

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMDAHL CORPORATION,)
)
 Petitioner,)
)
 vs.) CASE NO. 95-2648BID
)
 FLORIDA DEPARTMENT OF HIGHWAY)
 SAFETY AND MOTOR VEHICLES,)
)
 Respondent,)
 and)
)
 UNISYS CORPORATION,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER OF DISMISSAL

Upon due notice, on June 1, 1995, this cause came on for oral argument by telephonic conference call upon Unisys Corporation's Petition to Intervene and Motion to Dismiss. Thereafter, Amdahl Corporation filed a written response which, together with all other advices, has been considered by Ella Jane P. Davis, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David K. Miller
M. Stephen Turner
Jay Adams
BROAD AND CASSEL
Post Office DRAWER 11300
215 South Monroe Street, Suite 400
Tallahassee, Florida 32302

For Respondent: Enoch J. Whitney
Judson Chapman
Office of the General Counsel
Department of Highway Safety and
Motor Vehicles
2900 Apalachee Parkway
Tallahassee, Florida 32399-0524

For Intervenor: Mary Piccard
W. Robert Vezina III
CUMMINGS, LAWRENCE & VEZINA, P.A.
1004 DE SOTO PARK DRIVE
Post Office Box 589
Tallahassee, Florida 32302-0589

STATEMENT OF THE ISSUE

Whether the protest herein is premature under the terms of the Request for Proposals and Section 120.53(5) F.S.

PRELIMINARY STATEMENT

This cause arises from a Request for Proposal (RFP) issued by the Department of Highway Safety and Motor Vehicles (DHSMV). Petitioner Amdahl Corporation (Amdahl) is ranked as the number two bidder if the bid process proceeds no further. Unisys Corporation (Unisys) is ranked as the number one bidder if the bid process proceeds no further.

The case was referred to the Division of Administrative Hearings on May 25, 1995. Unisys' motion to intervene was already filed. The undersigned hearing officer received the file on May 26, 1995. A notice of formal hearing for June 8-9, 1995 was issued the same day.

Unisys filed its motion to dismiss on May 30, 1995. Oral argument occurred on June 1, 1995, as recited above. This recommended order addresses that motion.

There was no opposition to the intervention of Unisys. Intervention was orally ordered. This order also memorializes that ruling. The style of this case is hereby amended as set out above.

FINDINGS OF FACT

1. This proceeding concerns a protest by Amdahl regarding DHSMV's "notice of intent to benchmark" with Unisys pursuant to RFP 046-95 REBID.

2. The RFP was issued on April 5, 1995. Meetings concerning the specifications were held on April 14 and 18, 1995. No protests were timely filed with regard to the specifications. On May 4, 1995, the agency issued its notice of intent to benchmark as more specifically described below.

3. The RFP is divided into three sections: the technical proposal, the price proposal, and the benchmark. So far, all proposals have been evaluated and ranked by DHSMV based on technical and price criteria. At this stage, Unisys is ranked first, and Amdahl is ranked second.

4. When it had determined that Unisys had received the highest combined score on the technical and price proposals, DHSMV posted the tabulated scores of all proposers and notified them of the agency's intent to proceed to the benchmark evaluation phase of the RFP with Unisys. In an abundance of caution, the agency included in its notice of intent to benchmark, to which was attached the final point tabulation for all competing vendors, the notice of a right to protest within 72 hours pursuant to Section 120.53 (5) F.S.

5. Amdahl timely filed its notice of protest and its formal protest. Without unnecessary elaboration, the thrust of Amdahl's protest is directed to Sections 3.23 and 6.0 of the RFP and DHSMV's scoring of the technical and price proposals. That protest includes, but may not be limited to, an accusation that the agency improperly permitted Unisys to manipulate its certified minority business enterprise compliance after the submittal of its response to the RFP.

