

State Protest Committee Meeting No. 22
Minutes and Summary of Decision
September 27, 2023

The State Protest Committee (“Committee”) met on September 27, 2023, to hear the appeal of RN Expertise (“RNE”), concerning RFP # 32901-31311, issued by the Tennessee Department of Correction (“TDOC”) for Employee Drug and Alcohol Testing.

The Committee was comprised of the following members:

- Eugene Neubert, Deputy Commissioner of the Department of Finance and Administration (“F&A”), as designee of F&A Commissioner Jim Bryson;
- Rick Dubray, Deputy Treasurer, Support Services with the Department of Treasury, as designee of State Treasurer David Lillard, Jr.;
- Hannah Salita, Executive Director of the Division of Administration with the Department of General Services (“DGS”), as designee of DGS Commissioner Christi Branscom.

Agenda Item #1. Approval of Minutes from Meeting Number 21, which took place August 29, 2023, for the protest concerning RFP # 32901-31311 for Closed Loop Referral System.

Upon proper motion and second, the Committee unanimously voted to defer consideration of the minutes from Meeting Number 21, as drafted, to allow time for their revision and distribution prior to the next Committee meeting. The minutes as drafted, while summarizing the decision, did not address all agenda items that were included in the meeting.

Agenda Item #2. Tennessee Code Annotated § 8-44-112 (effective July 1, 2023) requires a period of time to be made available at public meetings for public comment. The requirement applies to all public meetings when action items (voting items) appear on the agenda and requires that the public be provided a reasonable opportunity to comment on “matters that are germane to the items on the agenda for the meeting.”

As no members of the public presented themselves to make any comments, no action was required on this agenda item.

Agenda Item #3. Consideration of a Protest Appeal by RNE, challenging the Protest Decision of Chief Procurement Officer Michael Perry (“CPO”) to uphold the intended award of a State contract to Comprehensive Drug Testing (“CDT”), pursuant to RFP # 32901-31311 issued by TDOC for Employee Drug and Alcohol Testing.

TDOC issued RFP # 32901-31311 for Employee Drug and Alcohol Testing on February 16, 2023. The State completed the evaluations and, on May 25, 2023, provided its Notice of Intent to Award the contract to CDT. On June 1, 2023, RNE filed a protest of that determination with the CPO.

On July 31, 2023, the CPO issued his written decision denying the protests by RNE. RNE filed a Notice of Appeal of the CPO’s decision to the Committee on August 7, 2023. Position Statements were submitted by RNE and the Central Procurement Office.

The protesting party RNE and the Central Procurement Office appeared for the meeting.

The issues for determination by the Committee were:

The contract award to CDT was arbitrary and capricious and exceeded the authority of the Central Procurement Office; and was contrary to applicable law, regulations, and terms of the RFP for the following reasons:

1. CDT was not the lowest responsive bidder.
2. The Evaluation Committee's scoring varied greatly with no explanation and was irrational and demonstrated favoritism toward CDT, the current vendor.
3. The Evaluation Committee failed to follow the rules of the procurement as set forth in the solicitation and this failure materially affected the contract award because RNE should have received a higher score as the lowest bidder meeting all requirements.
4. CDT's technical response should have been deemed non-responsive, and thus bypassed, because the RFP Statement of Certifications and Assurances did not contain evidence demonstrating the authority of the signer of the Statement, CDT Executive Vice President Art McGill, to bind CDT, despite the RFP requiring a respondent to provide evidence showing the individual's authority to bind the Respondent.
5. The Evaluation Committee demonstrated favoritism and bias toward CDT by allowing CDT to submit a clarification regarding Mr. McGill's authority to bind CDT after the technical responses were opened but not allowing RNE to correct an omission in its own technical proposal, i.e., to insert the score sheet that listed page numbers of RNE's responses to criteria.
6. The State failed to provide all vendors with the proper number of onsite tests for accurate price estimates resulting in incorrect totals and price evaluations.
7. An evaluator's scoring sheets used to evaluate RNE's proposal, which included the name of RFP respondent Norton Medical Industries on several of the sheets, reflects an evaluation of and scores for Norton Medical Industries rather than RNE.

After discussion and argument by RNE and counsel for the Central Procurement Office, the Committee unanimously upheld the decision of the CPO denying RNE's appeal based on the written position statements from the parties and oral presentations by RNE and counsel for the Central Procurement Office, as follows:

1. The Committee found no merit to the assertion that CDT should not have been awarded the contract because they were not the lowest responsive bidder. The Committee reasoned that the terms of the RFP – specifically, §§ 5.1-5.2 – provided that the evaluation process was designed to award the contract not necessarily to the respondent with the lowest Cost Proposal, but rather to the respondent who offers the best combination of attributes as demonstrated by their General Qualifications and Experience, Technical Qualifications and Experience, and Cost Proposal. The Committee further observed that CDT, while not scoring as many points as RNE for their Cost Proposal, did score more points than RNE for Technical Qualifications and Experience as well as Technical Qualifications and Experience, which led to CDT receiving more total points for their RFP response than RNE. Thus, reasoned the Committee, CDT was properly awarded the contract as the highest scored RFP response.

