



COLORADO

Office of the State Controller

Department of Personnel & Administration
State Purchasing & Contracts Office
1525 Sherman St., 3rd Floor
Denver, CO 80203

September 21, 2020

Delivered by email to grantorvis@gmail.com and by certified mail to:

BoCo Farms, LLC
Attn: Grant Orvis
P.O. Box 98
Hygiene, CO 80533

SUBJECT: Appeal Decision - Appeal of Denial of Protest of Award for Solicitation RFP # 2020*0230, Colorado Hemp Center of Excellence Development

Dear Mr. Orvis:

This letter (Appeal Decision) is in response to the appeal that you submitted by email on August 8, 2020 (Appeal) on behalf of BoCo Farms LLC, (BoCo). The Appeal challenges the decision by the Colorado Department of Agriculture (CDA) issued on July 24, 2020 (Protest Decision) denying BoCo's protest submitted by email on July 10, 2020 (Protest) of the award of the above-referenced Request for Proposal (RFP).

After a review of the documents and correspondence relevant to this matter, BoCo's Appeal is denied in part and upheld in part. The reasons are set forth below and BoCo's further appeal rights are discussed below. CDA is directed to cancel the award to MPG Consulting, (MPG), and create a new evaluation committee in accordance with the State Procurement Code and Rules.

BACKGROUND:

CDA posted the RFP on May 5, 2020 requesting proposals to develop a Colorado Hemp Center of Excellence. CDA received six proposals in response to the RFP, including responses from BoCo and MPG. CDA selected four individuals to serve as members of an evaluation committee (Evaluation Committee) to review the proposals and make a recommendation for an award of the contract. The Evaluation Committee determined that MPG was the responsible offeror whose proposal was most advantageous to the State.



CDA issued a Notice of Intent to Award on June 18, 2020, to MPG. BoCo filed its Protest on July 10, 2020. On July 24, 2020, CDA issued its Protest Decision denying BoCo's Protest. On August 8, 2020, BoCo filed a timely Appeal, pursuant to Colorado Procurement Code §24-109-201, C.R.S., with the Colorado Department of Personnel & Administration (DPA) regarding the award of the contract to MPG.

CDA regulates the cultivation of industrial hemp authorized through Title 35, Article 61 C.R.S. CDA has partnered with leading state, local, and tribal agencies, as well as industry experts in cultivation, testing, research, processing, finance, and economics to establish a statewide initiative known as the Colorado Hemp Advancement and Management Plan (CHAMP). Stakeholders engaged through the CHAMP process identified the development of a Center of Excellence (COE) for hemp to serve as a research, education, and grant funding hub in Colorado as one of the key goals of the initiative. The awardee's primary responsibility is to develop and implement a COE authority structure and strategic plan following direction provided by the CDA and other designated stakeholders.

Individuals referenced in this Appeal Decision

Daniel Huse, CDA Procurement Director
Hollis Glenn, CDA Division Director, Division of Inspection and Consumer Services
Wondirad Gebru, Evaluator, CDA Division Director, Division of Plant Industry
Ean Seeb, Evaluator, Governor's Office
Courtney Krause, Evaluator, Governor's Office
Grant Orvis, Principal BoCo Farms, LLC
Adam Orens, Principal, MPG Consulting

I, Nathan Weatherford, have been authorized by the Executive Director of DPA, Ms. Kara Veitch, to review the Appeal and issue a decision pursuant to §24-109-201(1), C.R.S.

NEW ISSUES RAISED ON APPEAL:

BoCo has asserted new allegations against CDA Procurement Director, Daniel Huse, based on the State of Colorado, Procurement Code of Ethics and Guidelines (Code of Ethics). As stated in the Preamble, the Code of Ethics is designed to be a guide for minimum standards and is mandatory for all State of Colorado purchasing employees. According to C.R.S. §24-109-202(2), "An appeal is limited to only the material issues raised in the original protest." As such, I will not review new issues raised on appeal based on the Code of Ethics. Lastly, the Code of Ethics is not legal authority and I have no authority to provide BoCo any relief for violations of the Ethics Code.

