

STATE OF SOUTH CAROLINA)
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COUNTY OF RICHLAND)
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IN RE: Appeal by Canon Solutions)
America, Inc.)
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)
Solicitation No. 5400022842)
Statewide Term Contract for Print)
Management Program)
)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

ORDER

Case No. 2022-7

RECEIVED

Jan 17 2023

SC Court of Appeals

This matter came before the South Carolina Procurement Review Panel (the “Panel”) for further administrative review, pursuant to a request for review filed by Canon Solutions America, Inc. (“Canon”) under sections 11-35-4210(6) and 11-35-4410(1)(a) of the South Carolina Consolidated Procurement Code (the “Procurement Code”). Canon appeals the Chief Procurement Officer’s (“CPO”) written determination denying its protest alleging improper evaluation related to a Statewide Term Contract for a Print Management Program. The Panel convened on December 5, 2022 for the purpose of hearing oral argument on dispositive motions filed by the CPO and Canon.

In the hearing before the Panel, Marcus A. Manos, Esquire, represented Canon; and Manton M. Grier, Jr, Esquire, represented the CPO. The Panel issues this Order based on the evidence within the administrative record, the legal memoranda filed by the parties, the oral argument of the parties, and applicable law and precedents.

Findings of Fact

On February 25, 2022, the State Fiscal Accountability Authority (“SFAA”) issued a Request for Proposal to provide a Statewide Term Contract for a Print Management Program (the “Solicitation”). Record at PRP00018. The Solicitation was amended five (5) times. The fifth and

final amendment was issued on March 22, 2022 and was a complete rewrite of the solicitation. Record at PRP00019-113. The Solicitation contained five product categories and allowed up to five awardees for each category. Record at PRP00024. Offerors had the option to submit proposals for some or all the categories, and all categories were evaluated using the same criteria *Id.*

Canon submitted offers for categories one, two, three, and five, and did not submit an offer for category four. Record at PRP00157. The Procurement Officer determined Canon's offers on categories two and five were nonresponsive and these offers were rejected. Record at PRP00114. Canon received an award for product category three but was not selected for award of product category one. Record at PRP00115. Canon protested challenging the intended award for category one to the Solicitation arguing the State did not comply with the law and regulations governing the Solicitation, the requirements of the Solicitation, and that its scoring was confusing, arbitrary and capricious. Record at PRP00009-17.

The CPO conducted an administrative review addressing Canon's challenge to the ranking decision of category 1 in his written protest decision posted September 20, 2022. Record at PRP00001-6. The CPO categorized Canon's protest into four grounds:

1. "There is no documentation in the contract file as to the basis of the award, and therefore it could not satisfy an external audit, and furthermore there is no documentation showing the rationale behind the scoring."
2. The Request for Proposals (RFP) provided for seven evaluation subcriteria for the evaluation of the technical proposals, but the ranking determinations only provide scores for five.
3. The RFP listed the seven evaluation subcriteria for the evaluation of the technical proposals in the order of their relative importance but did not provide the relative importance of the numerous elements of six of the seven subcriteria.
4. Some of the evaluator's comments were not applicable to the subcriteria for which the comment was provided.

Record at PRP00002.

The CPO determined the first ground lacked merit as a lack of an auditable procurement file does not by itself provide a basis for overturning an award; and nevertheless, the procurement file had ample documentation to support the Selection Committee's scoring conclusions. As to the second ground, the CPO acknowledged that the Solicitation set forth seven subcategories for the evaluation of the technical proposals while the consensus evaluation sheet only provided scores for five subcategories. However, the procurement officer's reasoning provided that the two subcategories that were not listed on the evaluation score sheets were not numerically scored but were reviewed pass or fail. With all offerors, including Canon, receiving a pass, the CPO reasoned that Canon was not an aggrieved offeror under S.C. Code Ann. §11-35-4210(1)(b). As such, Canon did not have a right to protest. The CPO determined Canon's third protest ground failed, because the Selection Committee complied with the Procurement Code's requirement that "[p]roposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously." S.C. Code §11-35-1530(7). The Solicitation did not provide the relative importance of the numerous elements under each subcriteria, so to the extent Canon objects, it is an untimely protest of the Solicitation. *See* S.C. Code §11-35-4210(1)(a). Finally, the CPO concluded that ground four failed to state a claim, because it does not state a violation of either the Procurement Code or a mandatory requirement of the Solicitation, nor does it demonstrate any harm to Canon. For these reasons, the CPO denied Canon's protest.

