

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE:)	
)	Case No. 2008-4
Protest of CollegeSource, Inc.;)	
Appeal of CollegeSource, Inc.)	
)	
Solicitation No. 5400000301)	
Course Articulation and Transfer System)	
)	

This matter came before the South Carolina Procurement Review Panel (the Panel) for a hearing on December 9 and 10, 2008. The Panel heard the appeal by CollegeSource, Inc. (CollegeSource), of the August 25, 2008, decision of the Chief Procurement Officer (the CPO) for the Information Technology Management Office (ITMO). The CPO’s decision denied CollegeSource’s protest and upheld ITMO’s Intent to Award the contract for a course articulation and transfer system to AcademyOne, Inc. (AcademyOne). CollegeSource sought further administrative review before the Panel.

In the hearing before the Panel, Marcus A. Manos, Esquire, and Manton M. Grier, Jr., Esquire, represented CollegeSource. M. Elizabeth Crum, Esquire, and Sue-Ann Gerald Shannon, Esquire, represented AcademyOne. Keith C. McCook, Esquire, and Frank S. Potts, Esquire, represented the CPO.

Findings of Fact

On April 1, 2008, ITMO issued an RFP on behalf of the South Carolina Commission on Higher Education (CHE) seeking proposals for the acquisition and implementation of a statewide system “for performing academic reporting, course articulation, course transfer, and similar functions.” The statewide course articulation and transfer system, or CATS, would allow

students and higher education institutions in the state to compare course offerings between the institutions, to track degree requirements and academic progress, and to predict how coursework completed at one institution would be applied at another institution in a transfer situation.

The RFP was a “Solutions-Based Procurement,” or one in which the State states a problem and asks offerors to propose a solution to that problem. Record at 59. The RFP advised, “Through this method, the state attempts to provide the minimum amount of specifications and requirements in order not to transform this RFP into a bid.” *Id.* Seeking creative solutions, Section II of the RFP contained a general outline for offerors to use in preparing proposals. The general outline contains the following introduction:

The following outline may be helpful in preparing your proposal. Your offer should address each of the areas outlined below (as applicable) and provide the information requested. As your offer will be evaluated based on the information you provide, failure to provide a complete and comprehensive presentation of your solution could negatively [a]ffect our evaluation of your offer.

Record at 57. The general outline then lists numerous factors a proposed technical solution should include. Record at 57-58. One factor included in the general outline is the following: “3.5 Intellectual property: explain the ownership rights to all proposed intellectual property.” Record at 58.

After this general outline, the RFP contains a section entitled “Statement of Work,” which advises offerors about the nature of solutions-based procurements and notes:

Offerors’ responses to the Technical Proposal are highly encouraged to include a detailed explanation of their responses for every feature and function they can offer. However, CHE recognizes that not all offerors will be able to provide all features and functions described herein.

Record at 59. On the same page as the “Statement of Work,” the RFP included a clause alerting offerors to the possibility of discussions and negotiations. Record at 59.

Section III of the RFP, entitled “SCOPE OF WORK/SPECIFICATIONS,” details the scope of the solicitation and outlines specifications for proposed solutions. Record at 61-67. The first portion of Section III describes the functions and goals of CHE and gives a brief overview of the state’s higher education institutions. Record at 61-62. After this overview, Section III contains a heading labeled “Requirements and Required Information.” Record at 62. The first subsection under this heading, labeled “A. Introduction,” lists the objectives for CATS. Record at 62-63. The next subsection is labeled “B. Application Business Requirements.” Record at 63. Directly below this heading is another heading labeled “Desired Features & Functionality.” Record at 63. The “Desired Features & Functionality” portion of Section III is similar to the general outline for solutions-based procurements discussed above, but its specifics are directed to CHE’s desired system. This portion of Section III is introduced by the following language:

The following sections contain statements concerning various desirable features and functions about which CHE, on behalf of South Carolina’s public higher education institutions, would like more information. For each numbered item, please provide as detailed a response as you deem necessary in order to explain fully how your system provides such features and functions. If your system does not include the type of feature or function described, please state so as well. If you are able to provide such functionality through customized development, please indicate so.