DISCUSSION:



BoCo has raised twenty-three issues. It should be noted that the Appeal contained some miss-numbered and duplicated Issues. Further, the numbering of the Issues on BoCo's Protest is not the same as BoCo's Appeal.

The procurement appeal process, set forth in C.R.S. §24-109-201 et seq., establishes the procedures for resolving issues raised under the Colorado State Procurement Code (Procurement Code). The process enumerated in the Procurement Code is non-judicial in nature and is not subject to the administrative procedures set forth in C.R.S. §24-4-105. The purpose of the process is to determine whether a solicitation or award is in accordance with procedures provided in the Procurement Code, regulations enacted pursuant to the Code and the terms and conditions of the solicitation. (C.R.S. §24-109-204 and Rule R-24-109-401-01). The Procurement Code provides that determinations of award to the most advantageous offerors are final are conclusive unless they are clearly erroneous, arbitrary capricious, or contrary to law, C.R.S. §24-103-701.

Issue 1:

In BoCo's Protest, BoCo based its argument on the mistaken assumption that the requirements of the State of Colorado Procurement Manual (Manual) were legally binding on CDA. CDA, in the Protest Decision, correctly determined the Manual was only guidance – not legal authority – and further stated the Manual was discontinued and removed from the Department of Personnel and Administration's website on or prior to August 9, 2017, before the Procurement Modernization Act, (House Bill 17-1051) became effective.

BoCo asserts on Appeal, the Code of Ethics applies. As stated above, I will not consider new issues raised under the Code of Ethics.

Further, BoCo does not asset an argument or make an independent claim. Instead of stating a claim for consideration, BoCo states in general "These allegations were described and evidence was provided in Material Issues 3, 5, 18-21 and 23." Instead, BoCo refers to its asserted claims in Issues 3, 5, 18-21 and 23. In order to make a determination on an issue, I must have a material issue to review. BoCo has failed to make a claim.

For the reasons cited above, Issue 1 is denied. For review of Issues 3, 5, 18-21 and 23, please see those paragraphs below.

Issue 2:

BoCo asserts CDA is required to have discussions with vendors for purposes of determining a best and final offer pursuant to C.R.S. §24-103-203(6). BoCo's reading of the statute is erroneous.



Discussions are optional and may be conducted for the purpose of clarification as provided in the RFP and pursuant to the Procurement Code and Procurement Rules.

BoCo also asserts CDA is required to negotiate with the highest qualified offerors pursuant to C.R.S. §24-103-203(8). BoCo's reading of the statute is erroneous. Section C.R.S. §24-103(8) applies to *Professional Services*. *Professional Services*, defined in C.R.S. §24-101-301(31), applies to the services of accountants, clergy, physicians, lawyers, and dentist and is not applicable to this RFP.

For the reasons cited above, Issue 2 is denied.

Issue 3:

BoCo asserts that Mr. Hollis Glenn, CDA Division Director, Division of Inspection and Consumer Services, had a conflict of interest. In support of this claim, BoCo has provided the following evidence:

- Mr. Glenn communicated with Mr. Orvis via text message;
- Mr. Glenn was listed as the first reference for MPG; and
- A recording of a telephone call between Mr. Glenn and Mr. Orvis in which Mr. Glenn said that being listed as a reference for an offeror would be highly inappropriate.

The screenshots of text messages between Mr. Orvis and Mr. Glenn do not support the finding that Mr. Glenn had a conflict of interest. On the contrary, these screenshots show that Mr. Glenn was careful to avoid discussing the RFP with an offeror. BoCo has not presented any evidence that Mr. Orvis and Mr. Glenn discussed any substantive issues concerning the RFP during a phone call or that they had any phone calls regarding the RFP. The Procurement Code does not bar communication between an offeror and persons who worked on and contributed to the requirements of a solicitation on matters other than the solicitation. Indeed, Mr. Orvis and Mr. Glenn had an existing relationship and reasons for communicating based on their involvement with CHAMP.