Canon timely appealed to the Panel requesting further administrative review. The CPO filed a Motion for Judgment on the Administrative Record, and Canon filed a Motion for Summary Judgment.

Conclusions of Law

In its appeal to the Panel, Canon clearly states its challenge is limited the intended award under category one of the Solicitation. Canon asserts that the State failed to follow the scoring criteria of the Solicitation and did not include sufficient detail to determine the basis for the award in violation of S.C. Code §11-35-1530(7) – (9) rendering the evaluation arbitrary and capricious. Specifically, the Request for Proposal (“RFP”) listed nine evaluation criteria in the order of importance, with the first factor, price, being weighted more in total than all the other factors and subfactors combined, but the evaluation committee only provided scores for seven criteria. Canon argues the last two subfactors were changed to pass/fail without notice after submissions were received converting the two least important evaluation criteria into requirements, which ultimately made them more important than any of the other evaluation criteria. Finally, Canon claims it has been denied due process and a fair hearing due to incomplete and delayed Freedom of Information Act (“FOIA”) responses.

Canon moves the Panel for Summary Judgment on the grounds that undisputed facts support the conclusion that the procurement officer removed two criteria from the weighted scoring process and made them pass/fail in violation of the Procurement Code, because the Solicitation plainly stated all the provided criteria would be scored and given pre-determined weights. On the other hand, the CPO asks the Panel to grant his motion for judgment on the administrative record and affirm the written determination of the CPO on the grounds that the evaluation process was consistent with the Procurement Code. Canon was not aggrieved by the two pass/fail criteria that it passed, and ultimately the two “pass/fail” criteria were not arbitrary.

The Panel has considered and ruled on summary judgment motions and motions for judgment on the administrative records in the past. *Appeal by United Way Ass 'n of South Carolina*, Panel Case No. 2017-2(i) at 9-12; see also *Phoenix Mgt., Inc. v. U.S.*, 127 Fed. Cl. 358, 364, 2016 WL3606075 (Fed. Cl. 2016) (noting that a judgment on the administrative record is not precluded by the existence of a factual dispute and is akin to "an expedited trial on the record" where the court "must make factual findings based on the record." (citations omitted)). Although the Panel has traditionally conducted *de novo* evidentiary hearings to facilitate its administrative reviews, the Panel has concluded that its statutory governance does not require it to conduct a hearing in every case. *Id.* at 9; see also *Appeal by VetPride Services, Inc.*, Panel Case No. 2018-5. For the reasons discussed below, the Panel grants the CPO's motion for judgment on the administrative record and denies Canon's summary judgment motion.

This case involved competitive sealed proposals. Under S.C. Code §11-35-1530(5), RFPs are required to state the relative importance of the evaluation factors, but RFPs are not required to assign numerical weighting for each factor. S.C. Code Ann. §11-35-1530(5). "Proposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously." S.C. Code Ann. §11-35-1530(7).

The Solicitation provided:

EVALUATION FACTORS- PROPOSALS (MODIFIED)

Offers will be evaluated using only the factors listed below. **Evaluation factors are stated in the relative order of importance with the first factor being the most important. Please note that Item 1 (a) below is weighted more in total than all the other factors and subfactors combined. Once evaluation is complete, all responsive offerors will be ranked from most advantageous to least advantageous.**

1. Business Proposal

- a) Response to all cost-related items, point-by-point, in Section VIII, including completion of Schedules A1, A2, B, C1 and C2, you elect to participate in (Product Categories 1 through 5), in accordance with instructions.
 - b) Completed Cost of Conversion, Value-Added Services (Section IV.6) (for the initial 5 year term of the contract) (Section VIII, Section VIII.13).\
2. Technical Proposal- Qualifications & Experience
- a) Technical Proposal Technical Requirements (Section IV.1).
 - b) Support and Service (Section IV.2).
 - c) State UGU references, usage history, reporting requirement, fee compliance, comparable references and Corporate Experience Responses (Section IV.3).
 - d) Assessment and Implementation Plan (Section IV.4).
 - e) References (Section IV.5).
 - f) Authorized Resellers/Dealers including usage history, reporting requirements, fee compliance.
 - g) Completed Optional Solutions as described under VIII.14 through VIII.16 (non-mandatory).