Record at 63. The “Desired Features & Functionality” portion of Section III lists numerous technical features a proposed solution “should” include. For example, the desired system “should be Web-enabled and accessible on any computer, anywhere, and at any time to display ‘real time’ data.” Record at 63. This portion of Section III uses the phrases “should,” “should be able to,” and “needs to” throughout when describing the eighty-five desired features and functions. Record at 63-67.

In Section V of the RFP, offerors are asked to provide information regarding their qualifications to ensure that they are responsible and eligible for award of a contract. Record at 72-75. Within Section V, under a heading labeled “Reference Information,” offerors are asked to “[p]rovide a resume for your project manager that identifies past experience implementing your application in higher education, preferably at multiple campuses of colleges and universities.” Record at 74. Several lines down from the resume request, offerors are requested to “[p]lease provide PMI certification certificates.” *Id.* A few lines down from that request, offerors are asked to “provide at least three references we can call who have used your services for a similar solicitation. These references should be from projects of similar size and scope and should be knowledgeable about each product or service you desire to provide.” *Id.* The final paragraph in the subsection under “Reference Information” provides:

The CHE shall have the right to approve/disapprove project staff proposed by the vendor. Furthermore, the CHE shall have the right to request removal of project staff at any time with appropriate notice. Do you agree to these rights? If so, please specify the period of time you would consider to be an appropriate period of notice.

Record at 75.

The next portion of Section V is labeled “QUALIFICATIONS – REQUIRED INFORMATION (JAN 2006).” Record at 75. Under this subsection, offerors “shall submit . . . [a] list of every business for which offeror has performed, at any time during the past three year(s), services substantially similar to those sought with this solicitation.” Record at 75.

Finally, Section VII of the RFP contains general and special terms and conditions that will be incorporated into the contract. One of these provisions, entitled “Ownership of Data and Materials,” provides that “All data, material and documentation . . . prepared for the state pursuant to this contract shall belong exclusively to the State.” Record at 86.

The RFP was amended once on April 25, 2008, to answer vendor questions. Record at 94-103. The opening was held as scheduled on May 13, 2008. After the evaluation and ranking, ITMO conducted negotiations with AcademyOne, the highest-ranked offeror. A signed record of those negotiations bears the date of June 19, 2008. Record at 240. On June 25, 2008, ITMO posted notice of the Intent to Award the contract to AcademyOne. On July 7, 2008, CollegeSource filed a timely protest with the CPO. The CPO conducted a hearing and issued a decision denying CollegeSource's protest on August 25, 2008.

Conclusions of Law

CollegeSource's initial protest letter before the CPO contained numerous grounds of protest, some of which were withdrawn by CollegeSource and some of which were dismissed by the CPO. In the hearing before the Panel, CollegeSource designated which issues from this initial protest letter it desired the Panel to review. Those designated issues can be summarized as three main protest grounds. First, CollegeSource alleges that AcademyOne's proposal was materially non-responsive in that it failed to offer solutions for every desired feature and functionality listed in the "Desired Features & Functionality" portion of Section III. Second, CollegeSource alleges that AcademyOne was non-responsive to the qualification requirements of the RFP and therefore did not demonstrate its responsibility. Finally, CollegeSource alleges that AcademyOne's proposal was non-responsive because it materially altered the terms and conditions of the RFP by reserving to itself ownership rights of proposed databases and software.¹ The Panel will address each of these grounds separately and in detail below.

I. AcademyOne's Responsiveness Regarding the Desired Features and Functions

¹ In its original protest letter, CollegeSource also alleged a fourth ground of protest relating to an alleged misappropriation of intellectual property. This ground was withdrawn before the Panel on November 14, 2008. With the parties' consent, the Panel Chairman considered and granted a motion to strike from the record all allegations relating to this withdrawn protest ground on December 4, 2008. The Panel notes that this ground was withdrawn because of a lawsuit filed in another jurisdiction.