Mr. Glenn did not serve as a member of the Evaluation Committee that recommended that the award of the contract be made to MPG. As stated by CDA in the Protest Decision, it is not uncommon for offerors to list the name of State employees as references who have firsthand knowledge and experience working with the offeror. Despite the inconsistency in being listed as a reference and his own words stating that it would be highly inappropriate, being listed as a reference does not establish a conflict of interest.

For the reasons cited above, Issue 3 is denied.

Issue 4:



BoCo states in its Appeal, “The protest provided by BoCo along with the other two protests actively outline Conflicts of Interest and taken together demonstrate the appearance of unethical or compromising practices by those alleged to be in violation of the Code of Ethics and R-24-101-107-02.”

As stated above, C.R.S. §24-109-202(2) does not permit new claims to be raised on appeal. Further, Issue 4 contains only non-material, general statements of allegations; BoCo has failed to make a claim. I have addressed BoCo’s allegations that Mr. Ean Seeb, a member of the Evaluation Committee, had a conflict of interest in the discussion of Issue 17.

For the reasons cited above, Issue 4 is denied.

Issue 5:

BoCo again raises the Issue that Mr. Glenn violated the Procurement Rules and Code by having communication via text message and phone call(s) with Mr. Orvis. This is a duplicative claim regarding Mr. Glenn’s conflict of interest and is discussed in Issue 3.

For the reasons cited above, Issue 5 is denied. See Issue 3.

Issue 6:

BoCo alleges that CDA has not complied with the Colorado Open Records Act (CORA).

Neither the Procurement Code nor the Procurement Rules control the release of public records or grant the authority to provide BoCo any relief from violations of CORA. Although DPA may extend the time period for filing an appeal to allow for the receipt of records pursuant to CORA, BoCo has not alleged that denials or delays caused by CDA frustrated or impeded BoCo’s ability to file its Appeal. Further, I have not received any request for an extension of the 30 day deadline for the rendering of the Appeal Decision to provide additional time for BoCo to review and submit additional material in support of its claims based on any pending or late delivery of information requested by BoCo and not fulfilled by CDA.

For the reasons cited above, Issue 6 is denied.

Issues 7, 8, 9, and 10: (Issue 7 is non-existent and was skipped in BoCo’s Appeal. Issues 8, 9, and 10 are duplicative and will be addressed together)



BoCo states, “24-103-301(8) requires negotiation “with the highest qualified offerors”, which can also be defined as finalists”.

First, BoCo references an erroneous statutory citation. C.R.S. §24-103-301(8) addresses the cancellation of solicitations. Second, BoCo has failed to make a claim or provide any additional evidence.

To the extent BoCo raises claims under C.R.S. §24-103-203(6) and (8) regarding obtaining a best and final offer and negotiating with the finalist, I have addressed those claims under Issue 2.

For the reasons cited above, Issues 7, 8, 9, and 10 are denied.

Issue 11:

BoCo states, “See Material Issues 2, 8, 9, and 10 above.” BoCo has failed to make a claim or provide any evidence. To the extent, BoCo is attempting to revive Issue 11 as asserted in its Protest, that claim was based on the incorrect assumption the Manual was legal authority. As addressed in Issue 1 of this Appeal Decision, the Manual is not legally binding on CDA and has been discontinued.

For the reason cited above, Issue 11 is denied.

Issue 12:

BoCo states, “See Material Issues 2, 8, 9, 10, and 11 above.” BoCo has failed to make a claim or provide any evidence. To the extent, BoCo is attempting to revive Issue 12 as asserted in its Protest, that claim was based on the incorrect assumption the Manual was legal authority. As addressed in Issue 1 of this Appeal Decision, the Manual is not legally binding on CDA and has been discontinued.

