

State of South Carolina)	Before the Chief Procurement Officer
)	
County of Richland)	Decision
)	
In Re: Protest of Oracle USA, Inc.)	
)	Case 2008-204
)	
Protest of Award: USC-RFP-0943-BB,)	Posted: October 8, 2007
Enterprise Resource Planning Project, University)	Mailed: October 8, 2007
of South Carolina)	
)	
)	

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. Oracle USA, Inc. (Oracle) filed a protest of the award of contract USC-RFP-0943-BB, Enterprise Resource Planning Project, University of South Carolina (University) to Sunguard Higher Education, Inc. (Sunguard). The Chief Procurement Officer for Information Technology (CPO) conducted a hearing on the issues of protest on September 20, 2007. Present at the hearing before the CPO were representatives from

as it relates to Oracle.

4. The Proposal of Sunguard Higher Education, Inc. ("Sunguard SCT") is not responsive to the Solicitation because the proposal fails to demonstrate that the proposer is able to perform the services and functions provided for in the Solicitation in the following areas:
 - I. The Proposal does not contain all applicable requested information.
 - II. Sunguard is unable to comply with Section 3.1 of the RFP.
 - III. Sunguard has failed to provide complete, detailed pricing as required by the RFP.
 - IV. Sunguard has failed to complete the evaluation process by performing the demonstrations contemplated therein.
 - V. Such other and further deficiencies as may be identified after review of excessively redacted portions of the Sunguard proposal.

Findings of Fact

Solicitation Issued	December 4, 2006
Amendment One	December 19, 2006
Amendment Two	January 2, 2007
Submission of Proposals	January 29, 2007
Oracle Declared Non Responsive	February 8, 2007
Issuance of Intent to Award	August 10, 2007
Receipt of Oracle Protest	August 20, 2007
Stay of Award	August 20, 2007

Motions

Prior to the hearing, the University moved to strike two assertions from the Oracle protest. First, the University moved to strike the assertion that Oracle “offered the highest rated technical proposal and lowest price” in response to the RFP.

In making the claim that its proposal was the highest rated technical proposal, Oracle relies on the evaluation of a proposal Oracle submitted during a previous solicitation which was subsequently cancelled. Oracle’s proposal submitted in response to the current solicitation was not evaluated (because it was deemed non-responsive), so claims that its proposal was the highest rated technical proposal are not accurate. The motion to is granted; the protest is dismissed to the extent it claims Oracle offered the highest rated technical proposal.

The University also moved to strike Oracle's assertion that the University’s determination of nonresponsiveness somehow converted the solicitation into a sole source procurement and resulted “in violation of ...the legal requirements for a sole source procurement.” The term “sole source” is a term of art and is defined under the Code. The fact that Oracle was invited and submitted a response to this solicitation demonstrates that this procurement was not processed as a sole source under Section 11-35-1560. Competition was sought and was available. The fact that the review process resulted in only one responsive proposal does not somehow convert this procurement into

an improper sole source procurement. This motion is granted. The protest is dismissed to the extent it alleges an improper sole source.

Sunguard moved to dismiss Oracle's third issue of protest on the grounds that the Regulations cited were not effective at the time this solicitation was issued and consequently do not apply. In its third issue of protest, Oracle alleges that "USC failed to comply with the terms of Regulation 19-445.2095I(1), I(2) and (J) as it relates to Oracle." New Section 2095, which Oracle seeks to rely on, only applies to solicitations issued after the first Monday in September of 2007, as provided for in R.19-445.2000E.

19-445.2000.E. Effective Date.

Except as otherwise provided herein, these regulations are effective upon publication in the State Register. The following additions or revisions to this regulation 19-445 apply only to solicitations issued after the first Monday in September following the legislative session during which they are approved: Sections 2010, -.2015, -.2050, -.2095, -.2097, -.2105, -.2120, -.2180.

The solicitation involved here was issued in 2006. Oracle relies on Regulations that do not apply to this solicitation. The motion to dismiss is granted.

Sunguard also moved to dismiss Oracle's fourth issue of protest on the grounds that it is impermissibly vague and fails to give notice of the issues to be decided as required under §11-35-4210. The CPO declined to rule on this motion prior to the hearing, holding his decision for the written order. Nevertheless, Oracle declared that it would not present any evidence in support of this issue at the hearing before the CPO, and would argue this issue de novo before the Procurement Review Panel. True to its word, Oracle presented no evidence during the hearing to support the allegations raised in protest issue four.

The CPO finds, on its face, that Oracle's fourth issue of protest fails to put the State on notice of the issues to be decided and the motion to dismiss is granted. Moreover, these issues are dismissed for failure to prosecute or offer any evidence to meet the burden of proof.

Discussion

The solicitation was divided into three lots and was to be awarded by lot. The solicitation required each offeror to provide a total price for all work involved in each lot. Each lot included the following categories of work: software pricing, implementation pricing, maintenance pricing, training, and "Task Order #1" pricing.

