

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LOCKHEED MARTIN INFORMATION )  
SYSTEMS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 98-2570BID  
 )  
DEPARTMENT OF CHILDREN AND )  
FAMILY SERVICES, )  
 )  
Respondent, )  
 )  
and )  
 )  
SAGEM MORPHO, INC., )  
 )  
Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on September 22-23, 1998, in Tallahassee, Florida, before Ella Jane P. Davis, a duly assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William E. Williams, Esquire  
Timothy L. Strum, Esquire  
Huey, Guilday & Tucker, P.A.  
Post Office Box 1794  
Tallahassee, Florida 32302

For Respondent: William A. Frieder, Esquire  
Melease Jackson, Esquire  
Department of Children  
and Family Services  
1317 Winewood Boulevard  
Building 2, Room 204  
Tallahassee, Florida 32399-0700



For Intervenor: W. Robert Vezina, III, Esquire  
Mary M. Piccard, Esquire  
Veniza, Lawrence & Piscitelli, P.A.  
318 North Calhoun Street  
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether the Department of Children and Family Services' (FDCF) notice of intent to award the contract for RFP No. MF650TH was contrary to the agency's rules or policies, or the proposal specifications and whether the Petitioner established that FDCF's decision was clearly erroneous, contrary to competition, arbitrary or capricious.

PRELIMINARY STATEMENT

This case concerns a protest filed by Lockheed Martin Information Systems (Lockheed) in response to the Department of Children and Family Services' (FDCF's) notice of intent to award a contract to apparent low bidder Sagem Morpho, Inc. (Morpho), as a result of a request for proposal issued January 23, 1998, Request For Proposal No. MF650TH (RFP), Automated Fingerprint Identification System (AFIS).

Lockheed complied with all protest time frames, and the cause was referred to the Division of Administrative Hearings on June 8, 1998. Morpho was granted Intervenor status.

Pursuant to the parties' request, the disputed facts hearing was not convened until September 22-23, 1998. Petitioner presented the oral testimony of Jayne Paris and had Exhibits 1-19 and 21-29, including two deposition transcripts, admitted in

evidence. Respondent presented the oral testimony of Connie Reinhardt. Intervenor presented the oral testimony of Thomas Ruggles and Richard Woodard.

A transcript was filed on October 9, 1998. All parties filed Proposed Recommended Orders on October 26, 1998, pursuant to the extended period agreed upon at the close of the disputed fact hearing.

On October 28, 1998, Intervenor filed a Motion to Strike paragraphs 60-69 of Petitioner's Proposed Recommended Order which addressed whether Morpho had modified the terms and conditions of the AFIS RFP and conditioned its prices in its proposal. Petitioner's Response was filed November 3, 1998. These motions will be resolved within this Recommended Order.

#### FINDINGS OF FACT

1. The parties' Joint Prehearing Stipulation specified, in pertinent part, as follows:

##### E. ADMITTED FACTS

The following facts are admitted by all parties and will require no proof at hearing:

1. On or about January 23, 1998, the Department issued RFP No. MF650TH ("the RFP"), Automated Fingerprint Identification System (AFIS). The purpose of the RFP was to solicit proposals from qualified proposers to design, develop and implement an automated fingerprint identification system, or AFIS, and to procure a statewide fingerprint identification capability for applicants and recipients of public assistance.

2. The RFP was subsequently amended by Addendums 1, 2, 3, and 4 dated February 18, February 26, March 9, and March 16, 1998, respectively.

3. Two vendors, Lockheed Martin and Sagem Morpho, submitted proposals in response to the RFP on March 23, 1998.

4. The Department posted notice of its intent to award the contract described in the RFP to Morpho on April 17, 1998.

5. On April 22, 1998, Lockheed Martin timely submitted a notice of intent to protest the proposed award to Sagem Morpho, pursuant to the terms of the RFP and Section 120.57(3), Florida Statutes.