For the reason cited above, Issue 12 is denied.

Issue 13:

BoCo states, “See Material Issues 2, 8, 9, 10, 11, 12, and 13 above.” BoCo has failed to make a claim or provide any evidence. To the extent, BoCo is attempting to revive Issue 13 as asserted in its Protest, that claim was based on the incorrect assumption the Manual was legal authority. As addressed in Issue 1 of this Appeal Decision, the Manual is not legally binding on CDA and has been discontinued.

For the reason cited above, Issue 13 is denied.



Issue 14:

BoCo claims that CDA has failed to provide the written determination required by C.R.S §24-103-203(7).

As stated in Issue 6, neither the Procurement Code nor the Procurement Rules control the release of public records or grant the authority to exercise remedies available under CORA. BoCo has not alleged that not having the written determination for the award frustrated or impeded BoCo's ability to file its Appeal. BoCo may pursue its CORA request with CDA for the written determination for award that was prepared by Mr. Huse on June 17, 2020 independently of this Appeal Decision.

For the reasons cited above, Issue 14 is denied.

Issue 15:

BoCo asserts a claim pursuant to R-24-103-202-02(a) that BoCo's proposal was incorrectly evaluated based on price.

Procurement Rule R-24-103-202-02(a) applies for Invitations for Bids. The solicitation method for COE was a Request for Proposal, See RFP, Section I.4. Therefore, the Procurement Rule cited is inapplicable.

For the reason cited above, Issue 15 is denied.

Issue 16:

BoCo states, "See Material Issues 2, 8, 9, 10, 11, 12, and 13 above." BoCo has failed to make a claim or provide any evidence. To the extent, BoCo is attempting to revive Issue 16 as asserted in its Protest, that claim was based on the incorrect assumption the Manual was legal authority. As addressed in Issue 1 of this Appeal Decision, the Manual is not legally binding on CDA and has been discontinued.

For the reason cited above, Issue 16 is denied.

Issue 17:

BoCo asserts that Mr. Seeb had a conflict of interest and should have avoided participation as a member of the Evaluation Committee once learning of responsive offerors because of his professional relationship with Mr. Orens, the founder of MPG, who ultimately received the award.



The Procurement Code, C.R.S. §24-101-107, Procurement Ethics, states in part that a state employee involved in the procurement process shall enhance the proficiency and stature of the purchasing process by adhering to the highest standards of ethical behavior. Procurement Rule 1 Colo. Code Regs. §101-9, R-24-101-107-2, Procurement Conflicts of Interest, states all individuals involved in the procurement process shall avoid any actual or apparent, individual conflicts of interest in accordance with DPA policies and technical guidance. Office of the State Controller Policy on Procurement Conflicts of Interest, §3 states in part that a worker has a duty to avoid or mitigate Potential Individual Conflicts of Interest and Perceived or Apparent Conflicts of Interest.

Here, Mr. Seeb and Mr. Orens have had a long professional relationship and have established themselves as leaders and experts in the marijuana industry locally and nationally. Mr. Seeb, after founding Denver Relief Consulting in 2011, hired Mr. Orens as the firm's market data advisor. Mr. Orens later went on to found MPG in 2014.

In May of 2019, Mr. Seeb took a position with the State of Colorado at the Governor's Office in the Marijuana Policy Group.

As an Evaluation Committee member, Mr. Seeb had a duty to avoid any actual or perceived conflicts of interest. In this case, based on Mr. Seeb's recent and extended professional relationship with Mr. Orens, Mr. Seeb had a duty to avoid any apparent conflict of interest. To his credit, during the Evaluation Kickoff Meeting on June 11, 2020, Mr. Seeb disclosed that he knew of and had prior business dealings with each of the offerors. Mr. Seeb stated that he no longer maintained any of those business dealing and further stated that he did not have a financial or other interest with any of the offerors.

