTP attempted to rely on the fact that the letter reached the evaluators as a part of the Beeline's proposal. However, including such a letter in the proposal does not violate the bidding instructions at issue. To the contrary, the proposal is the very vehicle by which offerors should communicate with the evaluators. As for the content, the letter amounted to little more than a sales pitch by an employee of the offeror. Ms. Moore, a very successful native of South Carolina for whom the University of South Carolina's Moore School of Business is named, currently serves as Director of MPS Group, Inc., of which Beeline is a division. In her capacity as a corporate director,

25,365, 1992 WL 201036 ("[W]here an agency's violation of statute or regulations has no prejudicial effect on the procurement, the transgression constitutes harmless error which does not warrant altering the outcome of the procurement.")

it is appropriate for her to write letters endorsing a division of her corporation. This letter is little more than an endorsement of Beeline and its product

DETERMINATION

The bidding instruction at issue reads as follows:

CONTACT LIMITATION

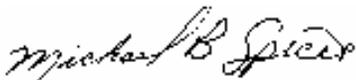
By submission of a response to this RFP, vendor agrees that during the period following issuance of the proposal and prior to the statement of intent to award, vendor shall not discuss this procurement with any party except members of the INFORMATION TECHNOLOGY MANAGEMENT OFFICE or other parties designated in this solicitation. OFFERORS shall not attempt to discuss or attempt to negotiate with the using Agency, any aspects of the procurement without the prior approval of the buyer responsible for the procurement.

This generic clause is used without modification in every manner of ITMO solicitation. As discussed above, it is directed at communications that attempt to discuss or negotiate aspects of a procurement with an improper party between the time the solicitation was issued and the time the notice of intent to award was posted.

The limitation on contact serves a variety of purposes. First, it helps to insure that all bidders receive accurate and timely information concerning the solicitation by routing all information through ITMO or someone it designates. Second, it communicates that negotiations - should they take place - can be conducted only by ITMO or its designee. Third, it telegraphs that improper attempts to influence the process - such as communicating with an evaluator during the evaluation process - is improper. None of these purposes are violated by the facts of this case.

VTP failed to meet its burden of proof that the letter from Ms. Moore violated the bidding instructions or in any way prejudiced VTP. Accordingly, VTP's protest is denied.

For the Information Technology Management Office



Michael Spicer

Chief Procurement Officer

December 29, 2003

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4210, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten calendar days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the Panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Additional information regarding the protest process is available on the internet at the following web site:

<http://www.state.sc.us/mmo/legal/lawmenu.htm>

NOTE: Pursuant to Proviso 66.1 of the 2002 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel [filed after June 30, 2002] 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(4). . . . 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 hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2002 S.C. Act No. 289, Part IB, § 66.1 (emphasis added). PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

Attachment 1



EXHIBIT

4

Frank Fusco
Executive Director
State of South Carolina
State Budget and Control Board
P.O. Box 12444
Columbia, SC 29211

Dear Frank:

In addition to proudly being a resident of South Carolina, I also serve as a Director for MPS Group, Inc., a Fortune 1000 professional services company that is publicly traded on the New York Stock Exchange. A division of MPS Group, Beeline, is actively pursuing an opportunity with the State of South Carolina Information Technology Office (ITMO) to provide them with a managed e-procurement solution for information technology temporary staffing. Beeline's solution may provide direct labor savings of 5-15%, which is especially helpful with the current cost savings initiative being undertaken by the State.

Companies such as Merrill Lynch, ChevronTexaco, BMW Manufacturing, and JPMorganChase have selected Beeline as their solution to manage their temporary workforce. Several states are currently evaluating the use of Beeline. In addition to the cost savings of Beeline, there would be no cost to the State for this product. Beeline's revenue model is funded entirely by the State's suppliers.

I recommend Beeline as a product and the company which stands behind it, and hope the State will give this company careful consideration. This month a Request for Proposal will be issued by Michael Spicer, Chief Procurement Officer for ITMO. Beeline was a finalist in the prior Request for Proposal before that initiative was terminated. Beeline personnel have recently met with Michael Spicer to discuss the benefits of their solution.

Thank you for your consideration of Beeline. I appreciate any input you may offer to ITMO.