PRP00079-80 (emphasis and colored text in original).

As required by the Procurement Code, the Solicitation states the evaluation factors in the order of relative importance, and as permitted by the Code, it does not assign weightings to these factors, aside from providing that Item 1(a) would be “weighted more in total than all the other factors and subfactors combined.” Record at PRP00079; see also S.C. Code Ann. §11-35-1530(5). Review of the evaluation documents establish that Item 1(a) was in fact weighted more than all the other evaluation factors combined, which is the only weighting that was previously assigned. Record at PRP00116-11. With exception to Items 2(f) and 2(g), the two subfactors that were evaluated as pass/fail, the remaining factors were assigned unpublished numerical weighting that corresponds to the order of relative importance published in the Solicitation. It is undisputed that all offerors, including Canon, received a pass for the two pass/fail subfactors. Those two factors are listed in the RFP as the least important, with Item 2(g) being non-mandatory. There is no evidence in the record to reflect they were not treated as the least important nor is there evidence

that any other factors were considered in the evaluation process. For these reasons, the Panel concludes that all offers were evaluated using only the nine criteria stated in the RFP in compliance of S.C. Code §15-35-1530(7).¹

Next, the Panel considers whether the evaluation process having two pass/fail criteria constituted arbitrary and capricious conduct in selecting the intended awardees as alleged by Canon. Under §11-35-2410, a determination by the State as to which proposal is the most advantageous considering price and the other evaluation criteria is final and conclusive unless such determination is “clearly erroneous, arbitrary, capricious, or contrary to law.” S.C. Code Ann. §11-35-2410.

Canon argues because the last two subfactors were considered pass/fail, the evaluators never received the opportunity to evaluate two criteria specifically provided in the RFP and the procurement file does not provide how the pass/fail evaluation was applied or who determined if an offer passed or failed, which on its face is arbitrary and capricious. In other words, Canon argues the resulting intended awards are arbitrary and capricious because they were not made based on the evaluation factors stated in the RFP, the contract file does not contain the basis on which the

¹ Canon argues nothing in the RFP suggested that Items 2(f) or 2(g) would be evaluated as pass/fail as the description of these factors does not request information that could be evaluated/graded on a pass/fail basis, and that there is no document or other evidence in the procurement file demonstrating that the State established weighting for each factor before evaluation and then scored the evaluation pursuant to that weighting. However, §15-35-1530(5) clearly states that the RFP “may not require a numerical weighting for each factor,” so the Procurement Code does not preclude evaluation factors from being evaluated pass/fail. *See* S.C. Code Ann. §15-35-1530(5). The proposals must be evaluated using only the published criteria and there must be adherence to the weightings that have been previously assigned. S.C. Code Ann. §15-35-1530(7). In this case, that means that the evaluation process had to be conducted in a manner that complied with the order of relative importance, and Item 1(a) had to be weighted more than all the other factors combined. Canon characterizes evaluating the two least important factors pass/fail as a “change in the award criteria,” however no numerical weighting was published in the RFP. Further, there is no evidence to support the two pass/fail factors were considered more important than the preceding evaluation factors. Thus, the Panel concludes Canon could not meet its burden of proving its allegation that the evaluation process violated S.C. Code §11-35-1530(7). *See Appeal by Intralot*, Panel Case No. 2017-8 (The protestant bears the burden of proving its allegations by the preponderance of the evidence).

award is made, and the contract file is insufficient to satisfy an external audit in violation of S.C. Code §15-35-1530(9).

Based upon the administrative record before the Panel, it is unclear how the procuring officer and/or the evaluation committee determined what was considered in determining a passing response opposed to a failing response for the two pass/fail criteria. What is clear, however, is that all offerors were evaluated using the same evaluation criteria; the pass/fail criteria were applied equally to every offeror; and just because all offerors received a pass for the pass/fail factors, essentially making those factors a wash across the board, does not inherently mean the evaluation factors or the methodology chosen was arbitrary. While it may be more convenient to offerors to know what rating methods the State will employ in a solicitation, neither the Code nor the regulations require disclosure of those methodologies in advance of the bid/submittal due date or evaluation.