CollegeSource asserts that AcademyOne's proposal is non-responsive because it failed to offer solutions for specific, mandatory requirements of the RFP. In particular, CollegeSource argues that AcademyOne's proposal did not offer the following solutions:

- (1) a direct interface between its CATS solution and the various student information systems in place at the thirty-three public colleges and universities in the state; Record at 64, RFP Section III.B. 3.3 and 3.4;
- (2) parameter based searching of multiple variables for student information; Record at 64, RFP Section III.B. 3.1;
- (3) user initiated ad hoc reporting without having AcademyOne create new "canned" reports; Record at 64, RFP Section III.B. 4.1;
- (4) "sort[ing] by an unlimited number of identifiers"; Record at 64, RFP Section III.B. 3.5;
- (5) export of student academic information to external programs; Record at 64, RFP Section III.B. 4.4;
- (6) student viewing, but not changing, of counselor- or advisor-generated plans; Record at 65, RFP Section III.B. 6.3;
- (7) student execution of "what if" scenarios; Record at 65, RFP Section III.B. 7.1;
- (8) perform reports for an individual student based on changes in catalog dates; Record at 65, RFP Section III.B. 7.2;
- (9) import externally calculated grade point averages; Record at 65, RFP Section III.B. 8.1;
- (10) provision of a broad, national base of course descriptions for access by its CATS; Record at 65, RFP Section III.B. 8.3 and 8.4;
- (11) an automated scanning engine to "[d]isplay both direct and indirect equivalency opportunities" by "look[ing] for relationships between equivalencies within the database"; Record at 65, RFP Section III.B. 8.6; and
- (12) "[e]xchange student information and coursework between institutions"; Record at 65, RFP Section III.B. 8.7.

CollegeSource argues that each of these features or functions were mandatory requirements based on the RFP's use of phrases including "should," "should be able to," and "needs to" when describing them. Based on its assertion that AcademyOne did not offer solutions for these mandatory requirements, CollegeSource argues that AcademyOne's proposal should not have been evaluated and ranked.

To determine the meaning of the words "should," "should be able to," and "needs to" as used in the RFP, the Panel must look at those words in context and not in isolation. *See In re: Protest by J & T Technology, Inc.*, Panel Case No. 1987-3 (July 13, 1987) (RFP provisions must be read in conjunction to determine whether the word "should" carries a mandatory or permissive meaning). In this case, the RFP explained that a solutions-based procurement is one in which "the state attempts to provide the minimum amount of specifications and requirements" in order to encourage flexibility and creativity. Moreover, CHE recognized that not every offeror would be able to provide every feature and function described in the RFP. In addition, the introduction to Section III. B., the section containing the specifications CollegeSource relies on, provides:

The following sections contain statements concerning various *desirable* features and functions about which CHE, on behalf of South Carolina's public higher education institutions, would like more information. For each numbered item, please provide as detailed a response as you deem necessary in order to explain fully how your system provides such features and functions. *If your system does not include the type of feature or function described, please state so as well. If you are able to provide such functionality through customized development, please indicate so.*

Record at 63 (emphasis added). Reading this paragraph in conjunction with the list of features and functions that follows it, the Panel concludes that these specifications were desired by CHE, but not required. Clearly, an offeror responding to the RFP had three options: (1) to provide a detailed response offering a feature or function; (2) to state that the solution did not include a

feature or function; or (3) to indicate that the feature or function could be provided through customized development. Because a responding offeror had these three options, it would be illogical and inconsistent for the Panel to find that the words “should,” “should be able to,” and “needs to” imposed mandatory requirements in the context of this RFP.² Therefore, the Panel finds that AcademyOne’s failure to offer a solution for every feature or function listed in Section III.B. cannot be grounds for non-responsiveness.

II. AcademyOne’s Failure to Submit Three References and a Project Manager Resume

CollegeSource argues that AcademyOne’s proposal failed to include three references and a project manager resume as required by the RFP. As a result, CollegeSource asserts AcademyOne is materially non-responsive and fails to demonstrate the minimum qualifications for responsibility established by the State.

