

State of South Carolina)	Before the Chief Procurement Officer
)	
County of Richland)	Decision
)	
In Re: CollegeSource, Inc.)	
)	Case 2009-201
)	
Protest of Award: Solicitation 5400000301,)	Posted: August 25, 2008
Course Articulation and Transfer Software)	Mailed: August 25, 2008
for the S.C. Commission on Higher)	
Education)	
)	

The South Carolina Consolidated Procurement Code grants the right to protest to any bidder who is aggrieved in connection with the solicitation or award of a contract. CollegeSource, Inc. (CS) filed a protest (Attachment 1) of solicitation 5400000301, Course Articulation and Transfer Software for the S.C. Commission on Higher Education, awarded to Academy One (AO) issued by the Information Technology Management Office (ITMO) on behalf of the S. C. Commission on Higher Education (CHE). The Chief Procurement Officer for Information Technology (CPO) conducted a hearing on the issues of protest on August 14, 2008. Present at the hearing before the CPO were representatives from CS, AO, CHE, and ITMO.

Findings of Fact

Solicitation Issued	March 31, 2008
Amendment One Issued to address questions	April 25, 2008
Proposals Received	May 13, 2008
Intent to Award Issued	June 25, 2008
Received CollegeSource Protest	July 7, 2008
Issued Stay of Award	July 8, 2008

Issues of Protest

The full text of CS's protest (Attachment 1) is incorporated by reference. The following is a summary of CS' issues of protest:

- 1) AcademyOne proposes an integrated solution with existing systems which it admits may not work in its Proposal and, therefore, is materially non-responsive.
- 2) AcademyOne failed to sign its offer as required by the solicitation and, therefore, is non-responsive.

- 3) AcademyOne fails to state that it can deliver the software within thirty days after receipt of a purchase order and instead provides for a three year development plan and, therefore, is non-responsive to a material term of the solicitation.
- 4) AcademyOne was not responsive in its proposal regarding specific functionality requested by the State and fails to submit the required information.
 - a) AcademyOne failed to respond to the State regarding its escalation policies, practices, and contacts as required by the solicitation and therefore, is non-responsive.
 - b) AcademyOne's response regarding the ability to maintain information identifying the prerequisites for courses and programs is vague and non-responsive.
 - c) AcademyOne's proposal does not state that its system can provide particular functionality required by the State. (There are 17 sub issues listed in the letter of protest.)
 - d) AcademyOne's business proposal is materially non-responsive and vague. The business proposal also contradicts the pricing shown in the intent to award. The pricing proposal had been incorrectly scored.
- 5) AcademyOne is materially non-responsive to the qualification requirements of the RFP and fails to demonstrate the required minimum experience and resources for responsibility.
 - a) RFP required detailed information on the three most recent similar projects in type and scope.
 - b) RFP asks each offeror to submit a resume for the proposed project manager including many specific types of certifications and experience. AcademyOne failed to submit such resume.
 - c) Qualifications section of the RFP also requires each offeror to provide its proposed acceptance and sign-off procedures.
- 6) AcademyOne materially altered the terms and conditions of the RFP in its response and, therefore, should not have been evaluated and scored as it was non-responsive.
- 7) AcademyOne uses, without permission, the intellectual property of its competitors making it both non-responsive and not responsible.

During the hearing, CS withdrew issues 2, 4d, 4c13, 4c14, and 4c15.

Prior to the hearing, AO moved to dismiss issues 1, 3, 4a, 4b, 4c, 4d, 5, 6, and 7 for failure to state a cause of action upon which relief can be granted, and issues 1 and 7 on the grounds that

each does not "set forth...the grounds of protest...with enough particularity to give notice of the issues to be decided," as required by South Carolina law. S.C. Code Ann. §11-35-4210(2)(b) and summary judgment on issues 1, 2, 4a, 4b, 4c1-17, and 5.