6. On May 1, 1998, Lockheed Martin filed its Formal Written Protest and Petition for Formal Administrative Proceeding.

7. Jayne Paris served as Procurement Manager for the AFIS RFP.

8. Connie Reinhardt served as Project Manager for the AFIS project.

F. AGREED UPON ISSUES OF LAW

The parties have agreed on the following issues of law:

1. The Administrative Law Judge shall conduct a hearing pursuant to Section 120.57(3), Florida Statutes.

2. All parties have standing to participate in this proceeding.

G. ISSUES OF FACT WHICH REMAIN TO BE LITIGATED.

The following issues of fact remain to be litigated:

1. Whether Morpho's AFIS proposal was responsive to the RFP.

2. Whether Lockheed Martin's AFIS proposal was responsive to the RFP.

Lockheed Martin contends that the following additional facts remain to be litigated:

3. What the Department's policy is with respect to evaluation of cost proposals on RFPs.

4. Whether and when the Department altered its method of evaluating the AFIS cost proposals.

5. The reason the Department decided not to use the cost proposal ranking and fatal criteria checklist which had been previously prepared.

6. Whether the addenda to the RFP provided supplemental RFP instructions and incorporated clarifications in response to questions submitted by potential proposers.

H. ISSUES OF LAW WHICH REMAIN FOR DETERMINATION BY THE JUDGE

The following issues of law remain for determination by the Court:

1. Whether Morpho's AFIS proposal was materially responsive to the RFP.

2. Whether Lockheed Martin's AFIS proposal was materially responsive to the RFP.

Lockheed Martin contends that the following additional issues of law remain for determination by the Judge:

3. Whether any minor irregularities waived by the Department in evaluating and scoring the AFIS proposals met the definition of a "minor irregularity" under Rule 60A-1.002(16), F.A.C.

4. Whether the Department may alter its proposal evaluation methods after proposals have been received by it.

5. Whether the Department's proposed award of the AFIS contract to Morpho is contrary to the Department's governing statutes, rules, or policies, or the AFIS RFP specifications.

6. Whether the Administrative Law Judge shall conduct a de novo proceeding pursuant to Section 120.57(3), Florida Statutes, to determine whether the Department's proposed action is contrary to its governing statutes, rules, or policies, or the AFIS RFP specifications.

Lockheed's unilateral statements of issues do not bind the parties or the undersigned but are included so that the pending Motion to Strike may be addressed in the Conclusions of Law, infra.

2. At formal hearing, Petitioner Lockheed contended that Morpho's proposal was not responsive to the RFP and that Lockheed should be awarded the contract. Intervenor Morpho contended that its proposal was responsive and that Lockheed's proposal was not responsive. FDCF contended that both proposals were responsive and that the proposed final agency action to award the contract to Morpho should be carried out.

3. The RFP solicited proposals from qualified proposers to design, develop and implement an Automated Fingerprint Identification System (AFIS) and to procure a statewide fingerprint identification capability for applicants and recipients of public assistance. (Agreed Facts). AFIS is

intended to support the client certification process for the benefit programs delivered through the Department's electronic Benefits Transfer program (EBT). The current EBT programs include Food Stamps, Temporary Assistance to Needy Families -- Work and Gain Economic Self-Sufficiency (TANF-WAGES), and the Refuge Assistance (RA) programs. The Department had determined that AFIS is the only acceptable biometric technology.

4. The RFP included the following pertinent provisions:

1.1 General Provisions -

The procurement process will provide for the evaluation of proposals and selection of the winning proposals according to applicable state and federal laws and administrative regulations. All responses received by the closing deadline, unless determined to be non-responsive will be evaluated by an evaluation team. (Exhibit P-1. pp. 66-67).

1.2 Statement of Purpose

The objective of this Request for Proposals (RFP) is to obtain proposals from qualified proposers to design, develop and implement the AFIS in accordance with the requirements defined in Section B of this RFP. FDCF intends to procure a statewide fingerprint identification capability for applicants and recipients of public assistance programs as stated above. Through this competitive solicitation, the FDCF desires to obtain a comprehensive identification service which represents the best value for the state, and which provides all hardware, (with the exception of existing administrative terminals as discussed in RFP Section B, subsection 6), software, communications networks, central site operations, terminal operations training, system administration



training, operational support, maintenance, and other services. State personnel will be utilized to operate the system's imaging, fraud investigation, and administrative workstations located at state facilities.

The system will include a central identification system to maintain fingerprint and photographic identification records and perform duplicate fingerprint record search and verification. It will also include workstations for creation of the fingerprint and photo identification records and for support of administrative and fraud investigation activities.