The procurement file certainly could have more information regarding the pass/fail methodology, but the file contains ample information to support the basis on which the intended awards were made.² Even if this were not the case, the Panel has expressed doubt in the past that an allegation that the procurement file is not sufficient to satisfy an external audit would be a sufficient basis for overturning an award. *See Appeal by Intralot*, Panel Case No.2017-8. Further, the Panel has held that the evaluation process does not need to be perfect so long as it is fair. *Appeal by Transportation Management Services, Inc.*, Panel Case No. 2000-3.

Canon contends the CPO erred in concluding it is not an aggrieved party and the evaluation process was unfair, because a protesting offeror could not determine how the conversion of criteria

² The procurement file includes the rationale and supporting comments for the numerically weighted scoring (Record at PRP00116-121), the individual evaluator comments incorporated into the evaluation score sheet (Record at PRP00122-124), meeting minutes that explain the consensus scoring (PRP00136-147), and documentation demonstrating all three voting members of the Selection Committee were present at those meetings (PRP00135-156).

to pass/fail after submission and without notice or opportunity to revise their proposals effected the grading outcome of each offer. Canon states it became an aggrieved party when the criteria and weighting changed after submission.³ The Panel disagrees. First, the record does not reflect, and Canon cannot show that the criteria and weighting changed. Rather, Canon incorrectly assumes that all the evaluation factors had to be rated on a numerical scale and/or that the State was required to publish its evaluation methodology. These assumptions are contrary to the law. *See* S.C. Code Ann. §11-35-1530. Second, Canon has not established it was harmed by the application of the pass/fail criteria as it received a pass on both “pass/fail” criteria and all offerors were evaluated on a pass/fail basis on the same criteria. For these reasons, the Panel concludes the evaluation process was fair and Canon was not “aggrieved” according to section 11-35-4210(1)(b). S.C. Code Ann. §11-35-4210(1)(b) (granting the right to protest only to those offerors aggrieved in connection with the intended award or award of contract).

Canon’s final appeal ground alleges its due process rights and right to a fair hearing were denied by incomplete and delayed FOIA responses. In this case, the Panel has conducted a *de novo* review of Canon’s claims as required by section 11-35-4410(1) of the Procurement Code; all parties were afforded the opportunity to brief the issues raised by the varied dispositive motions; and the Panel convened a motion hearing to receive oral argument on those issues. Thus, the Panel concludes Canon was afforded an opportunity to be heard “at a meaningful time and in a meaningful manner.” *Appeal by Catamaran, LLC*, Panel Case No. 2015-2 (quoting *S.C. Nat’l Bank v. Central Carolina Livestock*, 289 S.C. 309, 313, 345 S.E.2d 485, 488 (1986) (citation

³ Under this rationale, Canon would be an aggrieved party under category three as well, despite having received an award under that category. While Canon correctly points out that the only issue before the Panel is related to category one of the Solicitation and the Panel does not have jurisdiction to make any determinations regarding the awards of the other categories, it is not lost on the Panel that the record reflects the same evaluation criteria and methodology were utilized for each of the product categories, but Canon only takes issues with the evaluation process where it did not result in receiving an award.

omitted)). Consequently, an adequate de novo review by the Panel “renders harmless a procedural due process violation based on the insufficiency of the lower administrative body.” *Id.* (quoting *Unisys Corp. v. South Carolina Budget and Control Bd.*, et al., 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001)).⁴

Conclusion

Therefore, for the reasons set forth herein, the Panel grants the CPO’s Motion for Judgment on the Administrative Record and denies Canon’s Motion for Summary Judgment. The appeal of Canon is denied. Accordingly, the Panel affirms the decision of the CPO consistent with this Order.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 

C. BRIAN MCLANE, SR., CHAIRMAN

This 16th day of December, 2022.

Columbia, South Carolina

⁴ Canon states that it does not ask the Panel to enforce the Freedom of Information Act, but asks the Panel to take notice of the documents and material specifically referenced in the documents produced in FOIA, but not also produced (presumably in the administrative record). As Canon requested in other briefings, it was at liberty to request the administrative record be supplemented with any additional documents it deemed relevant to it appeal. Regardless, Canon has not shown actual prejudice.