At the outset of the hearing the CPO dismissed issues 1, 4a, 4b, 4c1-17, and 5 for the following reasons: In protest issues 1, 4a, 4b, 4c1-17, CS alleges that AO's proposal is non-responsive to the requirements of the solicitation. Clearly, an award cannot be made to a nonresponsive offeror; section 11-35-1530 requires that offerors be evaluated and ranked prior to award and that only responsive offerors can be ranked. The Code defines a responsive offeror as follows:

§11-35-1410(7) "Responsive bidder or offeror" means a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.

Regulation 19-445.2095(J)(1)(b) provides that "[r]easons for rejecting proposals include but are not limited to: (b) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the State in some material respect" Read together, these provisions make clear that an offeror need not conform to all the requirements of an RFP, only those that are material. *Cf.* Protest of National Computer Systems, Inc., Case No. 1989-13; Protest of Gregory Electric Company, Case No. 1989-17(II)

With this guidance in mind, the State must decide which requirements are essential and designate them in absolute or mandatory terms in the solicitation. Every requirement protested in grounds 1, 4a, 4b, and 4c1-17, was published as a desirable feature about which the offeror should submit information for the State's consideration. It is the State's purview to determine a requirement to be mandatory and, as reflected in the RFP, it did not consider these requirements to be material and essential nor state them in absolute or mandatory terms. CS cannot confer mandatory status to a requirement the State does not designate as such. These issues of protest are dismissed.

Protest issue 5 AcademyOne is materially non-responsive to the qualification requirements of the RFP and fails to demonstrate the required minimum experience and resources for responsibility.

...Further, the RFP calls for detailed information on the three most recent similar projects (in type and scope) conducted by the offeror...

...The RFP specifically asks for each offeror to submit a resume for the proposed project manager including many specific types of certifications and experience...

...The qualifications sections of the RFP also requires each offeror to provide its proposed acceptance and sign-off procedures...

...AcademyOne is materially non-responsive and fails to provide the required information to demonstrate responsibility.

These requirements are found in a section of the RFP specifically identified as "Qualifications." The issues raised by CS are not a matter of responsiveness, but rather, responsibility of the bidder. The Code defines a responsible bidder as:

§11-35-1410(6) "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.

The determination of responsibility is a matter of business judgment for the state. This exercise of discretion is final unless it is arbitrary or contrary to law. S.C. Code § 11-25-2410. Here, CS has offered no evidence that the state's determination was arbitrary or contrary to law. Rather, CS argues that AO failed to present evidence that it met some "required minimum" criteria. The regulations Regulation 19-445-2125(F) expressly authorizes the use of special standards of responsibility:

When it is necessary for a particular acquisition or class of acquisitions, the procurement officer may develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards shall be set forth in the solicitation (and so identified) and shall apply to all offerors. A valid special standard of responsibility must be specific, objective and mandatory. [R. 19-445.2125(F)]

As this regulation makes clear, a mandatory minimum experience requirement, or special standard of responsibility, must be specific, objective and mandatory in order to be valid.

Following are the solicitation requirements and AO's responses:

The solicitation requirement:

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.

AcademyOne's response:

The Pennsylvania Department of Education Office of Post-Secondary and Higher Education and the Washington Higher Education Coordinating Board projects also received Project Management Consulting Services from AcademyOne.

The solicitation requirement:

Provide a resume for your project manager that identifies past experience implementing your applications preferably at multiple campuses of colleges and universities.

AcademyOne's response:

We will hire a Project Manager based in South Carolina for this contract...

The Pennsylvania Department of Education Office of Post-Secondary and Higher Education and the Washington Higher Education Coordinating Board projects also received Project Management Consulting Services from AcademyOne.

The solicitation requirement:

What type of acceptance of signoff procedure do you propose? At what points during the implementation will this acceptance take place?

AcademyOne's response: On page 23-36 of its proposal, AO describes the acceptance process during implementation of each tool, and on page 32 it describes the implementation acceptance.

In none of these instances has the solicitation stated a specific, objective, and mandatory requirement. The first seeks references, which by statute are a waivable minor

informality. The first is non-mandatory, as it provides only characteristics that the references "should" have. Lastly, the concept of "similar size and scope" is, in this situation, hardly an objective criteria. The second seeks a resume for project manager, obviously not a minimum requirement applicable to the offeror itself. Moreover it states the requirements in terms of a preference, rather than a mandatory minimum. The third issue is another non-mandatory requirement and is not grounds for a non-responsive determination.