6. Amdahl further asserted that since a tabulation was attached to the notice of intent to benchmark and due to the wording of Section 120.53(5)(b) F.S., DHSMV Rule 15-2.003(2), and RFP General Condition 5 and Special Condition 3.5, Amdahl was required to challenge the DHSMV scoring and tabulation at this point in time or be presumed to have waived its right to protest.

7. Pursuant to Sections 4.1 and 4.2 of the RFP, the highest ranked proposer (as determined by the scoring system thus far) next must participate in a month-long benchmark designed to demonstrate the highest ranked proposer's ability to perform. If the highest ranked proposer fails the benchmark, DHSMV will eliminate the highest ranked proposer and the next ranked proposer will be given the opportunity to perform the benchmark. If the second ranked proposer fails, the third can try benchmarking, and so on. Once some proposer passes the benchmark tier of evaluation, the recommendation to award will be posted. Specifically, RFP specifications 4.1 and 4.2 which were not challenged by a protest within 72 hours of the last explanatory meeting thereon, read as follows:

4.1 CONTRACT AWARD

It is the intent of the DHSMV to require the qualified proposer scoring the highest number of points after the Technical evaluation, and Costs evaluation of the proposals to benchmark all proposed hardware and software on the configurations proposed . The Benchmark will be performed at the DHSMV, Kirkman Data Center, Tallahassee, Florida. Upon successful completion of the Benchmark described in ATTACHMENT-B , a recommendation to award the contract resulting from RFP 046-95-REBID will be submitted to the Governor and Cabinet of the State of Florida. Final award of a contract for this RFP will be contingent upon the agency obtaining third party financing.

4.2 MANDATORY BENCHMARK REQUIREMENT

The hardware and software proposed in this RFP shall be benchmarked using the performance criteria set forth in ATTACHMENT-B. This benchmark shall be performed utilizing ORACLE asw the DHSMV data-base standard. It is the responsibility of the proposer to insure that all hardware and software proposed meet this requirement. In the event any non conformity or noncompatibility is encountered at any time, the proposer will be eliminated from further consideration and the next highest points scoring proposer will be given the opportunity to perform the benchmark. (Emphasis in the original)

8. DHSMV asserted unequivocally that in the present case, if Unisys does not pass the benchmark, then Unisys will be eliminated and Amdahl will be permitted to benchmark. It is equally clear that if Unisys passes the benchmark, then a recommendation to award will be issued.

9. All concerned seem to recognize the foregoing as the natural flow of the RFP award procedure as contemplated by the RFP. Even the prayer for relief contained in Amdahl's petition states, in pertinent part,

". . . Amdahl requests that DHSMV suspend further action with respect to the contract award process until this protest is resolved by final agency action; . . . That a DOAH recommended order and a DHSMV final order be entered selecting Amdahl as the winning proposal for benchmarking and ultimate award of the contract;

10. Amdahl asserts that it is both fairer and more efficient to score the competing proposals and resolve all scoring issues pertaining to the technical and price portions before benchmarking the interim winner, rather than providing an opportunity for the interim winner to negotiate the manner in which its products can be integrated to achieve conformance and compatibility with the agency's purposes; that the benchmarking procedure directed to Unisys cannot be monitored by Amdahl for possible protest purposes at a later stage; and that benchmarking permits Unisys to make further adjustments towards qualifying a minority enterprise that was not certified at the time Unisys submitted its proposal. Amdahl did not raise any of these issues prior to submitting its own bid.

CONCLUSIONS OF LAW

11. Any jurisdiction the Division of Administrative Hearings derives herein is pursuant to Sections 120.53(5) and Section 120.57 (1), F.S,

12. Bid protests are governed by Section 120.53(5) F.S. The statute requires agencies to establish rules regulating protests of their decision or intended decision concerning a bid solicitation or a contract award. There are two types of agency action giving rise to the right to protest. These are decisions concerning the solicitation specifications and an intended decision to award a contract.

13. The motion to dismiss asserts two grounds for dismissal. First, that Amdahl's protest in effect untimely challenges the specifications, and second, that the protest is premature until the agency completes all phases of its evaluations, including the benchmark tier of evaluation.