Under the Consolidated Procurement Code, a “responsible bidder or offeror” means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.” S.C. Code Ann. § 11-35-1410(6) (Supp. 2007). Only a responsible offeror may be awarded a contract. S.C. Code Ann. §11-35-1530(9) (Supp. 2007). A procurement officer has an obligation to determine responsibility prior to award and may consider any source of information. S.C. Code Ann. §11-35-1810(1) (Supp. 2007); S.C. Code Ann. Regs. 19-445.2125(B) (Supp. 2007). A procurement officer’s decision regarding responsibility is a matter of discretion that will not be overturned absent a showing that it is “clearly erroneous, arbitrary, capricious, or contrary to law.” S.C. Code Ann. §11-35-2410 (Supp. 2007).

² Nonetheless, the Panel encourages the State to use precise language when drafting RFPs. The Panel may have reached a different result had this protest been directed at the solicitation itself and not the Intent to Award.

The Panel first notes that the failure to provide references is a minor informality which may be waived by the procurement officer when such a waiver is advantageous to the State and not prejudicial to other bidders. S.C. Code Ann. § 11-35-1520(13)(j) (Supp. 2007). In this case, AcademyOne concedes that its proposal contained only two references. However, in the hearing before the Panel, the parties stipulated that AcademyOne submitted a client list which did contain the name of a third client for whom AcademyOne had performed a similar service. Under the facts of this case, the Panel finds that the procurement officer had sufficient information to determine AcademyOne's responsibility with regard to the requested references. The Panel also finds that the CPO's decision satisfies the writing requirement of section 11-35-1520(13). *In re: Protest of PS Energy*, Case No. 2002-9 (July 3, 2002).

Citing S.C. Code Ann. regulation 19-445.2125, CollegeSource contends that the requests for three references and a project manager resume established specific standards of responsibility. Because AcademyOne's proposal did not provide all of this requested information, CollegeSource asserts the procurement officer's finding of responsibility, which is evident in the Intent to Award, is "clearly erroneous, arbitrary, capricious, or contrary to law." Regulation 19-445.2125 authorizes the State to set special standards of responsibility, which must be so identified in the solicitation and apply to all offerors. S.C. Code Ann. Regs. 19-445.2125(F) (Supp. 2007). In order to be valid, special standards of responsibility "must be specific, objective and mandatory." *Id.*

The request for references appears under the heading "Reference Information" within Section V of the RFP and states:

Please provide at least three references we can call who have used your services for a similar solicitation. These references should be from projects of similar size and scope and should be knowledgeable about each product or service you desire to provide.

Record at 74. The Panel notes that nothing in the language of this request establishes that it is a special standard of responsibility. The Panel also finds that the request for references involving “projects of a similar size and scope” cannot be considered an objective standard. Therefore, the Panel concludes that the request for references is not a special standard of responsibility in this RFP.

The request for the project manager resume is also found under the “Reference Information” heading and reads as follows:

Provide a resume for your project manager that identifies past experience implementing your application in higher education, preferably at multiple campuses of colleges and universities.

Record at 74. A few sentences down from this request, the RFP asks for PMI certification certificates. *Id.* Finally, CHE reserved the rights to approve or disapprove staff proposed by the vendor and to request removal of project staff. Record at 75.

AcademyOne concedes that its proposal did not contain a resume for a specific person for the project manager’s position, but argues that its proposal indicated it would hire an individual with PMI certification if awarded the contract. Record at 212. Moreover, AcademyOne did not take exception to CHE’s rights to approve or disapprove staff or to request removal of staff. Record at 139. The Panel finds that AcademyOne provided sufficient information for the procurement officer to determine that it would be responsible when hiring a project manager if awarded the contract. *See In re: Appeal of Medical Review of North Carolina d/b/a The Carolinas Center for Medical Excellence*, Case No. 2007-2 (April 2, 2007) (provision of position descriptions and qualifications sufficient to demonstrate awardee would provide needed staffing where State retained right to approve all staff to be hired).

