

STATE OF SOUTH CAROLINA)
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COUNTY OF RICHLAND)
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IN RE:)
)
Protest of Oracle USA, Inc.)
Appeal of Oracle USA, Inc.)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

ORDER

Case No. 2007-10

This matter came before the South Carolina Procurement Review Panel for a hearing on December 4, 2007. The Panel heard an appeal of the October 8, 2007, decision of the Chief Procurement Officer for Information Technology (the CPO) by Oracle USA, Inc. (Oracle). The CPO issued a decision upholding the University of South Carolina's (USC) intent to award contract USC-RFP-0943-BB, Enterprise Resource Planning Project (ERP), to SunGard Higher Education, Inc. (SunGard). Oracle sought further administrative review before the Panel contending that its proposal was responsive to the RFP or that if it was non-responsive, it was a minor informality or irregularity that should have been waived.¹

At the hearing Oracle was represented by Michael H. Montgomery, Esquire. SunGard was represented by John E. Schmidt, III, Esquire, and Michael S. Cashman, Esquire. USC was represented by George W. Lampl, III, Esquire. The CPO was represented by Keith C. McCook, Esquire.

FINDINGS OF FACT

In December of 2006, USC issued USC-RFP-0943-BB seeking proposals for its Enterprise Resource Planning Project (ERP), which contemplates an extensive overhaul of

¹ In its initial protest letter, Oracle also asserted that SunGard's proposal was non-responsive and that USC should have applied S.C. Code Ann. Regs. 19-445.2095 I (1), I (2), and (J). Oracle abandoned these grounds before the Panel.

USC's student, sponsored programs, financial, and human resources enterprise information systems. The ERP "is a software suite and contains products designed to integrate data and business functions across campuses, colleges, departments and offices." University of South Carolina, <http://www.sc.edu/OneCarolina/about.shtml>. USC's RFP asked offerors to submit proposals by three Lots: Lot 1 - Student, Lot 2 - Human Resources, and Lot 3 - Finance (this Lot includes Sponsored Programs). The RFP specified that each offeror had to respond to all Lots and that an award would be made by individual Lot. R. at 54. The RFP also specified that an "[o]fferor must respond to each Lot to be considered responsive." Furthermore, the RFP requested individual Lot pricing for Task Order #1 (a fit-gap analysis phase). R. at 59. Bruce Breedlove, USC's procurement officer, testified before the Panel that the RFP was structured in this way to allow USC the flexibility of choosing the best vendor for each module. Additionally, the RFP addressed the issue of responsiveness:

(c) Responsiveness. Any Offer which fails to conform to the material requirements of the Solicitation may be rejected as nonresponsive. Offers which impose conditions that modify material requirements of the Solicitation may be rejected. If a fixed price is required, an Offer will be rejected if the total possible cost to the State cannot be determined. Offerors will not be given an opportunity to correct any material nonconformity. Any deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer.

R. at 46. Finally, price was the second most important evaluation factor. R. at 72.

In a summary table, an offeror was to provide subpricing within each Lot for the following categories: Total Software, Total Implementation, 5 year Annual Maintenance Costs, Task Order #1 Costs, and 5 Year Total Costs. R. at 59. The summary table also addressed the likelihood of redundant costs: Offerors were asked to indicate the savings to USC if an award

was made as a whole solution rather than by individual Lot. Below is a reproduction of the summary chart from the RFP:

	Total Software	Total Implementation	5 Year Annual Maintenance Costs	Task Order #1 Cost	5 Year Total Costs
Lot 1 - Student					
Lot 2 - HR					
Lot 3 - Finance					
Total Redundant Costs					

R. at 59.

USC also requested that offerors submit a detailed cost table as an attachment to their proposals. The detailed cost table, which is too large to reproduce in its entirety here, required offerors to list and price the software products necessary for each Lot's proposed solution. R. at 74-75. At the end of each Lot's detailed list, an offeror was to provide the total costs for Implementation, Training, and Task Order #1 for each Lot. By way of example, this part of the table for Lot 1 is reproduced below:

Description	Total Cost Lot 1
Implementation	
Training	
Task Order #1 for Lot 1	

R. at 74. Thus, the RFP requested that pricing information be listed in two different locations, the summary table and the detailed cost table.