The solicitation asked that pricing information be provided in two different places. In one place, the solicitation requested summary price information. [Ex. 2, p. 17, ¶ 2.5] According to the accompanying text, this "table should include the costs of the total solution being proposed for each Lot." [Ex. 2, p. 17, ¶ 2.5] As the reprint below reflects, this chart included a blank for "5 Year Total Costs" by lot. It also sought subpricing information on each lot, as reflected by the columns for software, implementation, maintenance, and "Task Order #1".

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

In addition, this chart requested "Total Redundant Costs." The solicitation acknowledged that some costs would be duplicated if all three lots were not awarded to the same vendor because different offerors might provide overlapping functions or services for each lot and, if awarded by individual lots, the University would pay more than once for exactly the same thing for each lot. The solicitation refers to these duplications as Redundant Costs and asked offerors to identify them as such in this summary chart.

Pricing was also sought in another place: the Detailed Cost Table identified as Attachment A. [Ex. 2, p. 32-33, § VIII.] While this chart is too large to recreate here, a review reflects that it too sought subpricing information. However, in the detailed chart, pricing information was sought for software, implementation, maintenance, "Task Order #1", **and** training.

If these two charts were to dovetail, i.e., if dollar figures provided for each subitem of pricing was to match on both charts item-by-item, the subpricing for training would be included in the total pricing on the summary chart but would not appear in the sub-pricing on the summary chart; the summary chart simply had no column for this item.

Oracle recognized this difference, and when it responded to the solicitation, Oracle chose to add to the summary pricing table an additional column for training. [Ex. 4A, p. 5.] In both Oracle's modified summary table, and its completed version of the detailed pricing chart, Oracle addressed pricing for both Task Order #1 and Training. The pricing information for these two items is at the heart of this protest.

Training

Oracle provided sub-pricing information for each item in each lot, except Training and Task Order #1.

Instead of pricing for Training, Oracle referenced the following footnote and repeated it at the end of each lot in Attachment A (Detailed Cost Table) and in the cost summary on page 20 of its response:

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

As this note reflects, Oracle clearly understood the requirement to provide a cost for training for each lot. Nevertheless, Oracle claims that it lacked sufficient information to formulate a cost and elected not to provide the cost at the time of proposal submission. The solicitation expressly afforded potential offerors an opportunity to seek clarification of the solicitation requirements. [Ex. 2, p. 7.] If Oracle believed it was not possible to offer a price for training, it was incumbent on Oracle to ask any necessary questions.

Task Order #1

Instead of providing per-lot pricing for Task Order #1, Oracle referenced the following footnote at the end of each lot in Appendix A and in a cost summary on page 20 of its response:

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 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.

Again there is no question that Oracle understood the requirement to provide an individual Lot price for Task Order #1. Oracle claims that it can not offer individual lot pricing at the time of proposal submission. Again, if Oracle believed it was not possible to offer a price for training, it was incumbent on Oracle to ask any necessary questions.

While Oracle claims that it was unable to offer per-lot costs for either Training or Task Order #1, it was able to propose an “ERP Bundle” that included a separate cost to perform *Training* for all three lots - as a single bundle - and a separate cost to perform *Task Order #1* for all three lots - as a single bundle. A review of Oracle's summary chart, reproduced below, indicates that, not only were bundled costs not requested,¹ but that Oracle’s bundled costs, less the costs for Training and Task Order #1, is exactly the same as the sum of the unbundled costs for each lot less the costs for redundant products and services. This indicates three things: First that Oracle was able to determine the cost for Training and Task Order #1 for each lot. Otherwise how did it arrive at the bundled costs? Second, that the cost for Training and Task Order #1 are not included in the 5 year total cost for each lot. Third, that, in spite of the fact that the RFP stipulated award by individual lot, Oracle’s proposal was for all three lots or nothing.

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

¹ Compare Oracle's summary chart on this page to the summary chart reproduced above, which appears as it was published in the original solicitation.

Oracle's summary chart shows that the 5 year total cost for the ERP bundle is \$ [REDACTED]. If this total is reduced by the cost for Training, \$ [REDACTED] and Task Order #1, \$ [REDACTED] the total is \$ [REDACTED].

The sum total for all three lots of Oracle's proposal is \$ [REDACTED]. If the University was to award all three lots to a single bidder, it can reduce the three lot total by \$ [REDACTED] for a total of \$ [REDACTED]. Since the ERP Bundle price less the cost of Training and Task Order #1 is exactly equal to the sum total of all lots less the redundant costs, it is clear that the 5 year total for each lot does not include the price for Training and Task Order #1. Oracle's proposal is non responsive for failure to provide the costs for Training² and Task Order #1 for each lot or to include such costs in the total costs for each lot.

According to the University's Non-Responsiveness Determination #1 (Ex 4), the University attempted to verify the information in Oracle's proposal:

On February 1, 2007 Jack Nichols (USC Procurement Officer) and I call (sic) Jay Reilly (Oracle Sales Rep) Oracle's pricing sheet did not show a Lot price for Task Order #1 and I wanted to see if Oracle may have included the cost in their total or if it was listed in another part of their proposal.