### 1.3 Evaluation of Technical Proposals

#### 1.3.1 Part A Fatal Criteria

Failure to comply with all Fatal Criteria will render a proposal non-responsive and ineligible for further evaluation. For a list of Fatal Criteria, see Appendix XIX. Any technical proposal that is incomplete, non-responsive, contains cost or pricing data, or in which there are significant inconsistencies or inaccuracies will be rejected by the FDCF. No points will be awarded for complying with the Fatal Criteria.

#### 1.7 Acceptance of Proposals

. . . Untimely proposals will be rejected as unresponsive.

\* \* \*

All responsive proposals timely submitted will be evaluated. No proposed changes to the terms and conditions set out in this RFP, its appendices and any addenda will be accepted and submission of a proposal which purports to do so will make the proposal non-responsive. The FDCF may waive minor irregularities, but need not do so.

Where the FDCF waives minor irregularities, such waiver shall in no way modify the RFP requirements or excuse the proposer from full compliance with the RFP specifications and other contract requirements if the proposer is awarded the contract.

\* \* \*

The FDCF reserves the right to reject any or all proposals, cancel the RFP, or waive minor irregularities when to do so would be in the best interest of the State of Florida. Minor irregularities are those which will not, in the opinion of the contact person, have significant adverse effect on overall competition, cost or performance.



## 2. Proposal Format

\* \* \*

The proposal should be prepared concisely and economically, providing a straightforward description of services to be provided and capabilities to satisfy the requirements of this RFP. Emphasis should be on completeness and clarity of content. In order to expedite the evaluation of proposals, it is essential that proposers follow the format and instructions contained herein. For purposes of this section, the terms "shall, will and must" are intended to identify items that are required to be submitted as part of the proposal. Failure to comply with all such requirements will result in the proposal being rejected as non-responsive.

### 3.3 Tab 3. Transmittal Letter

Each copy of the proposal must include a transmittal letter in the form of a standard business letter and must be signed by an individual authorized to legally bind the proposer. It shall include at a minimum:

\* \* \*

2. A statement indicating that the proposer and any proposed subcontractors are corporations or other legal entities and that each satisfied all licensing requirements of state or federal law and that they are authorized to do business within the State of Florida. All subcontractors must be identified.

3. A statement indicating the percentage of work to be done by the proposer and by each subcontractor as measured by the percentage of total proposed price.

4. A statement identifying the proposer's and any proposed subcontractor's federal tax identification number(s).

### 3.12 Tab 11. Technical Proposal: Corporate Qualifications

. . . This section must also identify and describe the corporate capabilities of any proposed subcontractors and must include three (3) references for each subcontractor including names, addresses, and telephone numbers, and a description of the services which are being provided. Subcontractors not identified in the proposal will not be permitted to perform any work under any contract which results from the RFP.

### 4. Cost Proposed Format

The following information is intended to provide proposers with instructions and a format for submitting cost quotations. Cost quotations must be submitted using the provided pricing schedules. Responses that do not provide cost proposals in the required format will be rejected. Unless otherwise noted, the costs quoted shall apply for the entire term of the contract. Proposers are encouraged to identify means to reduce the cost of AFIS services in Florida. As part of the cost proposal, proposers should identify cost reduction factors, the rationale for costs savings, and any options in service that would produce such cost savings.

In order to assess FDCF options, proposers are requested to submit AFIS system costs in two ways—as a bundled price per add transaction and as an unbundled price. The selection of the contract pricing method—either bundled or unbundled—shall be at the sole discretion of the FDCF.

The FDCF will not make any corrections to arithmetic or other errors in the cost proposal. All numbers submitted will be assumed by the FDCF to be accurate even if an error appears likely. Proposers are cautioned to assure the accuracy of any amounts submitted because they will be held to the amounts which appear in the cost proposal throughout the term of any contract

which results from this RFP as well as any extension or renewals of that contract.

5. The RFP provided blank pricing schedules in the required format for submitting bundled and unbundled proposals. The RFP required proposers to submit prices based on alternative bundled and unbundled methods.

6. Under the first method, proposers were to provide one lump sum price per record added to the AFIS database. An "add" is the function by which a fingerprint image is programmed into the computer and no match is found, indicating that fingerprint is not already in the system. Under that method, the provider was to be paid based on the number of fingerprints added to the database. (Schedules 1A and 1B).

7. Under the second method, proposers were to provide a price per add, a price per inquiry (when the system searches the existing database), and prices for all hardware, broken down by type of hardware. This is called unbundled pricing. (Schedules 2A and 2B).

