

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF ADMINISTRATION**

EVERYONE COUNTS, INC.,)	
)	
v.)	
)	
OFFICE OF THE GOVERNOR)	OAH No. 12-0352-PRO
<hr style="width: 40%; margin-left: 0;"/>)	RFP No. 2013-0001-1266

DECISION

I. Introduction

The Division of Elections (Division), through the Office of the Governor (Office), issued a solicitation for proposals to design and install an online ballot delivery and tracking system. The Office issued a notice of intent to award the contract to Scytl USA, LLC (Scytl USA). Everyone Counts, Inc. (ECI) filed a protest. The procurement officer denied the protest and ECI filed this appeal.

The parties filed briefs and submitted the matter for decision on the written record. On appeal, ECI argues that Scytl USA is not based in the United States, that it does not meet the prior experience requirements, and that it misrepresented its ability to provide the services requested. Because ECI has not shown that the procurement officer erred in accepting the proposal, the appeal is denied.

II. Facts

The Division of Elections solicited proposals to design and install on online ballot delivery and tracking system.¹ The stated purpose of the system was “to provide automated service to Alaska’s voters for the delivery and marking of a blank ballot and transcription of that ballot upon receipt to one of five designated election offices.”² More broadly, based on the information provided in the solicitation, it appears that the system was to be capable of determining, based on information provided in an absentee voting application and the Division’s

¹ RFP, p. 1.
² RFP, p. 21.

voter registration database, what specific ballot should be provided to the voter requesting the ballot, delivering the appropriate ballot to that voter online, and providing for the voting³ and return of the voted ballot either online or, after the voter generates a paper ballot, by mail or facsimile.⁴ Whether the voted ballot is returned online or on printed paper, the system would have to be capable of generating, on official ballot paper stock, a printed ballot that replicates the voter's choices for counting by the Division's Accu-Vote optical scanning equipment.⁵ By providing for printing of mailed or faxed ballots onto official ballot paper stock, the Division would replace hand duplication of those ballots by on site election officials.⁶ The system would use 2D barcode technology to generate the ballot on official ballot paper stock.⁷ All data, hardware and software would need to be compatible with the Division's ballot programming information and printers.⁸ Printers were excluded from the solicitation.⁹

The solicitation states that in order to be responsive, the "offeror must have successfully implemented a similar solution(s) in at least three other states, counties or political subdivisions

³ See RFP p. 22 (system "allows voters to access an online platform to obtain their unique ballot style and vote the ballot as an intuitive electronic ballot.").

⁴ The solicitation is for an online delivery system. The solicitation does not identify any role for the system in the delivery of ballots requested to be delivered by mail or facsimile. The solicitation states at one point that "[v]oters requesting ballots by electronic transmission may return their ballot either by mail or through a secure online solution" and at another that "the voted ballot may be returned...either by mail, by fax or by the secure online solution." RFP p. 21.

In addition to the online delivery and return of ballots, the solicitation appears to require the system to provide other services. For example, the solicitation calls for the system to be able to tabulate statistical information for all absentee ballots returned, even those not delivered online. See RFP p. 42 (Item 7.1). It also appears to call for the system to provide voter registration and absentee application services. *Id.* (Item 9.2).

⁵ See RFP p. 45 (Item 11.18), p. 46 (Item 12.3). In addition to requiring printing for counting through the Accu-Vote system, it appears that the system must itself be able to tabulate votes by scanning the barcode. See RFP p. 40 (Item 4.2: "Scan the barcodes on the ballot in order to transcribe the contents of the ballot, and tabulate the votes as scanned.").

⁶ See RFP p. 21 ("Currently Alaska relies upon teams of two election officials to duplicate ballots returned that are not printed on the official ballot paper stock. Alaska is seeking an automated solution for six election offices."); RFP p. 45 (Item 12).

⁷ The solicitation states the system must "[a]llow the voter to print his or her ballot that utilizes a 2D barcode technology containing specific style information and voter's ballot choices." RFP p. 22. It is not clear from this wording whether the voter-printed ballot would physically replicate an official ballot, or would merely contain a 2D barcode. However, it appears to be the intent of the solicitation that the voter-printed ballot replicate an official ballot, with the voter's selections filled in by the printer, and that it would in addition contain a 2D barcode showing the voter's choices. That barcode would on return to the Division be scanned to generate a ballot on official paper stock. See RFP p. 41 (Item 6.12). Apparently a separate barcode would be placed on the voter's security envelope that would identify the voter, without providing any information on the actual vote case. *Id.* (Item 6.10).