Mr. Seeb's relationship with Mr. Orens presents a perceived conflict of interest and Mr. Seeb should have been removed from the Evaluation Committee upon learning the identity of the responsible offerors. Mr. Seeb's disclosure of his previous business dealings and his agreement to the CDA's Non-Conflict of Interest form does not waive the duty to avoid perceived conflicts of interests. The CDA erred in determining that Mr. Seeb's apparent conflict of interest was curable by disclosure.

For the reasons cited above, Issue 17 is granted.

Issue 18:

First, BoCo asserts that an investigation was conducted by CDA to determine whether or not Mr. Seeb had a conflict of interest. In its Protest, BoCo also asserts "any involvement in an investigation of a material issue by someone who is not the Procurement Official or their designee directly violates C.R.S. §24-109-101.5(2)." Second, in its Appeal, BoCo makes the claim that Mr. Huse violated the



Code of Ethics because he failed to disclose the investigation to Mr. Orvis or control who or what was investigated. Lastly, Mr. Orvis states, “See also 24-109-102(2).”

I have inquired into the alleged investigation of Mr. Seeb by CDA and I have determined that an investigation was not conducted.

BoCo’s reading of C.R.S. §24-109-101.5(2) is erroneous; there is no mandate on the Procurement Official to perform, participate, supervise, or control in any investigation relating to a material issue.

Regarding BoCo’s claim that Mr. Huse violated the Ethics Code, C.R.S. §24-109-202(2) does not permit new claims to be raised on appeal.

Lastly, regarding BoCo’s reference to C.R.S §24-109-202(2); this statute merely provides that any decision of the Procurement Official is subject to appeal. This statute serves as the legal authority for rendering this Appeal Decision. BoCo has failed to make a claim.

For the reasons cited above, Issue 18 is denied.

Issue 19:

BoCo raises two issues on its Appeal regarding the participation of Mr. Wondirad Gebru, CDA Division Director, Division of Plant Industry, as a member of the Evaluation Committee. First, BoCo alleges a conflict of interest because Mr. Gebru and MPG worked together to write and submit Colorado’s Hemp Submission to the USDA. Second, BoCo alleges that Mr. Gebru made false statements to Mr. Orvis regarding Colorado’s Hemp Submission via a recorded telephone conversation provided by BoCo as Exhibit 13 to its Appeal.

I will address BoCo’s claim of a conflict of interest pursuant to R-24-101-107-2, even though BoCo is making the allegation of a conflict of interest under the Code of Ethics. An existing working relationship between a State employee and an offeror is not dispositive of a conflict of interest and does not prevent that employee from serving on an Evaluation Committee where that offeror has submitted an offer for another or the same project. BoCo has not provided any evidence of an actual or perceived conflict of interest. BoCo has the burden to provide evidence to substantiate its claim.

I have listened to the recorded phone conversation between Mr. Orvis and Mr. Gebru, (BoCo’s Exhibit 13) three times and I have been unable to find the alleged “lie” told by Mr. Gebru.

For the reasons cited above, Issue 19 is denied.



Issue 20:

BoCo claims that it is impossible that Ms. Courtney Krause and Mr. Seeb evaluated the proposals independently and in an unbiased manner because they work together at the Governor's Office and that their scoring supports this claim. BoCo has offered no evidence in support of this claim. A review of the scoring provided by Mr. Seeb and Ms. Krause does not support BoCo's claim of collusion; the differences and similarities of their individual scores are the same or within one numerical unit of another evaluator's score, a difference that is not significant and does not provide evidence of bias or collusion.

For the reasons cited above, Issue 20 is denied.

Issue 21:

Again, BoCo claims Mr. Glenn has a conflict of interest because he is listed as the first reference for MPG. BoCo also raises a claim against Mr. Glenn based on the Ethics Code. This claim is addressed in Issue 3 and will not be further addressed here.