Sincerely,

Darla Moore

Cc: Michael Spicer, Wanda Dixon

Attachment 2



Received
12/5/03
9:38 AM
MSS

Daniel J. Ballou
dballou@kennedycovington.com
803.329.7609 (Voice)
803.980.7869 (Fax)

December 4, 2003

Via Federal Express

Mr. Michael Spicer
Chief Procurement Officer
Information Technology Management Office
4430 Broad River Road
Columbia, South Carolina 29210

Re: Solicitation Number 04-56172
Supplemental Notice of Protest

Dear Mr. Spicer:

This firm has been retained to represent Venturi Staffing Management Solutions (Venturi) in the above matter. This letter supplements the letter dated November 25, 2003, from Venturi protesting the intent to award the above Solicitation. This supplemental notice of protest arises from the additional information provided to us by Wanda Dixon on November 20, 2003, relative to the scoring of this Solicitation by the Information Technology Management Office, and is submitted within 15 days of our receipt of that information.

Based upon this additional information, which was not previously available to Venturi, we add the following grounds for protest of the intent to award:

1. The Request for Proposal failed to adequately explain the scoring process, including but not limited to the relative weighting of the various factors in Phase I and Phase II;
2. The RFP Award Criteria failed to disclose that the Phase II evaluation would change the relative weighting of the various factors stated in Phase I;
3. The RFP Award Criteria failed to disclose that the Phase I factors would not be independently evaluated in connection with the demonstration portion of the Phase II evaluation;

KENNEDY COVINGTON FORDPULI & HICKMAN, L.L.P.
CHARLOTTE RALEIGH ROCK HILL

www.kennedycovington.com
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facsimile 803.329.7877

FIRST UNION CENTER, 0165790.01 MAIN STREET
3rd FLOOR, POST OFFICE BOX 11429
ROCK HILL, SOUTH CAROLINA 29731-1429

Attachment 2

Mr. Michael Spicer
December 4, 2003
Page 2

4. The RFP Award Criteria did not disclose that the relative importance of the Phase I factors would change in the Phase II evaluation;

5. The non-responsive information referenced in Venturi's original protest affected, or had the potential to affect, the subjective scoring component of the Phase II evaluation; and

6. Because of concerns from a response by Venturi to a prior RFP, we provided additional information which may have clouded or confused the presentation of the financial information. We are concerned that this presentation may have prejudiced Venturi in the review of its financials in the Phase I and II evaluations.

Thank you for your consideration of this protest. Please do not hesitate to contact us with any questions or concerns you may have in this regard. We look forward to discussing these issues with Wanda Dixon on December 10, 2003.

Very truly yours,



Daniel J. Ballou
For the Firm

DJB/lm

cc: Jim Rice
Ken Bramlett, Esq.
Jamiel Saliba

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Attachment 3

STATE OF SOUTH CAROLINA)	BEFORE THE
)	CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	
IN RE: SUPPLEMENTAL NOTICE)	MOTION TO
OF PROTEST BY VENTURI)	DISMISS
TECHNOLOGY PARTNERS)	
<hr/>)	

The Information Technology Management Office (ITMO) hereby moves to dismiss the supplemental notice of protest dated December 4, 2003, filed by Kennedy Covington, Attorneys at Law, on behalf of Venturi Technology Partners (Venturi) on the basis that this protest is untimely filed. This matter is before the Chief Procurement Officer on Venturi’s protest pursuant to S.C. Code Ann. §§ 11-35-4210(1):

§ 11-35-4210. Authority to Resolve Protested Solicitations and Awards.
(1) Right to Protest; Exclusive Remedy. Any prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2) below within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment thereto, if the amendment is at issue.
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) below within fifteen days of the date notification of award is posted in accordance with this code.

Solicitation 0-S6172 for vendor management services for the State of South Carolina was issued by the ITMO on September 4, 2003. Amendment 1 was issued on September 17, 2003, with answers to questions. Amendment 2 was issued on September 18, 2003, to clarify the answer to a question. Amendment 3 was issued on October 1, 2003, to clarify a specification. Proposals were received on October 2, 2003.

Venturi is protesting the specifications published in the Request for Proposal (RFP) issued September 4, 2003. Section 11-35-4210(1) grants prospective bidders the opportunity to protest issues contained in the

RFP within 15 days of the date of issuance of that RFP. Venturi filed its Supplemental Notice of Protest with the Chief Procurement Officer on December 4, 2003, eighty-six (86) days after the specifications in question were issued. Even if the Supplemental Notice of Protest issues dated December 4, 2003, apply to the Intent to Award as Venturi contends, the protest is still untimely filed. The Intent to Award was issued on November 12, 2003. Section 11-35-4210(1) grants prospective bidders the opportunity to protest issues in connection with the intended award within 15 days of the date the notification of award is posted. The Supplemental Notice of Protest was filed on December 4, 2003, twenty-two (22) days after the Intent to Award was issued.