In response to this attempt to verify Oracle's response to the solicitation requirements and that it had not overlooked the per-lot pricing for these two items, the University received an email on February 2, 2007, from Oracle representative Jay Reilly which stated:

...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 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

² While pricing for training was not required in the solicitation's summary pricing chart, the detailed pricing chart expressly called for this information.

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...

Section 11-35-1520(13) of the Code allows for the waiver of a minor informality if it has "no effect or merely a trivial or negligible effect on total bid price..." The total price for Training and Task Order #1 for all three lots is more than 9% of the total price proposed by Oracle for the entire project. On a contract of approximately \$ [REDACTED] this is not a trivial or negligible amount. On February 8, 2007, the University correctly determined that the per-lot prices for Task Order #1 and Training were material and essential requirements of the solicitation that could not be waived as minor informalities. Likewise, including these costs in required total pricing was also a material and essential requirement. Consequently, on February 8, 2007, Oracle's proposal was properly declared non responsive for failure to provide a per-lot cost for Training and Task Order #1 under Regulations 19-445.2070(A), (C), and (D).

Upon learning that its proposal had been declared non responsive, Oracle made several unsolicited attempts to resurrect its proposal. Offerors cannot unilaterally extend any opportunity provided for verifying a proposal's cost information by submitting further unsolicited communication. Accordingly, such communications are irrelevant to determining whether the proposal - as originally submitted - is responsive. Nevertheless, a review of such communication further confirms Oracle's error.

First, Oracle sent the procurement officer an undated letter from Mr. Stephen Holdridge, Oracle Vice President for Government and Education. That letter was attached to a February 16, 2007, email from Mr. Jay Reilly. In this letter, Oracle professes that "Oracle provided USC with 'the total possible costs to the State' for Task Order #1 and Training . . ." However, in the same letter, Oracle offered to allow USC "to prorate the task order #1 and training costs [provided in its "bundled" offer] evenly among the three lots . . ." Oracles offer only confirms their failure to offer this pricing or to unambiguously include it in their total pricing for each lot.

...I believe that during a conversation, you did indicate to Jay that USC sought a better understanding of Oracle's proposed costs for Task Order #1 and for Training, given the proposals were asked to look independently at Lots I, II, and III...

...Oracle has been focused on presenting to USC the best value solution; i.e. the best possible solution at the lowest possible total cost of ownership. I understand, however, that USC may be considering excluding Oracle from the procurement based on the view that Oracle's proposal is nonresponsive...

...As required by the RFP, Oracle provided USC with the "total possible cost to the State" for Task Order #1 and Training and Oracle explained the pricing assumptions for that approach. See Oracle's proposal, p. 357. Further we chose to provide a total Training cost because the State will realize substantial savings from the overlap of Training cost across all Lots. Accordingly, Oracle's proposal was fully responsive to the RFP.

To the extent the State considered the absence of a separate Task Order #1 cost and a Training cost for each Lot a deficiency, such a deficiency is a minor informality under the RFP that can be waived or cured because the State has the total possible cost for all Lots Specifically, Clause (c) Responsiveness on page 4 of the RFP states that "Any deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer. [Regulation 19-445.2070 and Section 11-35-1520(13)]"...

Oracle proposes at this juncture that USC take any of the following approaches in the proposal evaluation process and **Oracle will honor any of these so that the competitive process can continue and provide the appropriate choices to USC and the value to the USC constituencies (in order of preference by Oracle):**

- USC waive the minor informality, as provide on page 4 of the RFP.
- USC cure the minor informality by submitting a clarification request to Oracle.
- USC to prorate the Task Order 1 and training costs evenly among the three lots...

Oracle tried again in another unsolicited letter, this one from Mr. Holdridge, which was attached to a February 26, 2007 email from Mr. Reilly:

This letter confirms our meeting last week in response to your request for clarification of the pricing component of our proposal. As we discussed, considering the complexity of a project of this magnitude, it is important for both parties to clearly understand the interactions between all three Lots. This premise holds true for each individual Lot, or any combination thereof. Therefore, completion of Task Order #1 is vital to the project's success.

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 Task Order #1 activities and training. That is, we will provide these services within the cost of the overall implementation price for each lot set forth in our proposal.

First, Oracle's assertion that this communication was "in response to your request for clarification" is a mischaracterization of the facts. The procurement officer's attempt to verify Oracle's proposal had long since past. In fact, his determination of non-responsiveness had already been made. Second, this attempt by Oracle to declare that the per-lot costs for Training and Task Order #1 are included in the implementation cost for each lot is simply not supported by the summary chart and footnotes referenced in Oracle's response to Section 2.5 (Summary Cost Options) or Appendix A (the Detailed Cost Table).

Determination

For the reasons stated above, the protest of Oracle USA is denied.

For the Information Technology Management Office



Michael Spicer
Chief Procurement Officer

10/08/2007

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 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 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:
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 66.1 of the 2005 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." 2005 S.C. Act No. 115, Part IB, § 66.1. 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). Copies of the Panel's decisions are available at www.state.sc.us/mmo/legal/paneldec.htm