

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1172

In the Matter of)	
)	
FIVE STARS INTERNATIONAL, LTD.)	ORDER
)	
Protest of Selection Process, RFP #05-003.)	

DISPOSITION: PROTEST DENIED

In this order, the Public Utility Commission of Oregon (Commission) denies a protest filed by Five Stars International, Ltd. (Five Stars) challenging the selection process used to award the Oregon Universal Service Fund Administrator contract to a competing proposer. The Commission concludes that Five Stars has failed to establish that all higher-ranked proposers are ineligible for selection.

Introduction

ORS 759.425 requires the Commission to establish a competitively neutral and nondiscriminatory Oregon Universal Service Fund (OUS Fund). The purpose of the fund is to ensure that basic telephone service is available at a reasonable and affordable rate. All telecommunications carriers in Oregon impose a surcharge on the sale of services and contribute these monies to the OUS Fund. Local exchange carriers that are certified and designated eligible by the Commission receive distributions from the OUS Fund to offset the costs of providing local services.

The Commission convened an OUS Fund Advisory Board (Board) in early 2000. Among other duties, the Board—comprised of representatives from industry, consumer groups and the Commission Staff—assists and advises the Commission in the selection of an OUS Fund Administrator. The OUS Fund Administrator monitors and calculates the OUS Fund contribution rate, coordinates collections of OUS Funds, submits requests for monthly disbursements, and does other things necessary to administer the fund.

In August 2000, the Commission contracted with Five Stars to administer the OUS Fund. The contract covered a two-year period with three optional one-year extensions. The Commission implemented two of the extensions. In November 2003, however, the Commission determined a new database was needed to meet the record

keeping requirements of the OUS Fund. Due to the database and other program changes, the Commission informed Five Stars that the Commission would not offer the final one-year extension and, instead, would issue a Request For Proposal (RFP).

The RFP closed on August 4, 2004. The Commission received proposals from Five Stars, NECA Services Inc. (NECA Services), and Rhoads & Sinon Group, LLC (Rhoads). Five Stars is a firm based in Salem, Oregon that provides organizational analysis and management consulting services. Five Stars has administered the Oregon OUS Fund since its inception in 2000. Five Stars' proposal estimated that it would require 2,700 hours of work to administer the OUS fund during the two-year period and projected its costs at \$280,706.

NECA Services, based in Whippany, New Jersey, provides program administration, billing and collection, network equipment, and database management services. With over 200 employees, NECA Services currently administers eight different state universal service funds and has implemented and administered other state and federal support programs. NECA Services' proposal estimated that it would require 1,200 hours of work to administer the OUS fund during the two-year period and projected its costs at \$136,207.

Rhoads, a consulting firm based in Harrisburg, Pennsylvania, provides a wide range of consulting services principally to government and non-profit organizations involved with the regulation of public utilities. Rhoads currently administers two state universal service funds and one federal universal service fund. Rhoads' proposal estimated that it would require 2,200 hours of work to administer the OUS fund during the two-year period and projected its costs at \$300,000.

An evaluation committee comprised of members from the Board and members of the Commission Staff scored the proposals. The first two sections, General Requirements and Mandatory Requirements, were scored on a pass/fail basis. The third section was scored using weighted scoring criteria set forth in the RFP. These criteria included:

1. Client References
2. Plan for Service-Start-up
3. Understanding of the Scope of Work
4. Demonstrated Ability to Perform the Proposed Work
5. Additional Knowledge and Experience
6. Soundness, Professionalism and Feasibility of the Proposal
7. Price Proposal

The evaluation committee met to discuss the proposals and to assign points to each proposal submission based upon the consensus of the committee. After this review, the evaluation committee selected NECA Services as the successful proposer with 915 of the 1,000 points. Rhoads was second, with 760 points out of 1,000, and Five

Stars was third, with 750 out of 1,000 points. The evaluation committee concluded that NECA Services distinguished itself from the other proposers with its expertise and longevity in the business of fund administration. The committee also noted that NECA Services received high praise for its work administering the Texas universal service fund, which is highly similar to Oregon's OUSF in terms of complexity, demands and the data analysis required.