The State respectfully requests the CPO dismiss this protest, without a hearing, on the grounds that it was not timely filed.

Respectfully Submitted,



Wanda J. Dixon
Information

Technology

Management

Office

Attachments: Solicitation 04-S6172

Amendment 1
Amendment 2
Amendment 3
Intent to Award

Attachment 4

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
IN RE: PROTEST BY VENTURI)
)
TECHOLOGY PARTNERS)
_____)

**BEFORE THE
CHIEF PROCUREMENT OFFICER**

**MOTION TO
DISMISS**

The Information Technology Management Office (ITMO) hereby moves to dismiss the protest of Venturi Technology Partners (Venturi) based clear and compelling precedent. This matter is before the Chief Procurement Officer on Venturi’s protest pursuant to S.C. Code Ann. §§ 11-35-4210(1). On November 26, 2003, Venturi filed a protest of the Intent to Award based on the grounds that the winning offeror made an “inappropriate attempt” to “influence the outcome of this solicitation and may in fact have influenced the decision to award” by including a letter from Ms. Darla Moore addressed to Mr. Frank Fusco in their proposal. Venturi also adds in the protest letter that “references are to be included in paragraph C. and then only in conjunction with a similar project.”

It is not unusual for a letter of support such as the one to Mr. Fusco from Ms. Moore to be included by an offeror in their proposal. The RFP does not prohibit an offeror from including a letter of support. Section III, Information for Offerors to Submit, of the RFP states that the “Offeror should submit, as a minimum, the following information...” The letter of support was not presented as a reference by Beeline as alleged by Venturi and the letter of support was not treated as a reference by the evaluation panel members as alleged by Venturi. No discussion of the letter ever took place among the evaluation panel members during the evaluation discussion period.

Specific to Venturi’s protest issues, the procurement process was conducted according to S.C. Code Ann. §§ 11-35-1530(5) and (7).

(5) Evaluation Factors. The request for proposals shall state the relative importance of the factors to be considered in evaluating proposals but shall not require a numerical weighting for each factor. Price may but need not be an evaluation factor.

(7) Selection and Ranking. Proposals shall be evaluated using only the criteria stated in the request for proposals and there must be adherence to any weightings that have been previously assigned. Once evaluation is complete, all responsive offerors shall be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the request for proposals. If price is an initial evaluation factor, award shall be made in accordance with Section 11-35-1530(9) below.

Venturi, in their protest letter, assumes that the letter to Mr. Fusco from Ms. Moore influenced the evaluator's scores. Given that the evaluation process is based on an independent evaluation, each evaluator arrives at their scores using their own conclusions and judgments. The Procurement Review Panel (Panel) has set clear precedent in case law on its position regarding evaluators and their judgment. In Case Number 1992-16, Protest of Coastal Rapid Public Transit Authority; Case Number 1993-16, Protest of NBS Imaging Systems, Inc.; and Case Number 1994-8, Protest of Volume Services, the Panel, in its Conclusion of Law states, "The Panel will not substitute its judgment for the judgment of the evaluators."

The ITMO requests the CPO dismiss this protest and allow the State to proceed with this procurement without continued delay.

Respectfully Submitted,



Wanda J. Dixon
Information

Technology

Management

Office

Attachment 5

Daniel J. Ballou
dballou@kennedycovington.com
803.329.7609 (Voice)
803.980.7869 (Fax)

December 17, 2003

Via E-Mail: mspicer@cio.sc.gov
and First Class Mail

Michael Spicer
Chief Procurement Officer
Information Technology Management Office
4430 Broad River Road
Columbia, South Carolina 29210

Re: Solicitation Number 04-S6172
Response to Motions to Dismiss
Our File No.: 0029149.00001

Dear Mr. Spicer:

This letter will serve as a response on behalf of Venturi Technology Partners (Venturi) to the Motions to Dismiss filed by Wanda Spicer on behalf of the Information Technology Management Office (ITMO), In Re Supplemental Notice of Protest by Venturi Technology Partners, received by e-mail on December 10, 2003, and In Re Protest by Venturi Technology Partners, received by e-mail on December 12, 2003. As you know, a hearing on this matter has been scheduled for Thursday, December 18, 2003.