Rather than treat this information as a mandatory minimum, the solicitation simply requested information it could consider in determining responsibility. By making an award, the State determined that the information provided was sufficient to determine that AO was a responsible bidder. This issue of protest is dismissed.

Discussion

Protest issue 3 alleges that AcademyOne fails to state that it can deliver the software within thirty days of purchase order and consequently is non-responsive. The standard boilerplate clause in the solicitation states:

Unless otherwise specified herein, all items shall be delivered no later than thirty days after contractor's receipt of the purchase order...

In response to a question about this thirty day delivery requirement during the solicitation process, the State responded that:

The clause to focus on here is "Unless otherwise specified herein,"

The solicitation asks that an implementation plan for the project be included in each proposal. In addition, the implementation plan is listed as one of the evaluation criteria. Requiring and evaluating an implementation plan that typically includes times for delivery, installation, and training, effectively replaces the standard thirty day delivery requirement. This issue of protest is dismissed.

Protest issue 6 alleges that AcademyOne materially altered the terms and conditions of the RFP in its response and, therefore, should not have been evaluated and scored as it was non-responsive.

Solicitation requirement 3.5 sets forth the State's intellectual property rights which go to licensing, custom developed software, etc. In response to this requirement, AO only declares ownership of its own intellectual property and any future enhancements or improvements to that property. What is being provided is a subscription and the necessary tools to access and use the proposed system. AO makes no claim to any customized software developed exclusively for use by the State or its users. AO makes no claim to the data entered into the system by the State or the end users to retrieve the desired information.

AO also offers that the State "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" on the condition that "all artifacts, code, documentation, and other work products developed through this process will remain the sole property of AcademyOne."

To the extent that AcademyOne's statement in its proposal had the potential to cause confusion, it was clarified to the State's satisfaction in the Record of Negotiation.

CS also claims that AO did not offer the State perpetual non-exclusive licenses to the propriety software involved in the system. Although not applicable in this particular instance, since this is a requirement of the solicitation and is included as part of the contract, an explicit affirmation of this contractual condition is not required. CS does not point to, nor can the CPO find any indication that AO takes exception to these contractual terms in its proposal. Protest denied.

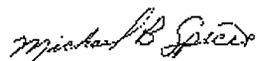
Protest issue 7 alleges that AcademyOne uses, without permission, the intellectual property of its competitors making it both non-responsive and not responsible. CS claims that in responding to requirement 8.4 of the solicitation AO includes copyrighted information in its solution.

Allegations of intellectual property right infringement are essentially a dispute between private parties and are within the exclusive jurisdiction of the Federal courts.- Protest denied.

Determination

For the reasons stated above, the protest is denied.

For the Information Technology Management Office

A handwritten signature in cursive script that reads "Michael B. Spicer".

Michael B. Spicer
Chief Procurement Officer

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

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: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 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(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." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain 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).

Attachment 1

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Marcus A. Manos
Member
Admitted in SC, NC, DC

July 7, 2008

VIA HAND DELIVERY AND ELECTRONIC MAIL

Mr. Michael B. Spicer
Chief Procurement Officer
Information Technology Management Office
Division of the State CIO
4430 Broad River Road
Columbia, South Carolina 29210

**Re: RFP Solicitation No. 5400000301
Course Articulation and Transfer Software for the S.C. Commission on
Higher Education**

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Dear Mr. Spicer:

CollegeSource, Inc., a responsive and scored offeror on the above referenced solicitation, protests the State's Intent to Award posted June 25, 2008 and intending to award the contract to AcademyOne, Inc. pursuant to S.C. Code Ann. § 11-35-4210(1)(b) and (2)(b). The protest of CollegeSource is timely as the intent to award was posted on June 25, 2008 and ten days later fell on Saturday, July 5, 2008 as the date of posting is not included in calculating the ten calendar days to protest. S.C. Code Ann. § 11-35-310(13). Since the ten days ran on a Saturday, protests must be filed by the end of the next business day, Monday, July 7, 2008. Id.

