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February 19, 2013

Re: MVP Appeal of ITS Protest Decision – RFP No: 11-01 IT Consultant Services

Dear Mr. Lucey:

The Office of the State Comptroller (“OSC” or “Office”) has reviewed your letter of August 6, 2012 appealing the bid protest decision of the Office of Information Technology Services (“ITS”), dated July 20, 2012, which denied the agency level protest filed by MVP Consulting Plus, Inc. (“MVP”). The protest decision upheld ITS’ determination that MVP’s proposal for “Lot Group E”¹ of the above-referenced procurement was non-responsive.

In your Appeal to this Office, you make three arguments: (i) MVP satisfied the requirements of the Request for Proposals (“RFP”); (ii) ITS’ protest decision attempts to justify the disqualification of MVP by altering the requirements of section 4.2D of the RFP; and (iii) ITS did not follow its evaluation criteria by failing to contact bidders’ references in certain instances.

The primary issues raised by your Appeal concern the interpretation of the requirement contained in section 4.2D of the RFP. Section 4.2D of the RFP reads as follows:

¹ On September 16, 2011, ITS issued Request For Proposals No. 11-01 seeking bids from qualified vendors to provide IT Consultants for various technology titles. Bidders were permitted to bid on one or more of seven different Lot Groups (Lots A through G). Vendors receiving a Lot Group contract (a Tier 1 Contract) become eligible to compete in a Tier 2 process when a consultant position needs to be filled. To date, we have received proposed contracts only for Lots D and E.

“D. Furnish the required number of resumes specified in the table above for individuals who have (i) provided services to a customer of Bidder within the last twenty-four (24) months (ii) in an equivalent job title contained in the Lot Group (iii) at a rate which is equal to or less than the hourly rate quoted for such job title in Bidder’s Cost Proposal ...” (emphasis added)

You assert that MVP satisfied the rate requirement set forth in section 4.2D by providing ITS with an invoice from the company owned by one of the individuals identified in MVP’s proposal establishing that MVP had “secured the services” of the individual at a rate below the rate bid by MVP. ITS asserts that the clear language of Section 4.2D requires that the bidder document that the bidder provided equivalent consultant services to a customer a rate equal to or less than the rate it bid. The resolution of this issue turns on whether the rate requirement set forth in section 4.2D (the bolded language above) requires that the bidder demonstrate the hourly rate in its cost proposal is equal to or less than: (i) the rate the bidder acquired such services, or (ii) the rate the bidder charged to a “customer” for such services.

In our view, the rate requirement of clause (iii), as well as the equivalent job title requirement of clause (ii), must be read in conjunction with the first clause of Section 4.2D which refers to services provided to a “customer of Bidder”. We think this reading is bolstered by ITS’ answer to a question from a bidder concerning the rate requirement. In Question Number 169, ITS was questioned about the rate requirement in the context of a bidder providing “resources to a prime rather than the end client.” ITS responded that the rate requirement related to “the rate the Bidder is **charging** the Prime Contractor for the consultant services” (emphasis added). In this answer, it is clear that the focus of the rate requirement is the amount that was charged by the bidder to its customer (which in that case happened to be a prime contractor), not the amount that the bidder is paying to acquire the services. We also note that this interpretation is consistent with the purpose of the rate requirement, as stated by ITS, to “confirm that a Bidder has actually provided the consultant to a customer at a rate which is at or below the rate that the Bidder offers to provide an equivalent consultant to ITS” (ITS Decision, pg. 3).

In light of the above, we conclude that MVP did not satisfy the rate requirement set forth in Section 4.2D of the RFP and, therefore, MVP’s proposal was not responsive. However, in our review of the parties submissions on this Appeal, and our independent review of the procurement record, it has become clear that ITS accepted paycheck information from an employee of MVP to satisfy the rate requirement for Lot D and, in fact, made an award to MVP for Lot D.² Furthermore, ITS also accepted payroll

² In its Protest Decision, in responding to MVP’s claim that ITS did not provide sufficient information to bidders concerning what information had to be submitted to satisfy the requirements of the solicitation, ITS stated that, “MVP’s arguments that bidders were provided insufficient information is undermined by the fact that MVP satisfied this minimum requirement for Lot Group D (in which MVP received an award) . . . (ITS Decision, pg. 4). However, in its Appeal, MVP responded it had “submitted an invoice in the form of a Paychex individual earnings report [for an MVP employee] for Lot Group D (Appeal, pg. 4). This information clearly is the rate paid to the individual for services provided to the customer, not that billed to the customer.

information for purposes of rate verification for another Lot Group D tentative awardee, infrastructure (see ITS Response to Appeal, pg.4).