8. As to unbundled pricing, the RFP specifically provided:

Proposers must also provide unbundled pricing under the two communications network assumptions. Unbundled pricing includes a unit price per record added to the database, a unit price per workstation, and a unit price per printer. The cost of system development, implementation and operations must be reflected in the unit prices per add or inquiry.

9. Schedule 3 applied to a POS Verification Study.

10. The RFP also required a way to resolve smudged print identifications:

5.3.7. Identification Searching

c) Workstations must provide the capability to launch identification search transactions using selected client records with or without minutiae editing.

11. The RFP also required proposers to submit a thumb print option:

Option to Add Thumb Prints

. . . The department is also considering the option of capturing and storing both thumb prints, in addition to both index fingers, for each applicant household member required to comply. In order to help the department assess this option, the proposer shall provide an incremental price per record added to the database. . . There is no guarantee that the department will exercise the option to capture and store thumb prints. However, should the department decide to exercise this option, the successful proposer's system must be capable of supporting this option.

12. The proposer was to provide the incremental price to capture and store thumb prints in Schedule 4.

13. The RFP required proposers to submit a technical proposal and a separate sealed cost proposal.

14. The RFP contemplated FDCF doing a completeness review against the "Fatal Criteria" provided in the RFP before the agency technically evaluated the proposals. The RFP presumed that those proposals which failed the completeness review would not be technically evaluated. No points were to be assigned via the completeness review. The RFP also contemplated that the cost

proposals would remain sealed unless, and until, a proposer had passed the technical evaluation with at least 400 points.

15. The evaluation system set out in the RFP provided for ranking proposals based on 600 possible points for the technical proposals and 400 possible points for the cost proposals. Any score less than 400 points on the technical proposal would mean the proposer could not be evaluated for cost.

16. On March 23, 1998, the day of submittal, the technical responses were opened by Jayne Paris. She was FDCF's Procurement Manager and contact person for this RFP. In doing the completeness review, Ms. Paris compared the technical proposals with the Fatal Criteria checklist for completeness. She also reviewed each proposer's Supplemental Proposal Sheet for completeness and to be sure each proposer had promised compliance with all RFP requirements. She also reviewed each proposer's transmittal letter to be sure neither proposer intended to deviate from the RFP requirements. This completeness review was witnessed by Project Director, Connie Reinhardt, to assure the integrity and accuracy of the process.

17. Although a consultant's checklist geared to federal contract review of cost proposal compliance was in the contract file which FDCF is required to maintain on every project, this checklist was only a suggestion which FDCF had rejected and had not included in the RFP. Ms. Paris did not apply it.



18. Both Morpho and Lockheed used conditional language in their respective transmittal letters.

19. Morpho's transmittal letter stated, "In the event that these stated requirements and assumptions are subsequently altered by the issuing agency, or are proved [sic] to be invalid due to actual experience, Sagem Morpho, Inc. reserves the right to make appropriate modifications to its scheduling or pricing." Lockheed asserts that by this language Morpho attempted to change the terms of the RFP, condition Morpho's prices, and include "pricing information" contrary to the RFP.

20. The RFP required that each proposer identify in its transmittal letter all proposed subcontractors by name, corporate status, eligibility through licensure for state projects, the percentage of subcontract work each subcontractor would be doing, and federal tax identification number, and also provide three references for each contractor. It also provided that any subcontractors not identified by the proposer could not work on the contract. Lockheed's transmittal letter did not propose any subcontractors. It merely stated that Lockheed anticipated the need for a maintenance subcontractor beginning in June 1999, approximately 13 months after the start of the contract, and that Lockheed anticipated submitting a request for approval of a subcontractor by March 1999. Lockheed stated as its reason for the absence of subcontractor information that waiting until June

1999 would result in selection of a subcontractor that would provide the service levels demanded by Lockheed and FDCF.

21. FDCF concedes that if a proposer intended to deviate from the RFP requirements, i.e. if the transmittal letter created a significant variance from the RFP specifications, that variance would have rendered that proposal substantively unresponsive at the completeness review, and no further evaluation of that proposal should have taken place. (TR-133; Exhibits P-2; P-3; DCF's PRO at page 7)

22. However, in her initial completeness review of the respective proposals for the Fatal Criteria, signed management summary material checklist, and transmittal letter, Ms. Paris, in fact, only considered whether all necessary parts of each proposer's response were included. The Fatal Criteria only applied to the technical response. Ms. Paris deferred consideration of the content or effect of each proposer's "extraneous language" related in Findings of Fact 18-20 to the subsequent technical and cost evaluations. Therefore, Lockheed and Morpho were treated equally at the completeness review, because neither was disqualified as non-responsive nor docked any points on the basis of their respective transmittal letters.