The OUS Board unanimously concurred with the committee's selection. The OUS Board agreed with the evaluation committee that NECA Services submitted a professional, well-written proposal that clearly demonstrated an understanding of the scope of work and the ability to perform the proposed work.

At a September 7, 2004 Public Meeting, the Board recommended that the Commission contract with NECA Services to administer the OUS Fund for a two-year period. The Commission agreed and adopted the recommendation.

Protest

On September 21, 2004, Five Stars timely submitted a written protest of the Commission's decision to contract with NECA Services. Five Stars makes numerous points in support of its protest, which we address as follows:

A. Scoring

Five Stars contends that, during the proposal evaluation process, the Commission erroneously awarded too many points to the two other proposers, NECA Services and Rhoads, and did not award enough points to Five Stars. As a result, Five Stars argues that it improperly received a lower ranking than either NECA Services or Rhoads when proposal evaluations were complete.

For example, Five Stars contends that both NECA Services and Rhoads understated the scope of work and that, consequently, both proposers price proposals were understated. Five Stars further contends that the evaluation committee's conclusions regarding the difference in hours were either erroneous or unsubstantiated. After detailing the work required and issues related to the new Access Database, the Telecommunications Revenue Review, the OUS web pages, and Fiscal Activity, Five Stars concludes that the evaluation committee improperly discounted Five Stars' superior proposal.

B. Scope of Work

Five Stars next contends that both NECA and Rhoads failed to meet the "Statement of the Task" requirement set forth in Section IV of the RFP. That section requires proposers to, among other things, explain the scope of work, describe all work activities, identify which activities are most important, and provide a project work plan

and proposed time schedule. Five Stars argues that NECA Services' proposal fails to offer a legal basis for calculating the OUS contribution rate and fails to address critical responsibilities integral to the success of the OUS Fund. Similarly, Five Stars claims that Rhoads' proposal failed to make any effort to meaningfully describe how it will fulfill critical obligations.

In addition, Five Stars contends that its proposal offered the most comprehensive description of the OUS program and fully describes how it intends to fulfill all tasks. It argues that the proposals submitted by NECA Services and Rhoads failed to address or demonstrate an understanding of specific and critical tasks integral to the OUS program, including those issues and tasks related to the collection and disbursement of OUS funds and the maintenance of the OUS database. Accordingly, Five Stars contends that the other proposals should have been discounted significantly under the scoring criteria for Understanding of the Scope of Work, the Soundness, Professionalism and Feasibility of the Proposal, and Price Proposal. Conversely, Five Stars adds that its proposal should have received additional points reflecting its more comprehensive, inclusive and responsive proposal, resulting in the highest score.

C. Miscellaneous RFP Requirements

Five Stars continues its objections and argues that the proposals submitted by NECA Services and/or Rhoads should be discounted or rejected for failure to comply with various RFP requirements. We address each contention separately.

1. OUS Website. Rhoads' proposal should have been discounted because of its failure to establish an independent website.

2. Service Coordination. Rhoads' proposal should have been rejected, for its failure to identify the cost of service coordination. NECA Services' proposal should have been discounted because its proposed cost for service coordination was higher than that proposed by Five Stars.

3. Audit Costs. Rhoads' proposal should have been rejected because of its improper inclusion of audit costs to be paid by the Commission.

4. Option Year Cost Adjustments. Rhoads' proposal should have been discounted for its failure to acknowledge the cost adjustment limitation.

5. Resumes. NECA Services proposal should have been discounted or rejected for its failure to specifically identify or provide resumes for all staff members assigned to the project.

6. Conflict of Interest. The proposals submitted by NECA Services and Rhoads should have been discounted or rejected for their failure to identify all potential conflicts of interest.

7. Contract Term. Rhoads' proposal should have been discounted for its failure to offer a schedule conforming to the terms of the anticipated contract.

8. Cost Proposal. The proposals submitted by NECA Services and Rhoads should have been discounted or rejected for their failure to meet specific requirements for the cost proposal, including the failure to identify costs for 11 identified tasks, provide names of personnel in each category, and itemize subcontractor costs.