In response to the Appeal, ITS attempted to justify its acceptance of paycheck information from an employee of the bidder to satisfy the rate requirement stating that “acceptance of the salary and fringe of a consultant that is an employee of the Bidder is distinguishable from the situation of a Consultant that is an independent contractor for the Bidder (ITS Response to Appeal, pg. 4). In support for this distinction, ITS cites to the greater degree of control an employer has over an employee, arguing that the employer can control its costs to “employ the employee, while the services of an independent contractor are subject to negotiation on the open market.” (ITS Response to Appeal, pg. 3).

In our view, there is no rational basis to distinguish between an employee and an independent contractor for purposes of the rate requirement, and any such distinction would be contrary to the stated purpose of the rate requirement, which, as stated in ITS’ Decision was to “confirm that a Bidder has actually provided the consultant to a customer at a rate which is at or below the rate that the Bidder offers to provide an equivalent consultant to ITS”. Therefore, we are hereby advising ITS that this Office will not approve any award under this procurement unless the bidder has documented that it has provided services to a customer at or below the rate set forth in its proposal – irrespective of whether such services were provided by an employee of the bidder or an independent contractor.

The second argument raised in your Appeal also relates to the requirements of section 4.2D. Specifically, you assert that ITS altered the requirements of section 4.2D to justify its disqualification of MVP. Your second argument is premised on the incorrect view that the requirements of section 4.2D of the RFP could be met by providing evidence that the bidder acquired the necessary services at rates equal to or less than those in its bid. In light of our determination above, this argument must be rejected.

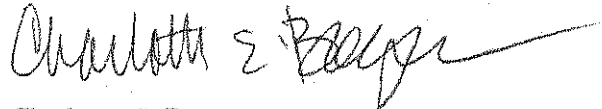
Finally, you assert that “ITS did not follow its evaluation criteria by failing to contact bidder’s references in certain instances . . .”. Section 4.2E of the RFP required that bidders provide three customer references, two of which must be current customers of the bidder that were utilizing the individuals that the bidder identified in its proposal. You assert that ITS did not contact Unisys, one of MVP’s customer references, and you speculate that ITS may not have done so in other cases.

Preliminarily, we note that since ITS found that MVP’s proposal was not responsive to the mandatory requirements of the RFP with respect to Lot E, any issue with respect to the scoring of MVP’s references is irrelevant. Furthermore, based upon our review, it appears that ITS did, in fact, contact the customer references provided by the bidders, including the three references provided by MVP.³

³ With respect to MVP’s assertion with respect to ITS’ failure to contact Unisys, we note that the references were expected to be the end users of the bidders services, and MVP did that in this case by identifying three end users of its services, specifically the Division of State Police (“State Police”), the Office for Technology (“OFT”, which was the prior name of ITS), and the Office for People With Developmental Disabilities – although MVP did note that in the case of State Police and OFT, MVP provided resources

For the reasons outlined above, we find that the arguments raised in the Appeal are not sufficient to overturn ITS protest decision and, therefore, your Appeal is denied. However, in light of certain other issues identified in our review of the procurement, this Office will not be approving ITS' contract awards under Lot Group E until ITS has provided additional information/documentation to this Office. Finally, please be advised, that consistent with this determination, this Office will not approve any other awards under this procurement until ITS provides evidence that the awardee has provided services to a customer at or below the rate set forth in its proposal.

Sincerely,



Charlotte E. Breeyear
Director, Bureau of Contracts
Office of the State Comptroller

cc: Office for Information Technology Services
GCOM Software, Inc.
Unisys Corporation
Universal Technologies, LLC
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through Unisys. As noted in the text, the three state agency references were contacted by ITS, and their responses were scored – although since MVP was ultimately determined to be non-responsive with respect to Lot E, these scores were ultimately irrelevant. Consistent with the evaluation methodology, when ITS contacted references, it also attempted to verify that the bidder was in compliance with the rate requirements of section 4.2D. However, in the case of State Police and OFT, the references were not able to provide information concerning the amount MVP charged its direct client Unisys for the services. While ITS would otherwise have contacted Unisys to attempt to verify compliance with section 4.2D, ITS determined that, because Unisys was also a bidder, it should not contact Unisys, but rather attempted to verify this issue through other resources, and, as noted earlier in this determination, ultimately concluded that MVP was not in compliance with the requirements of this provision. We believe that ITS' actions under the circumstances were reasonable and materially complied with the evaluation methodology. Therefore, even if MVP had not been disqualified as non-responsive, we would still find no merit to this assertion by MVP.