BoCo's allegation that Mr. Glenn has a conflict of interest because he was listed as a reference for MPG is addressed in Issue 3. Regarding BoCo's claim that Mr. Glenn violated the Ethics Code, C.R.S. §24-109-202(2) does not permit new claims to be raised on appeal.

For the reasons cited above, Issue 21 is denied.

Issue 22:

BoCo asserts scoring issues with all eighteen evaluation factors in its Protest. In its Appeal, BoCo claims the scoring was biased and claims CDA's response in the Protest Decision shows proof of the bias.

The Procurement Code, C.R.S. §24-103-701, provides that determinations of award are final and conclusive unless they are clearly erroneous, arbitrary capricious, or contrary to law.

BoCo claims CDA's responses in the Protest Decision demonstrate the Evaluation Committee's bias but fails to provide any evidence to support the allegation.

BoCo has failed to provide evidence that the scores it received for its two-person team proposal and pricing structure are clearly erroneous, arbitrary, capricious, or contrary to law. BoCo has provided statements of opinion, but not evidence to support its claim.



BoCo conflates the proposal submission requirement of references in Section III.5.5 of the RFP with evaluation factors, RFP, Section I.8. A List of References/Current Clients was not part of the evaluation process but was a requirement of the RFP.

For the reasons cited above, Issue 22 is denied.

Issue 23:

BoCo claims MPG made a misrepresentation in its proposal by incorrectly citing to the R&D and Seed stakeholder group instead of the Cultivation stakeholder group in the following statement: “During the CHAMP, MPG developed the content for all stakeholder discussions which served as key inputs to the majority of the CHAMP’s deliverables. Specifically, our work on the CHAMP deliverable and participation in the R&D and Seed stakeholder group helped form the initial guiding framework for the Colorado Hemp Center of Excellence.”

Regardless of whether or not BoCo’s claim is correct, the error is not a material misrepresentation. Indeed, BoCo further states that it is a fact known by CDA and is open knowledge that the work of the Cultivation group led to the development of the deliverables of the COE. This issue is not material, is not a misrepresentation under R-24-101-107-01(d), and will not be addressed in this Appeal Decision.

Although, BoCo also claims MPG failed to meet the required CHAMP Program deliverables. BoCo fails to provide any evidence that the determination of the Evaluation Committee was incorrect.

For the reasons cited above, Issue 23 is denied.

APPEAL DECISION:

Pursuant to C.R.S. §24-109-504(1), as designee for the Executive Director of the Department of Personnel and Administration, based on a review of the Protest, Protest Decision, and Appeal, as well as the RFP, and correspondence related to this matter, BoCo’s Appeal is denied in part and upheld in part.

My decision is to cancel CDA’s award to MPG. CDA is directed to conduct a re-evaluation of the proposals received in response to the RFP. Following the re-evaluation, CDA will make award to the offeror that is most advantageous to the State based upon the criteria established in the RFP.



A new evaluation committee will be required to conduct the re-evaluation. No member that served on the first Evaluation Committee shall be allowed to participate in the re-evaluation in any way. The CDA shall provide the original proposals as submitted by the offerors to the re-evaluation committee.

The determinations made in this Appeal Decision with respect to the Protest and the Appeal are based solely on factors pertaining to RFP 2020*0230.

APPEAL RIGHTS:

In accordance with C.R.S. §§24-109-205 and 24-109-206, BoCo may appeal this Appeal Decision to the District Court for the City and County of Denver within ten business days after the Appeal Decision is rendered.

Respectfully,

/s/ Nathan Weatherford

Nathan Weatherford, Esq.
Central Contracts Manager &
State Procurement Appeals Administrator

cc: Kara Veitch, Executive Director, DPA
Sherri Maxwell, State Chief Procurement Officer
Daniel Huse, Procurement Director, CDA