2. The Committee determined that the variations in the Evaluation Committee's scoring did not demonstrate favoritism toward CDT. First, the Committee noted that the Evaluation Committee for this RFP consisted of four members, which is one more than the suggested number of members as provided in § 5.10 of the Procurement Procedures Manual of the Central Procurement Office ("Manual"). Second, while acknowledging the variation in scoring between the Evaluation Committee members, the Committee opined that the CPO's decision to use four members rather than three helped to provide a more accurate score for the cost proposals by taking an average of a larger number of scores. Lastly, the Committee stated that the evidence did not demonstrate individual bias of the Evaluation Committee members in favor of CDT or against RNE, and did not demonstrate collaboration between the Evaluation Committee members to favor CDT or increase CDT's scores or to oppose RNE or decrease RNE's scores.
3. The Committee found no merit to RNE's argument that the Evaluation Committee failed to follow the rules of the procurement as set forth in the solicitation, and that this failure materially affected the contract award because RNE should have received a higher score as the lowest bidder meeting all requirements. The Committee observed that the rules and terms of the RFP stated that the contract was to be awarded based upon an evaluation of not only the respondents' Cost Proposals but also their General Qualifications and Experience and Technical Qualifications and Experience. As the Central Procurement Office based their intent to award the contract upon the total scoring for these areas, and CDT received the highest total score amongst the respondents, the Committee did not find this argument persuasive.
4. The Committee determined that CDT's technical response should not have been deemed non-responsive, and thus bypassed, because the RFP Statement of Certifications and Assurances did not contain evidence demonstrating the authority of the signer of the Statement, CDT Executive Vice President Art McGill, to bind CDT, despite the RFP requiring a respondent to provide evidence showing the individual's authority to bind the Respondent. The Committee acknowledged that CDT's response to the RFP did not contain this evidence of authority for Art McGill to bind CDT, but also noted that § 5.11.2 of the Manual provides that responses capable of being determined responsive through clarification should not be deemed non-responsive. The Committee reasoned that, because the Solicitation Coordinator was able to obtain the evidence of authority through clarification, thereby ensuring that CDT's response remained responsive, the Solicitation Coordinator properly declined to deem CDT's technical response as non-responsive.
5. The Committee found no merit to RNE's argument that the Evaluation Committee demonstrated favoritism and bias toward CDT by allowing CDT to submit a clarification regarding Mr. McGill's authority to bind CDT after the technical responses were opened but not allowing RNE to correct an omission in its own technical proposal, i.e., to insert the score sheet that listed page numbers of RNE's responses to criteria. The Committee stated that the record was void of proof of bias on this issue, as CDT's clarification was permitted in accordance with § 5.11.2 of the Manual. The Committee further noted that the record contained no corroborating proof that the failure to permit RNE to insert the score sheet into their technical proposal resulted from bias against RNE.
6. The Committee found no merit to the assertion that State failed to provide all vendors with the proper number of onsite tests for accurate price estimates resulting in incorrect totals and price evaluations. The Committee noted that Amendment 4 to the RFP answered the question "How many tests are expected to be done each year and what amount of those are done onsite using mobile collectors?"

with testing data from January 1, 2023, through March 1, 2023, demonstrating the most recent collection information. As such, opined the Committee, the State had provided all vendors with the proper number of onsite tests for accurate price estimates in their proposals.

7. The Committee determined that an evaluator's scoring sheets used to evaluate RNE's proposal, which included the name of RFP respondent Norton Medical Industries on several of the sheets, did not reflect an evaluation of and scores for Norton Medical Industries rather than RNE. The Committee stated that clarification was properly sought from that Evaluation Committee member, who indicated that the inclusion of the name "Norton Medical Industries" on the scoring sheets was a clerical error and that the member had intended to and did score RNE's proposal with those scoring sheets. The Committee further recognized the record did not contain any evidence to support RNE's contention that the scoring sheets were actually meant for Norton Medical Industries and not for RNE. As such, the Committee determined that the scoring sheets used to evaluate RNE's proposal, while including the name "Norton Medical Industries," reflected an evaluation of and scores for RNE.

Upon proper motion and second, the Committee unanimously voted to deny the protest and uphold the previous decision of the CPO.

Agenda Item #4. Consideration of the return of the protest bond to RNE.

Upon proper motion and second, the Committee unanimously voted to return the protest bond to RNE.