⁸ See RFP p. 21, 22. The Division uses the Dominion Voting, Assure 1.2 GEMS 1.21.5 ballot programming system and OkiData 9650dn printers.

⁹ RFP p. 22, ¶5.01 ("five ballot duplication systems, both hardware and software, excluding printers").

thereof..... Experience of a subcontractor does not meet the prior experience requirement.”¹⁰ Offerors were required to identify personnel who “will actually work on the contract” and provide information about their work history, project work location, and project responsibilities.¹¹ All offerors were to provide a full on-site demonstration of their proposed system as part of the evaluation process.¹²

An attachment to the solicitation listed additional project requirements, including that “[t]he vendor must be based in the United States and must show the successful implementation of their system in at least three jurisdictions.”¹³

Scytl USA, the selected contractor, is a limited liability company organized under Virginia law in 2009, with its principal offices located in Baltimore, Maryland.¹⁴ Scytl USA is a wholly-owned subsidiary of a Spanish entity, Scytl Secure Electronic Voting, S.A. (Scytl Spain).¹⁵ Scytl USA, in turn, is the parent corporation of a wholly-owned subsidiary based in Florida, SOE Software, Inc.¹⁶

Scytl USA identified eight individuals who would work on the project and provided information on the employer and work location of seven of them.¹⁷ One, Scytl USA’s general manager, is an employee of Scytl USA.¹⁸ Three are employees of SOE Software.¹⁹ Two are employees of Scytl Spain.²⁰ One is a consultant, not employed by Scytl OSA or its affiliates.²¹ All seven work in the United States.²²

¹⁰ RFP p. 11.

¹¹ RFP pp. 33, 34.

¹² RFP pp. 35, 37.

¹³ RFP p. 39.

¹⁴ Ex. 5; Scytl Proposal p. 61.

¹⁵ Scytl Proposal, pp. 5, 49, 137, 2011 Financial Statement, Item 1 (stating Scytl Spain directly holds 100% of the capital of Scytl USA).

¹⁶ Scytl Proposal, 2011 Financial Statement, Item 18 (“On 5 January 2012, the subsidiary Scytl USA, L.L.C. acquired 100% of the stock capital of the American company SOE Software, Inc....”).

¹⁷ Proposal pp. 56-59.

¹⁸ Proposal, p. 57; Affidavit of D. Campbell, ¶1.

¹⁹ See Proposal, pp. 58-59 (A. McKay, R. Shirey, B. Murphy identified as working for SOE Software); Motion for Summary Adjudication, Ex. 5.

²⁰ The materials provided by ECI identify P. Stenbjorn and I. Griodano as “at Scytl Secure Electronic Voting.” Motion for Summary Adjudication, Ex. 3.

²¹ See Proposal p. 56 (identifying K. Brown as “consultant”).

²² See Proposal pp. 56-57; Motion for Summary Adjudication, Ex. 3, Ex. 4.

At the scheduled on-site demonstration, the Division did not provide printers, and two of the offerors, including Scytl USA, were therefore unable to demonstrate the ballot-printing function of their system at that demonstration.

III. Analysis

A. Issues Raised

ECI contends that the Scytl USA proposal was not responsive, for two reasons: (1) Scytl USA is not based in the United States;²³ and (2) Scytl USA does not meet the prior experience requirement.²⁴ With respect to each of those points, ECI makes a variety of points, which are addressed in more detail below. ECI also contends that Scytl USA should be barred from participation in this solicitation because Scytl USA misrepresented its ability to provide the services requested.²⁵

B. Standard of Review

Summary adjudication may be granted when the material facts are undisputed. In this case, the material facts as set forth in above are undisputed. In deciding whether a proposal meets a solicitation's minimum requirements for responsiveness, the commissioner will afford the procurement officer's initial determination of responsiveness with an appropriate degree of deference.²⁶

C. Scytl USA Is Based In The United States

An attachment to the solicitation entitled "Detailed Requirements Document" states that "[t]he vendor must be based in the United States."²⁷ ECI's motion for summary adjudication asserts that Scytl USA does not meet this requirement, and is therefore non-responsive, because Scytl USA is a "straw entity" and is not the actual offeror.²⁸ The actual offeror, ECI argues, is Scytl USA's parent corporation, Scytl Spain. That Scytl USA is a mere straw entity, ECI contends, is demonstrated by these facts: (1) the proposal's references to "Scytl" are expressly stated to include both Scytl USA and Scytl Spain; (2) of the eight identified personnel who will work on the project, only one is known to be an employee of Scytl USA; (3) Scytl USA relies on

²³ Motion for Summary Adjudication at 3-6.