On January 29, 2007, USC received two proposals in response to the RFP, one from Oracle and one from SunGard. Oracle's summary table, as modified to remove dollar amounts² is reproduced below³:

	Total Software*	Total Implementation**	5 Year Annual Maintenance Costs***	Task Order #1 Cost****	Training*****	5 Year Total Costs
ERP Bundle	\$	\$	\$	\$	\$	\$
Lot 1 - Student	\$	\$	\$			\$
Lot 2 - HR	\$	\$	\$			\$
Lot 3 - Finance	\$	\$	\$			\$
Total Redundant Costs	\$	\$	\$			\$

The asterisks in Oracle's summary table refer to notes appended to the table. The notes that are pertinent to the issue of Oracle's responsiveness are reproduced below:

****NOTE – Oracle has assumed for pricing, Task Order 1 will be purchased as a bundled PeopleSoft Enterprise solution. Due to the many solution permutations possible, as required to fulfill the requirements of Task Order 1, we can not [sic] offer USC an individual Lot price at this time. In the event a single Lot is purchased, Oracle will work with USC to determine individual Lot pricing.

NOTE – Task Order #1 Costs include Labor Cost (including travel and expenses), eStudio, De Minimis and Phase Assistance.

*****NOTE – Oracle will provide appropriate Training costs per lot based on a further understanding of the required number of client attendees per course.

A comparison of Oracle's summary table and the one provided in the RFP reveals that Oracle's summary table added a column labeled "Training" and a row labeled "ERP Bundle."

² The dollar sign (\$) represents actual dollar amounts Oracle entered into the chart.

³ This chart is copied from Exhibit 4 before the CPO and is subject to the CPO's protective order of November 29, 2007. A redacted copy of the chart is located on page 220 of the Record.

Oracle's ERP bundle gave pricing for a bundled solution for all three Lots, Task Order #1, and Training. The pricing of the ERP bundle reflects the redundant costs savings to USC (for Total Software, Total Implementation, and 5 Year Annual Maintenance Costs) if USC were to purchase a bundled solution for all three Lots rather than solutions for individual Lots. However, as noted on the table above, no prices were given by Lot for Task Order #1 or for Training. Furthermore, no prices were given under Task Order #1 or Training reflecting redundant costs.

Oracle's Vice President for Government and Education, Stephen Holdridge, testified before the Panel that Oracle included pricing for a bundled ERP solution even though it was not called for in the RFP because Oracle believed that the bundled solution would best satisfy the RFP's goal of an integrated solution. Mr. Holdridge testified that Oracle based its recommendation of a bundled solution on its expertise and experience with other projects similar to USC's ERP.

The total cost portion of Oracle's detailed cost table for Lot 1, as modified to remove dollar amounts⁴, is reproduced below⁵:

Description	Total Cost Lot #1
Implementation	\$
5% De Minimis	\$
5% Phase Assistance Fee	\$
Managed Implementation Services (eStudio)	\$
Training (Oracle University)	*(Please see note)
Task Order #1 for Lot 1	*(Please see note)

*NOTE – Oracle will provide appropriate Training costs per lot based on a further understanding of the required number of client attendees per course.

⁴ The dollar sign (\$) represents actual dollar amounts Oracle entered into the chart.

⁵ This chart is copied from Exhibit 12 before the CPO and is subject to the CPO's protective order of November 29, 2007.

****NOTE** – Oracle has assumed for pricing, Task Order 1 will be purchased as a bundled PeopleSoft Enterprise solution. Due to the many solution permutations possible, as required to fulfill the requirements of Task Order 1, we can not [sic] offer USC an individual Lot price at this time. In the event a single Lot is purchased, Oracle will work with USC to determine the individual Lot pricing.