CollegeSource seeks a determination that the intent to award is in violation of law and a decision either: (1) eliminating AcademyOne's offer and awarding the contract to the next highest scoring offeror; or (2) canceling this solicitation and, if the State is still in need of the specified services, issuance of a new solicitation. S.C. Code Ann. § 11-35-4210(a).

Many portions of the copy of AcademyOne's proposal provided by the procurement officer have been redacted as allowed by the Consolidated Procurement Code. CollegeSource cannot, however, adequately evaluate these redacted portions nor

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assume that they are responsive. With the tight time limits provided by the Consolidated Procurement Code, CollegeSource requests access (and will agree to reasonable protective measures) to the redacted portions of the proposal as soon as possible. If access is not granted prior to the expiration of the fifteen-day period for filing an amended protest, CollegeSource may be denied due process in pursuing its protest rights.

The grounds for this protest are as follows:

1. Overview—AcademyOne proposes an integrated solution with existing systems which it admits may not work in its Proposal and, therefore, is materially non-responsive.

In this solicitation, the Commission on Higher Education (“CHE”) seeks a web-based system to aid students, counselors, and advisors in planning transfers from one institution of higher learning to another by tracking course, program, and degree requirements and equivalencies. The system needs to provide other functionality which assists in making decisions about transfer and degree paths, plans and decisions. Three components are involved.

The first part of the system is a student information system (“SIS”) that tracks the student’s personal information, enrollment status, courses and grades. Each institution already has an SIS and the offeror may either interface with existing ones and draw information or propose a statewide SIS database. The second part which every offeror must propose is the Course Articulation and Transfer System (“CATS”) to determine which courses are equivalent among the institutions and track program and degree paths between them to allow for transfer. Finally, an offeror may offer as part of its solution a degree audit system (“DAS”).

AcademyOne chose to only offer the CATS system, but has failed throughout its proposal to show how that system can interface with and draw information from the various institutions’ SIS. This theme of integration runs throughout the entire solicitation. But, on page 46 AcademyOne states: “...AcademyOne does not recommend interfacing directly between different proprietary products because of version control and changes that could ‘break’ interfaces.” The essential thrust of AcademyOne’s proposal requires interfacing with SIS at each institution many of which (as stated in the RFP) have been developed as proprietary institution-only systems, yet this is not recommended. Thus, the proposed solution fails and is non-responsive on this fundamental basis as well as the specifics listed below.

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2. AcademyOne failed to sign its offer as required by the solicitation and, therefore, is non-responsive.

The solicitation required submission of three original hard copies by the opening date/time. (RFP Amendment 1, Page Two). A hard-copy proposal must be signed by an authorized representative of the entity who can legally bind the entity to a contract. (RFP, Section II, Instructions to Offerors, Subsection A., General Instructions, "Signing Your Offer"). The copy of AcademyOne's proposal produced at this stage to CollegeSource, Inc. does not contain a signature and would, therefore, be non-responsive, as the offer does not conform to a material requirement of the solicitation. This requirement is very important to the State's procurement policies as an offer must be susceptible of immediately becoming a legally binding contract upon acceptance by the State. (RFP, Section II, Instructions to Offerors, Subsection A., General Instructions, "Bid/Proposal as Offer to Contract"). See, In Re: Protest of Dictaphone Corporation, Appeal by Sudbury Systems, Case No. 1991-10 (S.C. Procure. Rev'w Panel, July 9, 1991) (Party that did not sign offer, even though it was going to supply equipment to the State, is not offeror and has no standing); In Re: Protest of Cathcart and Associates, Inc., Case No. 1990-13 (S.C. Procure. Rev'w Panel, Dec. 4, 1990).¹

3. AcademyOne fails to state that it can deliver the software within thirty days of purchase order and instead provides for a three year development plan and, therefore, is non-responsive to a material term of the solicitation.