²⁴ Motion for Summary Adjudication at 6-8.

²⁵ Motion for Summary Adjudication at 8-11.

²⁶ See e.g., Quality Sales Foodservice v. Department of Corrections, OAH No. 06-0400-PRO at 11-12 (Commissioner of Administration 2006); In re Waste Management of Alaska, Inc., at 12-13, Department of Administration No. 01-08 (2002).

²⁷ RFP, Attachment 1, Item 1.1.

²⁸ Motion for Summary Adjudication at 4.

the work experience of its parent corporation to meet the solicitation's experience requirements; and (4) Scytl USA relies on the audited financial statements of its parent corporation to meet the solicitation's requirement for financial information.

None of these arguments casts any cloud on the existence of Scytl USA as a distinct legal entity from Scytl Spain. Scytl Spain is a Spain-based entity. Scytl USA, Scytl Spain's wholly-owned subsidiary, is organized in the United States. Scytl USA is the parent corporation of a wholly-owned Florida subsidiary, SOE Software,²⁹ which, prior to its acquisition by Scytl USA, had no known connection with any non-United States corporation. Scytl USA and SOE Software together have 65 employees in the United States,³⁰ and there is no evidence that either of them has any employees in any other country.

Nothing in the record suggests that Scytl USA should not be afforded recognition as a separate legal entity from Scytl Spain. Nothing in the solicitation precludes a wholly-owned United States-based subsidiary of a non-United States-based entity from submitting a proposal. Nothing in the solicitation precludes the offeror from utilizing employees and resources of a parent or subsidiary corporations in providing the services offered.³¹ There is a requirement that all work on the project be performed in the United States, but there is no evidence in the record that any of the work on this project will be performed anywhere other than in the United States. To the contrary, according to the information provided in the proposal and confirmed by ECI's independent research, all of the individuals who have been identified as working on the project are located in the United States. To the extent that ECI objects to that Scytl USA may not claim credit for prior experience based on Scytl Spain's past projects, that is a separate issue discussed below. The financial statements provided are consolidated statements for Scytl Spain and its subsidiaries, and the absence of separate statements for each subsidiary does not mean that the subsidiaries are legal fictions.

²⁹ See note 16, *supra*. ECI asserts that Scytl Spain, rather than Scytl USA, owns SOE Software, based on a press release identifying the owner as "Scytl." That the parent corporation and its wholly-owned subsidiaries identify themselves collectively as "Scytl" in press releases and in responding to proposals does not mean that the separate legal existence of these entities must be disregarded.

³⁰ Affidavit of D. Campbell, ¶2.

³¹ The solicitation expressly allowed the use of subcontractors. See RFP p. 7, ¶1.14. Even if subcontracting were prohibited, it is possible that employees of the parent and subsidiary corporations might be made available to Scytl USA without any subcontract.

D. Scytl USA Meets The Prior Experience Requirement

ECI's primary objection is that neither Scytl Spain nor Scytl USA has ever installed a system providing ballot printing from 2D barcodes, as was required by this solicitation. ECI makes two main arguments in this regard. First, ECI argues that in the absence of 2D barcode printing functionality, the prior experience of Scytl Spain and Scytl USA is not "similar" within the meaning of the solicitation. Second, ECI argues that to the extent that the absence of prior experience in 2D barcode printing functionality is overlooked, Scytl USA should not be permitted to rely on the experience of personnel employed by Scytl Spain or SOE Software who have not been identified as working on this particular project.

With respect to the first argument, ECI conflates the materiality of the 2D barcode printing functionality with the requirement for prior experience. However, that the 2D barcode functionality is material does not necessarily mean that a system lacking that particular functionality is by definition not "similar" to the system to be provided. Whether a system is sufficiently similar to warrant accepting it for purposes of the prior experience requirement depends on consideration of the system as a whole.