A comparison of Oracle's detailed cost table with the one provided in the RFP reveals that Oracle's detailed cost table added three additional rows and labeled them "5% De Minimis," "5% Phase Assistance Fee," and "Managed Implementation Services (eStudio)." Oracle provided pricing for these items as well as for Implementation on its detailed cost table. Oracle acknowledged at the hearing before the Panel that the corresponding portions of the detailed cost table for Lots 2 and 3 also provided pricing for Implementation, 5% De Minimis, 5% Phase Assistance Fee, and Managed Implementation Services (eStudio). These corresponding portions also referenced the same notes regarding Training and Task Order #1. For each Lot, the prices entered on the detailed cost table for Implementation, 5% De Minimis, 5% Phase Assistance Fee, and Managed Implementation Services (eStudio) were added together and entered into the summary table under Total Implementation. Individual Lot prices for Training (Oracle University) and Task Order #1 are not provided anywhere in Oracle's detailed cost table.

On February 1, 2007, the USC procurement office contacted Jay Reilly, Oracle's sales representative, regarding Oracle's proposal because it did not contain individual Lot pricing for Task Order #1 or for Training. R. at 204, 209. Mr. Reilly emailed a response to USC on February 2, 2007. R. at 213. Mr. Reilly's email stated in part:

The Oracle Team is looking forward to working together on your implementation. We believe the two days of presentations in Columbia with you and the selection committee will provide an opportunity to further clarify our proposal, especially as it relates to the implementation and training.

We welcome an open dialog [sic] surrounding Task Order 1. In our RFP response, we have assumed the purchase of PeopleSoft Enterprise for all three

Lots and this price was reflected in the combined proposal cost. Given the list of deliverables required in Task Order 1 and the number of potential interface and integration requirements in a multi-vendor environment, further clarification is warranted in order to accurately provide a fixed duration/cost. We look forward [sic] obtaining that level of understanding as we move through the process.

R. at 213.

Mr. Breedlove, USC's procurement officer, found that this email did not answer USC's concerns about Oracle's proposal, and he determined that Oracle's bid was non-responsive because its summary table did not include individual Lot pricing for Task Order #1. R. at 205. He also found the proposal to be non-responsive because its detailed cost table did not include individual Lot pricing for Training. R. at 210. Mr. Breedlove determined that these omissions rendered USC unable to determine the total cost for the proposal. R. at 205, 210. Mr. Breedlove made these determinations of non-responsiveness on February 8, 2007. R. at 201-10.

In the hearing before the Panel, Mr. Breedlove testified that he called Mr. Reilly to set up a meeting after he had determined Oracle's proposal to be non-responsive. Mr. Breedlove explained that he did so because he knew that Oracle had employees on stand-by to participate in demonstrations for USC. Unaware of USC's finding of non-responsiveness and in anticipation of this meeting, Mr. Reilly sent another email to USC on February 16, 2007. R. at 215. Attached to this email was an undated letter from Mr. Holdridge which asserted that "Oracle provided USC the 'total possible cost to the State' for Task Order #1 and Training" and that Oracle's proposal was "fully responsive to the RFP." R. at 216. Despite the assertion that its proposal was responsive, Oracle proposed a solution: "[t]o the extent the State considered the absence of a separate Task Order #1 cost and a Training cost for each Lot a deficiency USC [could] prorate the Task Order 1 and training costs evenly among the three lots." R. at 216.

USC met with Oracle representatives approximately a week after Mr. Reilly's February 2 email and informed them that their proposal had been determined to be non-responsive. In response to that meeting, Mr. Reilly sent USC an email on February 26, 2007, with another undated letter from Mr. Holdridge. That letter asserted:

Our approach is to conduct this comprehensive discovery and fit/gap process (as outlined and priced for the ERP Bundle) for all three individual lots. Accordingly, we confirm that the total cost figures for each Lot in Section 12, Attachment A, beginning on page 347 of our proposal, include the Task Order 1 activities and the training. That is, we will provide these services within the cost of the overall implementation price for each lot set forth in our proposal.