The solicitation requires that the application software be delivered within thirty days of purchase order. (Section III Scope of Work/Specifications, Subsection B. Application Business Requirements). While other portions of that Section discuss implementation schedules and training, nothing exempts an Offeror from proposing an existing suite of commercially available software to provide the specified functionality within thirty days. The AcademyOne proposal includes numerous references to a software development project, which varies materially from what the State requested. The Consolidated Procurement Code only allows for the scoring of "responsive" offers. S.C. Code Ann. § 11-35-1530(7). A "responsive" offer must conform in all material respects to the request for proposals. S.C. Code Ann. § 15-11-1410(7).

¹ At this time, CollegeSource only has an electronic copy of the AcademyOne proposal provided by the procurement officer. If after a full review of the procurement file pursuant to CollegeSource's outstanding FOIA request it is determined that a signed copy was submitted prior to the deadline imposed in the solicitation, this ground for protest will be withdrawn.

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4. AcademyOne was not responsive in its proposal regarding specific functionality requested by the State and fails to submit the information.

- a. AcademyOne failed to respond to the State regarding its escalation policies, practices, and contacts as required by the solicitation and, therefore, is non-responsive.**

The State asked, as part of the discussion of the proposed solution's project management, for escalation policies, practices, and contacts. (RFP Section II, Instructions to Offerors—B. Special Instructions, 3.1.5). This required information involves how the contractor will resolve problems with the State that arise in the implementation and operation of the requested commercial software products by escalating such problems to the proper levels of authority for resolution. Instead of providing the information requested, AcademyOne discusses its billing practices and requirements. It makes no disclosure of how it would actually handle escalating State concerns for prompt resolution.

Further, the solicitation calls for a fixed-price contract with the possible exception of consultant fees during implementation for which all offerors had to submit firm hourly-rate schedules and be prepared to negotiate a fixed price. (RFP Section V, Qualifications, Project Staffing and Experience and Section VII, Terms and Conditions, Fixed Pricing Required). AcademyOne's "escalation" discussion discusses the payment of fees and out-of-pocket costs that do not appear to be on a fixed price basis.

- b. AcademyOne's response regarding the ability to maintain information identifying the prerequisites for courses and programs is vague and non-responsive.**

The solicitation requires each offeror to provide a description of how its solution provides functionality for tracking information on course and program prerequisites. (RFP Section III. Scope of Work, B. Application Business Requirements, 2.3). AcademyOne merely replies that its system has "space" for such information, not how it provides the functionality. A portion of this response is redacted.

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c. AcadmeyOne's proposal does not state that its system can provide particular functionality required by the State.

AcademyOne's proposal fails to address certain functionality required in the solicitation or states that it "could" or "can" be developed. Several of these issues include redacted portions of the proposal impairing CollegeSource's right to notice and a fair hearing.

- AcademyOne admits in its proposal that its current system cannot provide parameter based searching of multiple variables for student information. (AcademyOne Proposal p. 45, RFP Section III. Scope of Work, B. Application Business Requirements, 3.1).
- AcademyOne also states it does not have the functionality to import electronic transcript data from other sources, but could possibly create interfaces to do so. (AcademyOne Proposal p. 45, RFP Section III. Scope of Work, B. Application Business Requirements, 3.2). A portion of this part of the proposal is also redacted.
- AcademyOne's proposal admits its solution does not currently allow for user initiated ad hoc reporting without having AcademyOne create new "canned" reports. (AcademyOne Proposal p. 46, RFP Section III. Scope of Work, B. Application Business Requirements, 4.1). A portion of this response is redacted from the proposal.
- The solicitation specifically requires that the offer's system should be able to "sort by an unlimited number of identifiers." (RFP III. Scope of Work/Specifications, B Application Business Requirements 3.5). In its Proposal, AcademyOne responds by stating that "CollegeTransfer.net allows sorting on most column views across result sets, where appropriate." (AcademyOne Proposal p. 46, F3.5). AcademyOne does not answer that its system can sort by an unlimited number of identifiers and, therefore, is materially non-responsive to this requirement.
- AcademyOne admits in its proposal that its current system cannot provide export of student information to external programs because its system will not contain student information. (AcademyOne Proposal p. 47, RFP Section III. Scope of Work, B. Application Business Requirements, 4.4). A part of this response is redacted from the proposal.