23. Ms. Paris' reason for not finding the transmittal letters unresponsive was apparently based at that stage on Section 1.7 of the RFP, which would hold the proposer to the RFP

specifications despite waivers of irregularities.

24. The next day, March 24, 1998, Ms. Paris provided the technical evaluation team with Sections I and III of an Evaluation Manual, which included the introduction and the substantive Evaluation Criteria Parts C-K. Ms. Paris also conducted a training session during which she provided a briefing on the evaluation process and instructions to the evaluation team members.

25. The evaluation team was to evaluate only the technical merit of each proposal. Sections II and IV of the Evaluation Manual, which had been prepared for FDCF by outside consultants, were removed before the manual was distributed to the evaluation team on the basis that these sections were cost-related and the technical evaluation team members, whose duties did not include consideration of cost, were not to use them.

26. The technical evaluation team members individually and independently evaluated the technical portion of each proposal and scored each technical response using a scale of 0 to 4 points, as instructed in Part I of the Evaluation Manual. With the exception of questions requiring a "yes" or "no" answer, scores were assigned as follows:

0 = no value; proposer demonstrated no capability to satisfy the Department's needs, ignored this area, or has so poorly described the proposal for this criteria that understanding it is not possible.

1 = poor; proposer demonstrated little or no direct capability to satisfy the Department's needs, or has not covered this area, but there is some indication of marginal capability.

2 = acceptable; proposer demonstrated adequate capability to satisfy the department's needs

3 = good; proposer demonstrated more than just adequate capability and good approach to satisfy the Department's needs.

4 = superior; proposer demonstrated excellent capability and an outstanding approach to satisfy the Department's needs.

This scoring concept comports with the RFP, pp 67-68.

27. A proposer had to receive a minimum score of 400 technical points before FDCF would open, review, and rank that proposer's cost proposal. FDCF determined that both Petitioner and Intervenor met this requirement. Morpho received 582.99 points out of a possible 600 points. Lockheed received 559.88 points.

28. Under the scoring system, neither the Fatal Criteria nor the management summary were entitled to any points, so neither proposer was scored any points on those bases during the technical evaluation.

29. "Minutiae editing" is the process of correcting misinformation details in an original fingerprint image which is smudged. Under Section 5.3.7 of the RFP, the system's workstations were required to have the capability to launch identification searches of fingerprint images "with or without

minutiae editing." Morpho's system as proposed can launch a search and find a match after minutiae editing. Lockheed's system could search, but its proposal candidly admitted that the Lockheed system could not match prints after minutiae editing. FDCF waived this technical problem with Lockheed's proposed system as an "immaterial irregularity" because the RFP expressly provided that proposers would be bound by the terms of the RFP.

30. The RFP required submittal of a thumb print option but reserved the right of FDCF to unilaterally exercise the option. Lockheed submitted Schedule 4, providing for the thumb print identification option, quoting a cost of \$0. However, Lockheed conditioned that \$0 quote on FDCF accepting Lockheed's proposal at the time of the initial contract. Morpho did not submit any Schedule 4, and Morpho's technical proposal shows this omission was probably inadvertent. FDCF waived as "immaterial" Lockheed's extraneous language conditioning the thumb print option in its proposal and likewise waived Morpho's complete failure to submit a Schedule 4 for the thumb print option pursuant to the RFP.

31. The optional thumb print function had no impact on ultimate scoring of the respective proposals because no value was assigned to it.

32. FDCF has taken the position that since the technical evaluation team did not consider either proposal to be technically "nonresponsive," then all flaws or omissions were properly waived.

33. The cost proposals remained sealed until after the technical proposals were scored by the technical evaluation team.

34. At formal hearing, FDCF personnel testified that it was never FDCF's intent to enter into a contract for the thumb print option at the time of the initial contract and that the thumb print option was purely for future informational purposes.