Commission Resolution

Before addressing Five Stars' protest, we begin with a summary of the RFP process. Through the RFP, the Commission sought responses from qualified individuals and entities interested in administering the OUS Fund. Based on those responses, the Commission identifies a successful proposer—that is, an individual or entity that the Commission felt best qualified to perform the described duties. The Commission is not required, however, to automatically award a contract to the successful proposer. Rather, the RFP contemplates the Commission and successful bidder negotiate the statement of work and other necessary contract provisions.¹ If the parties are unable to negotiate a successful contract, the Commission may begin negotiations with the next highest-ranked proposer, issue a new RFP, or seek alternative means for the administration of the OUS Fund.

As noted above, the Commission adopted the Board's selection of NECA Services as the successful proposer. Five Stars timely filed a protest to that selection.² To prevail, Five Stars must demonstrate that all other higher-ranked proposers were ineligible for selection.³

Five Stars' numerous arguments can be divided into two groups. First, Five Stars asserts that the Commission erroneously awarded too many points to NECA Services and Rhoads and did not award enough points to Five Stars. These arguments are based on its own review of the three proposals and subsequent determination that its own proposal best demonstrated an understanding of, and ability to perform, the tasks integral to the success of the OUS program. Second, Five Stars contends that NECA Services and Rhoads failed to comply with certain requirements of the RFP, and therefore, their proposals should have been rejected.

With regard to Five Stars' first group of arguments, evaluating proposals for personal services and determining the number of points for particular proposal requirements is an exercise of judgment that is within the scope of the Commission's

¹ RFP #05-003, Section I.E.6.

² Although the RFP required any written protest to be filed within seven (7) calendar days after receiving notification of the selection, the Commission extended the protest period to fourteen days at Five Stars' request.

³ RFP #05-003, Section VII.B.; OAR 125-020-0360(2).

duties and may require its specific expertise. The key question here is whether the Commission properly exercised this discretion, not whether everyone agrees with the resulting decision.⁴

As discussed above, the Commission assembled a Board comprised of individuals with particular expertise in issues related to the OUS Fund, the federal universal service fund, and other state universal service funds. A subset of these members, together with Commission staff members with expertise in State of Oregon accounting procedures, formed an evaluation committee to individually review each proposal. Using weighted scoring criteria set forth in the RFP, the evaluation committee concluded that NECA Services had the highest scoring proposal, followed by Rhoads and Five Stars.

Five Stars has failed to demonstrate that the Commission, in relying on the unanimous advice of the evaluation committee as endorsed unanimously by a quorum of the Board, abused its discretion in determining the number of points to assign to each proposal. Furthermore, there is no evidence of any such abuse contained in the documentation produced by the evaluation committee. Accordingly, Five Stars' arguments related to the scoring of the proposals are rejected.

Five Stars' second group of arguments contain numerous assertions that NECA Services and Rhoads failed to comply with certain requirements of the RFP. At the outset, we note that the Commission reserved the right in the RFP to waive any minor irregularity, informality, or non-conformance with the provisions or procedures set forth in the RFP.⁵ Moreover, the Commission is authorized to accept proposals that substantially comply with all requirements.⁶ Thus, contrary to Five Stars' assertions, there is no requirement that the Commission reject a proposal outright for failure to comply with any requirement, regardless of how minor the failure.

We begin by reviewing the allegations made against the winning proposer, NECA Services. In its complaint, Five Stars cited four specific reasons why NECA Services' proposal should be rejected. First, Five Stars contends that NECA Services' proposal failed to specifically identify or provide resumes for all staff members assigned to the project. Although NECA Services did provide the requested information for the program manager, program administrator, website IT manager and website developer, NECA Services did not specifically identify a data analyst. Instead, NECA Services reported that a data analyst to the program administrator would be assigned prior to October 1, 2004.

The objective of the Commission's RFP inquiry into the identities and resumes of staff members each proposer would assign to the project was to give the

⁴ See e.g., *Schlumberger Technologies, Inc. v. Tri-County Metropolitan Transportation District of Oregon*, 145 Or App 12, 20 (1996).

⁵ RFP #05-003, Section I.E.3.

⁶ RFP #05-003, Section I.E.4.