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- AcademyOne fails to state that it can provide a solution where students can view, but not change, counselor- or advisor-generated plans. AcademyOne admits in its proposal that its current system cannot provide parameter based searching of multiple variables for student information. (AcademyOne Proposal p. 53, RFP Section III. Scope of Work, B. Application Business Requirements, 6.3).
- In order to provide the required functionality for student “what-if” scenario planning, AcademyOne requires an interface with each institutions existing Degree Audit System. (AcademyOne Proposal p. 57). The RFP makes clear that the offeror must be able to import data from a wide variety of institutional degree audit systems. (Amendment 1, Q&A 17). AcademyOne does not state that its system can interface with all the institutions DAS to provide the required functionality. Again, a large part of this response is redacted.
- AcademyOne admits in its proposal that its system cannot provide “what-if” planning functionality to students based on changes in catalog dates. Further, AcademyOne states such functionality can only be added if it is available in the institution’s system. (AcademyOne Proposal p. 59 F7.2) As a result, AcademyOne is non-responsive to this requirement as its system cannot provide the required functionality listed in the RFP. (RFP III. Scope of Work/Specifications, B. Application Business Requirements 7.2).
- AcademyOne’s proposal states that its solution cannot offer the required functionality of importing externally calculated Grade Point Averages. AcademyOne states its system can be modified to do so, but does not state how. (AcademyOne Proposal p. 60, F8.1; RFP III. Scope of Work/Specifications, B. Application Business Requirements 8.1).
- The solicitation calls for a system containing state-wide and national course descriptions. At many places in its proposal, AcademyOne touts the 3,500,000 course descriptions in its National Course Atlas as the core of its system. This is not a comprehensive database when other vendors have 35,300,000 course descriptions going back to 1994 available for use by the system. AcademyOne is non-responsive in that it cannot provide a broad, national base of course descriptions for access by its system. (See, e.g., AcademyOne Proposal p. 61, F8.3 and 8.4; RFP III. Scope of Work/Specifications, B. Application Business Requirements 8.3 and 8.4).

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- The solicitation requires that the offeror's system contain an automated scanning engine to find the relationships between direct and indirect equivalency opportunities within the course database. (RFP III. Scope of Work/Specifications, B. Application Business Requirements 8.6). The AcademyOne solution contained in the proposal requires manual intervention by authorized users to make a determination on the equivalency opportunities, rather than presenting all users with the possible equivalencies as required by the RFP. (AcademyOne Proposal p. 62).
- The solicitation requires that an offeror's system allow "exchange student information and course work between institutions." (RFP III. Scope of Work/Specifications, B. Application Business Requirements 8.7). AcademyOne fails to provide this functionality. Instead, it allows students to enter their own information into a passport which they can then choose to send to an institution. (AcademyOne Proposal pp. 63-64). AcademyOne is materially non-responsive on this required functionality.
- The solicitation requires that the proposed system present institutional profiles including accrediting agency. AcademyOne's proposal does not address the underlined portion of the requirement. (AcademyOne Proposal p. 64, F8.10; RFP III. Scope of Work/Specifications, B. Application Business Requirements 8.10). A large part of this response is redacted.
- AcademyOne devotes pages 86 to 90 of its proposal to responding to the State's requirement for a disclosure of all software included in the proposed solution. AcademyOne, however, does not discuss at all, four of the state's required disclosures—warranties, support levels, documentation, and licensing to use the software products of third-parties. (RFP II. Instructions to Offerors, B. Special Instructions-Contents of Offer-Solutions Based 3.2.3 Software). AcademyOne is materially non-responsive on these vital issues.
- The solicitation specifically requires each offeror to provide a software development plan that includes: interfaces documentation, data synchronization, and replication plans, etc. (RFP II. Instructions to Offerors, B. Special Instructions-Contents of Offer-Solutions Based 3.2.6). AcademyOne's one paragraph response on page 96 of its proposal discusses none of these things but references section 3.3 for a product road map. Section 3.3 on page 98-99 discusses change order methodology and includes a

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high-level plan but does not discuss any of the specifics required by the solicitation. AcademyOne is materially non-responsive.