35. The RFP used mandatory language to ensure that cost proposals would be submitted in two ways -- a bundled price and an unbundled price. The bundled and unbundled pricing schedules were mutually exclusive, and the point system set up in the RFP assigned equal weight to the scoring of the bundled and unbundled price schedules. FDCF reserved the unilateral right to select either bundled or unbundled pricing as its procurement method.

36. Cost proposals were to be scored using a formula which compared each proposer's price to the lowest price proposal. Of the 400 points possible for cost proposals, 195 points were allocated by the RFP to the bundled pricing schedules (Schedules 1A and 1B), 195 points were allocated to the unbundled pricing schedules (Schedules 2A and 2B), and 10 points were allocated to the POS Verification Study (Schedule 3).

37. The RFP clearly indicated that both bundled and unbundled prices were required to be submitted on the provided Schedule format "in order to assess FDCF options."

38. FDCF did not decide until after scoring the cost

proposals and immediately before it was ready to post the Notice of Intent to Award to Morpho, that it would elect to contract based on the bundled cost proposals. Up until that moment, the bundled and unbundled price schedules had some significance to FDCF, if only for flexibility in procurement.

39. The RFP specified that FDCF would not own any of the equipment (hardware) for which it was seeking single unit prices in the unbundled schedules.

40. Nonetheless, on the unbundled pricing schedules provided in the RFP, proposers were required to provide an unbundled unit price per workstation and unit price per printer.

41. On Schedules 2A and 2B, "Unbundled Pricing," Morpho did not provide an entry in dollars and cents for fraud workstation printers or administrative workstation printers. Rather,

Morpho's schedule inserted in those spaces, "included in w/s (workstation) price" or "included above."

42. Lockheed also had some extraneous language on one of its schedules as opposed to just a dollar amount, but cost breakout was clear.

43. Morpho considered the printers part of the imaging and fraud investigation workstations because the RFP required a dedicated printer for each workstation and the RFP specified FDCF would not own or maintain any hardware.

44. Ms. Paris reviewed each cost proposal for compliance

with Section C of the RFP. She was concerned about whether Morpho's "unbundled" schedules complied with the RFP.

45. The RFP defined waiveable "minor irregularities" as "those which will not, in the opinion of the contact person, have significant adverse effect on the overall competition, cost or performance."

46. Upon advice of her supervisor, Connie Reinhardt, and FDCF's General Counsel, Ms. Paris determined both proposals to be responsive, and substituted a price of "zero" in the questionable spaces on Morpho's "unbundled" schedules, despite the absence of a pricing break-out between the fraud workstations and printers or between the administrative workstations and printers on Morpho's "unbundled" schedules.

47. Ms. Paris conceded that she was never referred to Rule 68-1.001(16) Florida Administrative Code,<sup>1</sup> which defines "minor irregularity" in terms of effect on cost.

48. Ms. Paris was told that only items which had an effect on the overall scores of the responding proposers' cost proposals could not be waived.

49. The cost proposals were not evaluated and scored subjectively as the technical proposals had been. No Fatal Criteria applied to this third review phase. Scoring was to be based on a purely mathematical formula devised prior to distributing the RFP. The RFP drafters had contemplated ranking the respective cost proposals by simply inserting the dollar



values each proposer placed on the unbundled unit price list into a computer program.

50. Ms. Paris attempted to rank the cost proposals. To assure the integrity of the process, Chris Haggard, Automation Specialist, physically entered cost proposal figures into the computer program. Ms. Paris instructed him to ignore any "extraneous language" on the schedules of both proposers.

51. The computer program would not accept the "zeros" inserted by FDCF.

52. Without any substitutions by Ms. Paris, Morpho had bid "zero" in the space indicating there would be no charge for the unbundled unit price per inquiry, thereby intending to signify that there would be no charge for this function. The record does not suggest that this proper use of "zero" had any effect on the computer program.

53. Ms. Reinhardt viewed the problem with FDCF's imputed zero components as a purely technical problem with the computer program and not an "irregularity" under the RFP. The computer program was adjusted to accommodate the imputed zeroes and produce a spreadsheet.

54. On unbundled Item 14, FDCF ranked Morpho with a score of one and Lockheed with 15, the maximum. On Item 15, the fraud workstation color printer, Morpho was ranked 15 and Lockheed was ranked zero. On Item 16, the administration workstation, Morpho was ranked three; Lockheed was ranked 15. On Item 17, the

administration workstation printer, Morpho was ranked 15 and Lockheed was ranked zero.