1. In Re Supplemental Notice of Protest by Venturi Technology Partners

ITMO first moves to dismiss Venturi's supplemental protest on the issue of timeliness, arguing that the December 4, 2003, filing was more than 15 days after the Notice of Intent to Award and the issuance of the RFP. ITMO mischaracterizes this supplemental protest as relating to the specification of the RFP. As set forth in the text of the Supplemental Protest, the issues raised therein arise from the scoring sheets that were provided to Venturi on November 20, 2003.

Prior to receiving the scoring sheets, Venturi did not have notice of the irregularities that gave rise to the protest. For example, although the RFP stated that the factors indicated in the Award Criteria were listed in order of relative importance, it did not disclose that certain factors would change in their relative weight between Phase I and Phase II. This issue and the others stated in the Supplemental Protest could not have come to light until Venturi had reviewed the

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scoring sheets. Until the actual scoring procedures were revealed on November 20, 2003, Venturi had no reason to believe it had a basis for protest.

It is fundamental that a right to protest must be accompanied by meaningful notice of the issues underlying the protest. These due process rights are guaranteed by Article I, Section 3 of the South Carolina Constitution, and yet are ignored by ITMO's motion to dismiss. Since ITMO does not contest the substantive basis for the appeal in its Motion, and does not otherwise address the issue of due process rights, Venturi respectfully requests that this Supplemental Protest be allowed to proceed to a hearing on its merits.

2. In Re Protest by Venturi Technology Partners

ITMO next moves to dismiss Venturi's original Protest filed November 26, 2003, based upon the deference given evaluators by the Procurement Review Panel. Such deference does not extend to decisions that are found to be either arbitrary or capricious in nature. Chemical Leaman Tank Lines, Inc. v. S.C. Public Service Comm'n, 258 S.C. 518, 189 S.E.2d 296 (1972). In this matter, Venturi asserts that the process for awarding this contract has been tainted by an apparent violation of the contact limitation rules contained in the RFP, and ITMO's arbitrary and capricious failure to follow its own rules and procedures.

The RFP requires all submitting vendors to agree "that during the period following issuance of the proposal and prior to the statement of intent to award, vendor shall not discuss this procurement with any party except members of the INFORMATION TECHNOLOGY MANAGEMENT OFFICE or other parties designated in this solicitation." The proposal in this matter was issued on September 4, 2003 and the Intent to Award was dated November 12, 2003.

The original Protest noted that the October 2, 2003, Beeline application included an *undated* letter from Darla Moore to Frank Fusco endorsing Beeline for this project. Mrs. Moore is a member of the board of directors of the parent corporation of Beeline, and Mr. Fusco is the Executive Director of the State Budget and Control Board. Contact with him by a vendor during the contact limitation period is not authorized under the rules of the RFP.¹

Venturi has specifically requested information, through Wanda Dixon, from both ITMO and the Budget and Control Board relating to the date of receipt of the Moore letter. Clearly, it was submitted on October 2, 2003, with the application package, and Mrs. Dixon indicated that she did not receive another copy of the letter and that no other record exists of the date of receipt, either at ITMO or the Budget and Control Board. Consequently, the evidence indicates that this letter was submitted during the contact limitation period and therefore in violation of the RFP.

¹ Moreover, Beeline's application provided incomplete responses to the request for references, failing to provide any details of similar services it had provided demonstrating its ability to manage IT temporary services, or the time periods of any such projects.

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December 17, 2003
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The integrity of the procurement process demands that the rules imposed upon applicants be applied fairly and consistently to all parties. The rules as set forth in the RFP clearly prohibit unauthorized contact during the limitation period between the issuance of the RFP and the date of the Intent to Award. ITMO fails to even address the question of timing in its Motion to Dismiss, preferring to merely claim that the letter had no substantive affect upon the evaluators.

While the Moore letter is itself unresponsive to the RFP, and should have been rejected outright, ITMO's argument misses the significance of the protest. The fact that contact was made with an extremely influential person outside of ITMO, copied to ITMO, for purposes of influencing the procurement decision during the contact limitation period shows a clear violation of the procurement rules, and becomes a taint on the overall process. The fact that ITMO is unable to identify any other date on which the Moore letter was received further questions the integrity of the process, by undermining any means to verify that the rules have otherwise been followed.

For these reasons, Venturi respectfully requests that the Motions to Dismiss be denied, that these matters be heard in the normal course and that the Intent to Award be rescinded and the RFP resubmitted at a later date.

Very truly yours,

Daniel J. Ballou
For the Firm

DJB/lm

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