R. at 219.

USC posted a notice of intent to award the contract to SunGard on August 10, 2007, and Oracle timely filed a protest with the CPO. The intent to award notice was suspended on August 20, 2007. The CPO conducted a protest hearing and issued a decision on October 8, 2007. Oracle appealed that decision by letter dated October 18, 2007.

CONCLUSIONS OF LAW

Motions

Prior to the hearing, USC, SunGard, and the CPO moved to exclude irrelevant evidence before the Panel. Specifically, USC, SunGard, and the CPO argued that Oracle should not be allowed to introduce evidence about a prior procurement relating to USC's ERP because that procurement, which was canceled, had not been protested and because each solicitation must be reviewed on its own merits. The Panel has consistently held that procurements not protested to the Panel are outside of its jurisdiction and irrelevant to a subsequent protest in a separate solicitation. *In re: Protest of Two State Construction Co.*, Case No. 1996-2; *In re: Protest of Accent Contracting, Inc.*, Case No. 2002-2. Therefore, in light of Panel precedent, the Panel

found that evidence of a prior procurement relating to USC's ERP was irrelevant and inadmissible in the protest currently before the Panel. The Panel granted the motions to exclude irrelevant evidence.

USC, SunGard, and the CPO also moved to dismiss assertions 6, 7, and 10 in Oracle's appeal letter, R. at 9, because those assertions raised questions regarding the previous procurement. Additionally, USC and SunGard moved to dismiss assertions 6, 8, and 9 in Oracle's appeal letter, R. at 9, because those assertions raised questions which were not presented to the CPO. Based on its previous ruling excluding irrelevant evidence of prior procurements, the Panel granted the motion to dismiss as to assertions 7 and 10. The Panel also found that assertions 6 and 8 raised issues not presented before the CPO and granted the motion to dismiss as to those assertions as well. *See In re: Protest of Action Mailers*, Case No. 1993-1 (where the Panel declined to address two appeal issues not first raised to the CPO). Finally, the Panel denied the motion as to assertion 9, finding that assertion 9 did relate to the issue of Oracle's responsiveness.

Oracle's Responsiveness

A "responsive bidder or offeror" is defined as "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals." S.C. Code Ann. § 11-35-1410(7) (Supp. 2006). A bid that does not conform in all material aspects to the RFP should be rejected. S.C. Code Ann. Regs. 19-445.2070(C) (Supp. 2006).⁶ However, a failure to conform with the exact requirements of an RFP may be waived if it is "[a] minor

⁶ Regulation 19-445.2070 is made applicable to competitive sealed proposals by Regulation 19-445.2095(G), S.C. Code Ann. Regs. (Supp. 2006).

informality or irregularity . . . which is merely a matter of form” that “[has] no effect or merely a trivial or negligible effect on total bid price . . . and the correction or waiver of which would not be prejudicial to bidders.” S.C. Code Ann. § 11-35-1520(13) (Supp. 2006).⁷ Section 11-35-1520(13) also provides a non-exclusive list of examples of minor informalities or irregularities, none of which has application in the present case. The Panel has previously noted that an RFP requirement is not material or essential “if variation from it has no, or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured.” *In re: Protest of National Computer Systems, Inc.*, Case No. 1989-13. Therefore, the pivotal question is whether Oracle’s proposal conformed in all material aspects to the RFP. We find that Oracle’s proposal was not materially responsive to the RFP.