55. Pursuant to the adjusted spreadsheet, Morpho received a score of 343 for its cost proposal, and Lockheed received a score of 240. Even if Morpho had received zero points for the printers and work stations (lines 14-17 of the Unbundled Schedules), and if Lockheed had received the maximum number of points available on these items, Morpho still would have received the higher score for its cost proposal.

56. At the disputed fact hearing, FDCF gave as its justification for imputing "zero" for bundling language in Morpho's "unbundled" schedules the following reasoning: because FDCF had requested unbundled prices purely for future contracts, not the contract to arise out of this RFP, for informational purposes, or for a cost benefit analysis for state budget purposes; because the RFP specified that FDCF would neither own nor maintain any of the hardware proposed for this RFP; because Morpho's failure to conform to the unbundled price format was not "irregular" if Morpho did not sell printers independently and Morpho used the unbundled schedules in a manner consistent with Morpho's offer; because the zero imputed by FDCF reflected accurately the integrated costs in effect; because Morpho was not charging separately for the printers; because FDCF's insertion of "zero" constituted no unfair economic advantage to Morpho; and finally, because having chosen the bundled option, FDCF believed

the Morpho proposal will save a great deal of money and "represent the best value for the state."<sup>2</sup>

57. The RFP specified that the successful proposer would be responsible for the "cost of system development, implementation, and operations" for the contract term as well as any extensions and include that cost in either the unbundled unit price per record added (per add) or the price per inquiry (per inquiry) in Schedules 2A and 2B. There is no RFP requirement that the maintenance portion be "unbundled" further. "Cost of . . . operations" meant "cost of maintenance."

58. According to Richard Woodard, who was responsible for the Morpho cost proposal, including Item 9, Morpho's price per add of \$6.70 on Schedule 2A included \$.80 for maintenance.

59. However, at formal hearing, Lockheed elicited from Ms. Paris testimony that even though Morpho had indicated that maintenance was not included in its unbundled schedules, FDCF had decided to hold Morpho to the prices shown in their per add or per inquiry line item (TR-61), and that because of Morpho's own extra schedule attached to the bottom of unbundled pricing Schedule 2A, Morpho's maintenance price over 5 years could be calculated on current maintenance prices. (TR-62) When the prices are calculated mathematically over the life of the contract they do not correspond to the \$.80 per add testified to by Mr. Woodard.<sup>3</sup>

60. Morpho's maintenance cost schedule and the provisions

within Morpho's "Comments on Unbundled Pricing" indicated that only 12 months of warranty were included with the equipment identified in Morpho's unbundled pricing schedules and that after 12 months, maintenance contracts would be negotiated. FDCF ignored this as "extraneous language," and did not consider it to be a material irregularity.

61. The Morpho bundled cost proposal was calculated on an average of 2.2 persons per file who would require finger imaging and matching. Morpho asserted that these calculations had been made on a "worst case scenario" based on RFP Addendum 3's specification that

an actual number cannot be provided. It is expected that less than 2.2 persons per case will be printed.

Lockheed selected a number less than 2.2 per file, and asserted that Morpho's "worst case" scenario is, in effect, a "best case" scenario because the higher the number of prints, the less Morpho can afford to charge per add; that by selecting the 2.2, Morpho has materially failed to comply with the RFP specification which estimated less than 2.2 persons per file, and that because Morpho also inserted the extraneous language in its transmittal letter as set out in Finding of Fact 19, supra., Morpho's proposal not only varied the express terms of the RFP by the use of "2.2" but also included "pricing information" in its transmittal letter and conditioned its prices on the potentially false assumptions stated or on a figure greater than a figure "less than 2.2," as required by the RFP.

#### CONCLUSIONS OF LAW

62. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.57(1) and (3), Florida Statutes.

63. All parties have standing in this cause.

64. All time frames were met by the Petitioner.

65. The duty to go forward and prove its position by a preponderance of the evidence is upon Petitioner Lockheed.

66. Section 120.57(3) provides, in pertinent part:

Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to

determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

69. An agency action is clearly "erroneous" if it results from substantial procedural error or a clear misapplication of the law or is contrary to the clear weight of the evidence. Black's Law Dictionary 228 (5th Ed. 1979).

70. "A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or despotic." Agrico Chemical Co. v. State Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. den, 376 So. 2d 74 (Fla. 1979).