- The solicitation requires as part of the offeror's proposal on warranties that the offeror "Describe acceptable warranty performance specifications and warranty performance reporting to include number of calls, number and type of repairs and changes, etc." (RFP II. Instructions to Offerors, B. Special Instructions-Contents of Offer-Solutions Based 3.2.8). AcademyOne includes none of this information in its proposal at page 104. AcademyOne is materially non-responsive on warranty issues.
- In its discussion of staffing at pages 106-107 of the proposal, AcademyOne completely fails to address the number and availability of non-key staff for the project as required by the RFP. (RFP II. Instructions to Offerors, B. Special Instructions-Contents of Offer-Solutions Based 3.6.1.2). AcademyOne also fails to inform the state of number of state employees and their skill/training level needed to complete the implementation. (RFP II. Instructions to Offerors, B. Special Instructions-Contents of Offer-Solutions Based 3.6.1.3). AcademyOne is materially non-responsive on these important staffing matters.
 - d. **AcademyOne's business proposal is materially non-responsive and vague. The business proposal also contradicts the pricing shown in the intent to award. The pricing of the proposal has been incorrectly scored.**

As required by the RFP, AcademyOne begins its business proposal at page 108 of the response by stating the total cost of ownership for the potential seven year term of the contract. The total cost of ownership reflects \$5,283,600.00. The Intent to Award states a total potential cost of \$2,688,333.00. AcademyOne marked its pricing confidential so CollegeSource cannot account for this discrepancy. As a result, CollegeSource protests on improper scoring based upon the obvious difference in these figures.

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5. AcademyOne is materially non-responsive to the qualification requirements of the RFP and fails to demonstrate the required minimum experience and resources for responsibility.

Section V of the RFP makes very specific demands on each offeror to demonstrate its qualifications. Because of redacting, CollegeSource cannot evaluate AcademyOne's responsiveness or responsibility based on its customer list. Further, the RFP calls for detailed information on the three most recent similar projects (in type and scope) conducted by the offeror. (RFP V. Qualifications, Reference Information, also in Qualification Required Information (Jan. 2006)). AcademyOne only provides two such projects—the University of Pennsylvania system and a contract with the University of Washington, Seattle and Bellevue Community College. AcademyOne is materially non-responsive on references and fails to meet the minimum qualifications for responsibility established by the state.

The RFP specifically states that the award will be based upon an offeror's demonstrated ability to implement in multi-campus institutions. All of AcademyOne's solutions appear to be single campus except Pennsylvania and Washington/Bellevue. AcademyOne has not demonstrated the required responsibility.

The RFP specifically asks each offeror to submit a resume for the proposed project manager including many specific types of certifications and experience. (RFP V. Qualifications, Reference Information). AcademyOne failed to provide such a resume and specifically admits that it plans to hire an unknown project manager to be located in South Carolina. AcademyOne is materially non-responsive regarding its project manager and fails to provide the required information to demonstrate responsibility.

The qualifications section of the RFP also requires each offeror to provide its proposed acceptance and sign-off procedures. (RFP V. Qualifications, (b) Minimum Qualifications Item 15). AcademyOne does not provide this information. As a result, AcademyOne is materially non-responsive and fails to provide the required information to demonstrate responsibility.

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6. AcademyOne materially altered the terms and conditions of the RFP in its response and, therefore, should not have been evaluated and scored as it was non-responsive.

The RFP requires all offerors to accept its terms and conditions as part of the contract. The cover page of the solicitation makes clear that by submitting a response, an offeror agrees to be bound by the terms and conditions proposed in the solicitation. (See, RFP Amendment 1 Q&A 14). The instructions to offerors make clear that an offer attempting to vary the material requirements of the solicitation is not responsive.