As noted above, the RFP required offerors to respond with solutions for each of the three Lots, and price was the second most important evaluation factor for the first phase of the RFP. Although nothing in the RFP precluded proposing a bundled solution, offering a bundled solution did not relieve an offeror from the obligation to respond to each Lot individually. Upon opening Oracle’s sealed proposal, Mr. Breedlove correctly determined that the proposal omitted individual Lot pricing for Task Order #1 and Training. Additionally, Mr. Breedlove read the numerous notes appended to the summary table and the detailed cost table, which clearly indicated that Oracle was unable to provide individual Lot pricing for Task Order #1 or for Training. Mr. Breedlove reasonably concluded that, given the blank boxes in the two tables and the explanations in the appended notes, Oracle had failed to provide all the pricing necessary for the State to be able to determine the total cost of the project. Although he was not required to do

⁷ This provision is made applicable to competitive sealed proposals by Regulation 19-445.2095(E), S.C. Code Ann. Regs. (Supp. 2006).

so, Mr. Breedlove sought clarification from Oracle, and received confirmation from Mr. Reilly that Oracle could not provide individual Lot pricing for Task Order #1 or training without further clarification, which Oracle assumed would occur during the demonstrations at USC. R. at 213. As noted above, Mr. Breedlove made his determination of non-responsiveness after receiving the February 2, 2007, email from Mr. Reilly.

The Panel need not consider the correspondence from Oracle after this determination of non-responsiveness because it was not sent in response to any further questions from USC. However, a review of the correspondence demonstrates that Oracle's original proposal did not contain the requested individual Lot pricing. Interestingly, Oracle has provided no fewer than four explanations for the omitted prices: (1) that it could not calculate individual Lot prices for Task Order #1 or for Training; (2) that it had included those costs in the 5 Year Total Cost column in the summary table; (3) that the prices listed for Task Order #1 and Training in the ERP bundle on the summary table could be pro-rated across all three Lots; and (4) that the prices listed for Task Order #1 and Training in the ERP bundle on the summary table should be carried down for each Lot.⁸ These varied explanations illustrate the difficulty Mr. Breedlove had in determining the total possible cost to the State. We conclude that Oracle failed to conform to a material requirement of the RFP when it failed to provide individual Lot pricing for Task Order #1 and Training in its proposal.

Minor Informality or Irregularity

Oracle has argued that the omission of per Lot pricing for Task Order #1 and Training was a minor informality which should have been waived by USC. The Panel has adopted a two-

⁸ Mr. Reilly provided this explanation during his testimony before the Panel.

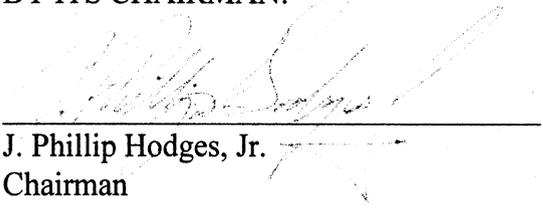
part analysis for deciding whether a deficiency can be waived as a minor informality. *In re: Protest of Coastal Rapid Public Transit Authority*, Case No. 2000-4. The first prong of inquiry is “whether the irregularity has more than a trivial effect on price, quality, quantity, delivery or performance of the contract.” *Id.* at 6. The second prong is “whether the waiver or cure of the minor irregularity is prejudicial to the other bidders.” *Id.* The parties agree that the potential award for USC’s ERP is in the millions. Mr. Holdridge testified before the Panel that the price for Training amounted to less than 1 ½ % of the total cost of the contract, and that the price for Task Order #1 was less than 10% of the total cost. While those figures may be small in relation to the total cost, they are still substantial, not trivial or negligible, when the contract in question is a multi-million dollar one. Therefore, we find that this deficiency cannot be considered a waivable minor informality or irregularity. Having determined that the effect on price is not trivial or negligible, we need not address the question of prejudice to other bidders.

ORDER

For the reasons stated above, we find that Oracle did not conform in all material aspects to the RFP and uphold the intent to award to SunGard.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL
BY ITS CHAIRMAN:



J. Phillip Hodges, Jr.
Chairman

Columbia, South Carolina

This 17th day of December, 2007.