Commission assurance that the proposer would dedicate sufficient personnel resources, and sufficiently experienced resources, to the OUS Fund contract to secure adequate performance of the contract. The NECA Services submission was more than adequate to secure that objective. As noted above, NECA Services reported that it currently has a staff of over 200 employees and administers eight state universal service funds. Moreover, it identified the positions and levels of responsibility of key personnel to be assigned to management, administration, and IT support. Therefore, the Commission acted well within its discretion when it decided that the proposal of NECA Services substantially complied with this portion of the RFP.

Second, Five Stars contends that NECA Services failed to provide a legal basis to calculate the OUS contribution rate. Five Stars notes that NECA Services' ability to perform this task is based on the assumption that it may require each local exchange company to complete a data request to project revenues, line counts, and OUSF support requirements for the following year. Five Stars is correct that the Commission has not previously required local exchange companies to submit such data requests. There has been no final decision, however, whether the Commission may require such information to be filed. Furthermore, even if this identified process is not possible, there are many alternative methods NECA Services may use to forecast information needed to calculate the OUS contribution rate. NECA Services' failure to identify these other available methods does not warrant rejection of its proposal.

Third, Five Stars contends that NECA Services failed to identify all potential conflicts of interest. While NECA Services' proposal asserted no actual or potential conflict of interest, Five Stars notes that its proposal identified the following economic interests on the part of its business and responsible officers:

- Eight NECA Services shareholders are telecommunication carriers based in Oregon
- NECA Services acts as an agent for certain Oregon local exchange carriers
- NECA Services' director owns a billing service bureau with a clientele that includes one competitive local exchange carrier operating in Oregon
- Another NECA Services' director owns shares in AT&T, SBC Communications and other carriers under the jurisdiction of the OUS program
- NECA Services may sell various services and products to telecommunications services providers, some of whom may be located in Oregon

Contrary to Five Stars' assertions, NECA Services disclosed all these economic interests under its "Statement Regarding Conflicts of Interest."⁷ Although

⁷ See *NECA Services' Proposal to Administer the Oregon Universal Service Fund*, pages 30 and 31.

NECA Services did not believe any of these relationships presented an appearance of conflict, NECA Services described the relationships in the interest of full disclosure. Consequently, Five Stars' apparent disagreement about whether these relationships constitute a potential conflict is moot. All relationships were fully disclosed and considered by the evaluation committee.

Finally, Five Stars contends that NECA Services' proposal failed to meet specific requirements set forth in the cost proposal section of the RFP. For example, Five Stars notes that the RFP asked for a cost proposal for the following 11 tasks:

- Calculate the OUS Contribution Rate
- Coordinate Collection of OUS Funds
- OUS Funds Disbursement
- Maintain Databases and Prepare Reports
- Develop OUS FUND Administration Budget
- Recommend Improvements and Changes of Administrative Procedures
- Establish Safeguards
- Limitation of OUS Information
- Audits/Reviews
- Additional Information

NECA Services' proposal, however, offered cost proposals for only five "major cost categories:"

- Calculation of OUSF Contribution
- Coordination of OUSF Collections
- OUSF Disbursements
- Reporting, Database and Website
- Program Administration

Five Stars also contends that the proposal contains information that appears to demonstrate the existence of subcontracts between NECA Services and the National Exchange Carrier Association (NECA), a separate entity. Five Star points out, however, that NECA Services failed to itemize subcontractor costs as required by the RFP.

Assuming that Five Stars is correct and that NECA Services' proposal failed to report cost proposals for all eleven specified tasks and to itemize subcontractor costs, such deficiencies are minor and do not warrant the rejection of NECA Services' proposal. NECA Services' five major cost categories subsumes all eleven tasks identified in the RFP. Moreover, any costs attributable to NECA were included in NECA Services' cost proposal.

Given our conclusion that Five Stars has failed to demonstrate that NECA Services was ineligible for selection, we need not address Five Stars'

arguments related to Rhoads, the other higher-ranked proposer. Five Stars' protest of the Commission's award of the contract to NECA Services under the RFP should be denied.

ORDER

IT IS ORDERED that the protest of the Commission's award of the contract to NECA Services under RFP #05-003, filed by Five Stars International, Ltd., is denied.

Made, entered, and effective _____.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

Judicial review of this Order is available in accordance with ORS 183.480.