AcademyOne attempted to vary two material terms and conditions from Section VII. First, it provides that all databases and software belong strictly to AcademyOne. (AcademyOne Proposal p. 108, 3.5 Intellectual Property). The custom portal, interfaces, and other software being programmed for the state must become the property of the state pursuant to the RFP and standard ITMO policy. (RFP VII. Terms and Conditions, Ownership of Data and Materials). Further the data used in the system must belong to the State. *Id.* AcademyOne is laying claim to the SIS and DAS information as well as course descriptions and program/degree information pulled from institutional systems and included in its database. This materially alters the terms and conditions required by the State. Therefore, AcademyOne is non-responsive.

Nowhere in its proposal does AcademyOne offer the State perpetual non-exclusive licenses to the proprietary software involved in its proposed system. It also does not offer the State full and clear title to all custom software developed as part of the project. Both of these are required by the RFP. (RFP VII. Terms and Conditions, Software Licenses). Amendment One to the RFP further alerted all offerors to the applicability of these provisions. (RFP Amendment 1, Q&A 27(b)). This materially alters the terms and conditions required by the State. Therefore, AcademyOne is non-responsive.

7. AcademyOne uses, without permission, the intellectual property of its competitors making it both non-responsive and not responsible.

AcademyOne "data scraped" information copyrighted by CollegeSource from CollegeSource and its contracted institutions websites resulting in a cease and desist letter in April of 2007. CollegeSource believes this practice may be continuing today. Further, CollegeSource is informed and believes that AcademyOne improperly uses the intellectual property of other competitors. The solicitation specifically inquires

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about the offeror's intellectual property rights to its solution. Further, the responsibility of the offeror does not exist if the offeror can be enjoined from using the intellectual property underlying portions of its solution.

8. Conclusion

The Consolidated Procurement Code only allows for the scoring of "responsive" offers. S.C. Code Ann. § 11-35-1530(7). A "responsive" offer must conform in all material respects to the request for proposals. S.C. Code Ann. § 15-11-1410(7). To evaluate score and award a contract based on a materially non-responsive offer is clearly erroneous, arbitrary, capricious or contrary to law.

Furthermore, an offeror must make full disclosure of its capacity to meet the terms of the contract based upon its past performance of similar contracts. S.C. Code Ann. § 11-35-1810(a). In this case, the solicitation asked for the specific information but nothing in the record provided shows that the information was provided. The failure to provide such information violates the specific regulations regarding responsibility. S.C. Code Ann. Regs. 19-445.2125. Any determination that AcademyOne is responsible, based on the record now available to CollegeSource, would be clearly erroneous, arbitrary, capricious, or contrary to law.

For the foregoing reasons, CollegeSource believes an award of this contract to AcademyOne would be clearly erroneous, arbitrary, capricious, or contrary to law. CollegeSource reserves its right to amend this protest upon receiving the full FOIA production from the procurement officer and upon receiving non-redacted versions of the AcademyOne proposal.² AcademyOne is non-responsive and not responsible and should not have its proposal scored nor evaluated nor should it be awarded the contract. S.C. Code Ann. § 11-35-1530(7) (allowing only responsive offerors to be ranked) and § 11-35-1530(9) (allowing award only to a responsible offeror). The offer was improperly scored as to price as well.

CollegeSource specifically reserves its right to amend this protest and add new issues and clarify the issues raised herein within 15 days of the posting of the Intent to Award which runs at 5 PM on Thursday, July 10, 2008. If CollegeSource has not received the procurement file pursuant to its FOIA request sent Thursday July 3, 2008

² CollegeSource reiterates it will agree to appropriate restrictions on the copying, dissemination, and use of the redacted portions of the AcademyOne proposal through an agreement signed by counsel or a consent order of the CPO. Further, CollegeSource will make its own redacted proposal fully available to counsel for AcademyOne on the same protective terms pursuant to the same agreement or order.

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and a non-redacted version of AcademyOne's proposal in advance of that date, CollegeSource will raise the violation of its due process rights to an effective protest as grounds of protest.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Marcus A. Manos". The signature is fluid and cursive, with a large loop at the end.

Marcus A. Manos

MAM/hjr

cc: Ms. Kerry Cooper
J. Michael Wilson, Esquire