14. Agencies understandably must be circumspect in advising potentially affected parties of statutory time limits, because, absent notice, an agency cannot reject a protest as untimely. See, *Capital Copy, Inc. v. University of Florida*, 526 So. 2d 988 (Fla. 1st DCA 1988). Here, the agency, in an effort to accommodate all possible interpretations of the statute, has confused the priorities of its own RFP by providing a notice and window of opportunity to protest which is not normally contemplated by the statute. Accordingly, it is not surprising that Amdahl thought it had better protest now to avoid being deemed to have waived all protestable issues now apparent.

15. The statute is designed to protect parties and the administrative process from unduly burdensome and wasteful litigation. Amdahl's argument that the case of *Xerox Corp. v. DPR*, 489 So. 2d 1230 (Fla. 1st DCA 1986) requires that a protest be filed any time a tabulation is announced, however non-final that tabulation may be, is not persuasive. That case essentially addressed timeliness for filing a formal protest after a notice of protest has been filed or, in effect, explained the methodology for perfecting a protest toward formal,

independent hearing before the Division of Administrative Hearings. It does not control this situation, which is one of filing a premature notice of protest and premature formal protest.

16. The current proceeding is not authorized. Section 120.53(5) F.S. and Rule 15.2003(3) and (4) F.A.C. are controlling. The two categories of intended agency action set out above (decisions concerning the solicitation specifications and an intended decision to award a contract) are all that may be protested, not a notice of intent to proceed to the third phase or tier of the proposal evaluation process.

17. If DHSMV proceeds to benchmark and Unisys fails to perform, Amdahl will be invited to benchmark and this current proceeding will have been a fruitless, but expensive and time-consuming exercise. If DHSMV proceeds to benchmark and Unisys performs satisfactorily, Amdahl and all other proposers will have another window of opportunity to protest all three tiers of evaluation when the agency's recommendation (intent) to award is noticed.

18. To adhere to Petitioner's reasoning would be to invite premature protests at each tier. To adhere to Petitioner's reasoning would be to open the door to sequential protests by each proposer who flunks the benchmark test. Either result would be unduly burdensome on the agency's resources and the administrative forum. Neither result would facilitate Section 120.53 F.S.'s goal to resolve all bid protests in the shortened time frame provided therein. While minds outside the agency may assess the tier system contained in the RFP specifications as increasing, rather than decreasing, costs associated with bidding, evaluating, testing (benchmarking), awarding, and protesting, that is not a viable issue under Section 120.53(5) F.S. The agency has wide discretion to establish its own bid procedure, and it is entitled to the orderly pursuit of its design and implementation. While the three tier evaluation process may be awkward, it is not ambiguous and it was not timely challenged when the specifications were subject to challenge. The motion to dismiss should be granted.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is recommended that the Department of Highway Safety and Motor Vehicles enter a final order dismissing the current petition without prejudice to its appropriate issues being raised within the statutory time frame after the agency's recommendation to award contract described in Section 4.1 of the RFP is issued and prior to that recommendation to award being submitted to the Governor and Cabinet.

DONE and RECOMMENDED this 6th day of June, at Tallahassee, Florida.

ELLA JANE P. DAVIS
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of June, 1995

COPIES FURNISHED:

David K. Miller
M. Stephen Turner
Jay Adams
BROAD AND CASSEL
P.O. DRAWER 11300
215 South Monroe St. Ste 400
Tallahassee, Florida 32302

Enoch J. Whitney
Judson Chapman
Office of the General Counsel
Department of Highway Safety and
Motor Vehicles
2900 Apalachee Parkway
Tallahassee, Florida 32399

Mary Piccard
W. Robert Vezina III
Cummings, Lawrence & Vezina, P.A.
1004 De Soto Park Drive
PO Box 589
Tallahassee, Florida 32302

Charles J. Brantley
Office of the General Counsel
Department of Highway Safety and
Motor Vehicles
2900 Apalachee Parkway
Tallahassee, Florida 32399

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.