The record before the Panel clearly supports the procurement officer's determination of responsibility. Furthermore, CollegeSource failed to demonstrate prejudice in the waiver of the third reference or in the acceptance of AcademyOne's proposal to hire a PMI certified project manager if awarded the contract. Therefore, the Panel concludes that the procurement officer's determination was not "clearly erroneous, arbitrary, capricious, or contrary to law."

III. AcademyOne's Responsiveness Regarding Software Ownership

CollegeSource argues that AcademyOne's proposal is non-responsive because it materially altered the terms and conditions of the RFP in its response by reserving software ownership rights. The basis for CollegeSource's contention is the following term from Section VII of the RFP: "All data, material and documentation . . . prepared for the state pursuant to this contract shall belong exclusively to the State." Record at 86. CollegeSource asserts that the following response by AcademyOne alters the ownership terms of the RFP:

3.5 Intellectual Property

AcademyOne is the sole owner of all AcademyOne Software, all databases and all patents, patent applications, trademarks, copyrights and other proprietary rights of any kind or nature whatsoever related thereto (collectively, the "AcademyOne Intellectual Property"). Client obtains no ownership rights in the AcademyOne Intellectual Property as a subscriber of the hosted Tools, Applications and Content. Rather, Client acquires only those rights expressly granted explicitly. All rights not granted to Client herein are expressly reserved to AcademyOne.

AcademyOne is continually improving its Tools, Applications and databases and that Client Employees may participate in the definition and/or validation of functional and technical requirements and may also participate in one or more of AcademyOne's development and/or testing phases for AcademyOne's solutions.

All artifacts, code, documentation, and other work products developed through this process will remain the sole property of AcademyOne and neither the Client nor the Client Employees, nor any agents thereof, have any rights or claims to the artifacts, code, documentation, and other elements of the AcademyOne work products.

Record at 211. However, AcademyOne argues that this response is directed not to the ownership term relied upon by CollegeSource, but rather to this request in Section II of the RFP: “3.5 Intellectual property: explain the ownership rights to all proposed intellectual property.” Record at 58.

In the hearing before the Panel, Robin Rutkowski, the ITMO procurement officer who handled this solicitation, testified that she understood from AcademyOne’s response that it was *explaining its ownership rights to the existing proprietary software proposed in its solution and that the State would ultimately own any customized data and solutions.* Ms. Rutkowski also testified that AcademyOne did not take exception to any of the contract terms and conditions contained in Section VII of the RFP. Ms. Rutkowski admitted that the issue of ownership rights was one of numerous topics addressed in the State’s negotiations with AcademyOne as the highest ranked offeror. During these negotiations, AcademyOne confirmed her understanding that the State would ultimately own any customized solutions.

The Panel finds that AcademyOne’s initial response was directed to the RFP’s request that an offeror explain the ownership rights to the existing intellectual property proposed in its solutions and was not an attempt to alter the terms and conditions of the contract. Thus, the Panel concludes that AcademyOne’s proposal was responsive to the RFP and was properly scored and evaluated.³

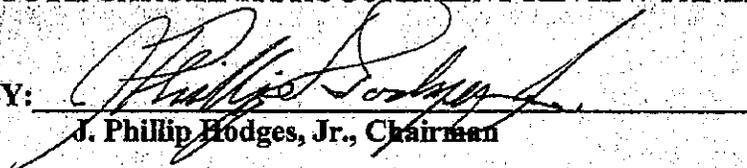
³ Because the Panel finds that AcademyOne’s proposal was responsive as initially submitted, it need not address CollegeSource’s argument that the State used the negotiations process to allow AcademyOne to “fix” a non-responsive proposal. However, the Panel cautions the State that the proper procedure for clarifying issues of responsiveness in competitive sealed proposals is outlined in section 11-35-1530(6); such issues should not be addressed in negotiations pursuant to section 11-35-1530(8).

For the reasons stated above, the Panel dismisses CollegeSource's protest and upholds those portions of the CPO's decision which are consistent with this order.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY:



J. Phillip Hodges, Jr., Chairman

This 8th day of January, 2009

Columbia, South Carolina