ECI characterizes the 2D barcode printing function as central to the entire project,³² but in reality the primary purpose of the project, and the core functionality of the system as a whole, rests in the provision of online services, rather than in the end product of a printed ballot. Printing the ballot is the final step in a process of online voting, preceded by a multitude of prior steps that would be substantially similar regardless of whether the end product is a printed ballot or not. The Division might reasonably have insisted on prior experience in 2D barcode functionality, but it had discretion, in the absence of a specific requirement for such experience, to consider experience with a system lacking that particular component as acceptable.

With respect to ECI's second point, while the solicitation expressly precludes relying on the experience of a subcontractor, it does not similarly preclude reliance of the experience of a parent or subsidiary corporation. Absent any such express preclusion, and given the express representation by Scytl USA that it would take advantage of Scytl Spain's past experience and resources in performing the work, the procurement officer's determination was reasonable.³³

³² See Reply at 3.

³³ See generally, Opposition to Summary Adjudication at 4-5.

E. Scytl USA Is Not Barred From Participation In This Solicitation

ECI argues that Scytl USA falsely represented that it had a patented barcode technology, asserting that a search of the United States Patent and Trademark Office database shows no such patent.³⁴ ECI adds that having failed to demonstrate the 2D barcode printing functionality at the demonstration, Scytl USA should be barred from participating in the solicitation.³⁵ Lastly, ECI contends that because Scytl USA allegedly misrepresented its prior experience, its status as a United States-based entity, its patent status, and its ability to provide the requested services, the contract (awarded to Scytl USA before this appeal was filed) should be rescinded pursuant to AS 36.30.687.³⁶

ECI's first argument is based on the premise that absent a United States patent, Scytl USA's representation that it (through Scytl Spain) had a barcode patent is false. That premise is invalid. Undisputed evidence establishes that Scytl Spain owns a patent for barcode ballot technology in Mexico and Australia.³⁷ It did not state or represent that it had any sort of United States patent.

As to the failure to demonstrate the printing capability at the demonstration, nothing in the proposal states the failure to demonstrate that particular functionality at the demonstration would render the proposal non-responsive. Lastly, as explained above, Scytl USA did not misrepresent its prior experience, its status as a United States-based entity, its patent status, or its ability to provide the requested services.³⁸

IV. Conclusion

Whether Scytl USA's prior experience is sufficiently similar to meet the solicitation's requirement is a judgment best made by the procurement officer. In the absence of a showing by ECI that prior experience in the delivery of ballot printing by 2D barcode was necessary in order to provide reasonable pre-award assurance that the vendor would be capable of satisfactorily providing the requested services, the procurement officer's determination need not be disturbed. Nothing in the solicitation precludes Scytl USA from relying on the experience, resources, and personnel of a parent or subsidiary corporation, and Scytl USA is a wholly United States-based

³⁴ Motion for Summary Adjudication at 9.

³⁵ Motion for Summary Adjudication at 10-11.

³⁶ Motion for Summary Adjudication at 11-12.

³⁷ Letter, M. Kramer to S. Henderson, August 17, 2012 at 2 (*quoting* P. Valles).

³⁸ See Opposition to Motion for Summary Adjudication, Affidavit of Gail Fenumiai.

entity. ECI has not shown that Scytl USA misrepresented its experience, qualifications, or proprietary rights. The appeal is therefore denied.

DATED October 8, 2012.

By: Signed
Andrew M. Hemenway
Administrative Law Judge

Adoption

In accordance with AS 44.64.060(e)(1) and e(4), the proposed decision is amended to include the following sentence and footnote at page 7, following the first sentence of the third paragraph (concluding, “would render the proposal non-responsive”):

Moreover, Scytl subsequently demonstrated to the Division’s satisfaction its system’s printing functionality on the specified Okidata printer.^A

[Footnote] A. See Opposition to Motion for Summary Adjudication, Affidavit of David Campbell at ¶8; Affidavit of Gail Fenumiai at ¶¶ 4-5.

As amended, the proposed decision is adopted.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 23rd day of November, 2012.

By: Signed
Signature
Becky Hultberg
Name
Commissioner
Title

[This document has been modified to conform to the technical standards for publication.]