71. "Contrary to competition" is best understood by its plain and obvious meaning, i.e., against or in opposition to competition. "The purpose of the competitive bidding process is to secure fair competition on equal terms to all bidders by affording an opportunity for an exact comparison of bids." Harry Pepper and Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2nd DCA 1977) (emphasis supplied).

72. Intervenor's Motion to Strike Paragraphs 60-69 of Petitioner's Proposed Recommended Order was based on Morpho's assertion that a) Lockheed's position statement in the Prehearing Stipulation was expressly limited so as to remove from

consideration the issue of whether or not Morpho modified the terms and conditions of the AFIS RFP and conditioned its prices in its proposal, an issue clearly raised in the original Petition; and that b) Lockheed did not present evidence on this issue at formal hearing.

73. I conclude that this cause can only be resolved upon evidence actually presented at formal hearing, but that if evidence fits the category raised by Lockheed's protest of Morpho's cost proposal's compliance "with the cost proposal format requirements and other substantive requirements of the RFP," then that evidence may be argued in the respective proposals of fact and conclusions of law. Also, upon Finding of Fact 1, supra, one would be hard put to say that a conditioned cost proposal, if proven, is not an attack upon the cost proposal itself. Likewise, the facts as found in Finding of Fact 1, as well as the parties' opening statements at the disputed fact hearing clearly demonstrate no unfair surprise to the Agency and Intervenor Morpho by Lockheed's assertions in paragraphs 60-69 of Lockheed's Proposed Recommended Order. The Motion to Strike is denied.

74. However, I also conclude with regard to Paragraphs 60-69 of Lockheed's Proposed Recommended Order, that Morpho's interpretation of the RFP that it was free to base its calculations of the potential number of adds upon "2.2 persons per file" is at least as valid as Lockheed's decision to

calculate on less than 2.2 persons per add. (See Finding of Fact 61). The RFP's specification stated that "an actual number cannot be provided. It is expected that less than 2.2 persons per case will be printed," is only an estimation. By definition and function, RFPs permit more fluidity of response than ITBs. Lockheed's concern over Morpho's interpretation of FDCF's estimate, in the face of FDCF's lack of concern, is akin to the undersigned's wondering why Lockheed elected to compute much of its proposal on a seven-year contract instead of a five-year contract, a fact that was never explained at the disputed fact hearing but a fact which FDCF apparently also found of no consequence. Lockheed's protest on the isolated issue of "2.2" is unnecessarily hypertechnical.

75. Throughout these proceedings, FDCF has taken the position that any omissions or flaws of either proposer were waiveable minor irregularities, and although the reasons FDCF advanced for this view have varied, FDCF has been consistent that its overriding reasons are because the RFP specified the AFIS contract would be a fixed price contract and the proposers would be held to the dollar amounts stated in the respective cost proposals throughout the term of the contract, including any extensions or renewals, none of the omissions or flaws of either proposer represented a detriment to the State. Morpho, on the other hand, asserted that its proposal's flaws, if any, were



properly waiveable minor irregularities, whereas the flaws Morpho assigned to Lockheed's proposal were major, substantive, nonwaiveable irregularities. Lockheed likewise asserted that Lockheed's flaws, if any, were properly waiveable and Morpho's flaws were nonwaiveable.

76. This case hangs on what the words "shall, will, and must" mean in this particular RFP, what constitutes a material deviation from the specifications of the RFP, and how waiver of such terms affect cost and competitive bidding.

77. Courts favor an interpretation of bid contract provisions using the plain meaning of the words. Quesada v. Director, Federal Emergency Management Agency, 577 F.Supp. 695 (S.D. Fla. 1983), and Tropabest Foods, Inc. v. State, Department of General Services, 493 So. 2d 50 (Fla. 1st DCA 1986). Common sense suggests that a straight-forward analysis of bid language is always best, but not every failure of a proposer to adhere to "shall, will, and must" language is a fatal deviation. Some can be corrected by adjusting the points awarded. See Amdahl Corp. v. Dept. of Highway Safety and Motor Vehicles, DOAH Case No. 95-5382BID (RO 1/29/96).

78. A variance is material only when it gives the bidder a substantial advantage over other bidders and restricts or stifles competition. See Tropabest Foods, Inc. v. State of Florida, Department of General Services, supra. A bid containing a material variance is unacceptable. The courts have applied two

criteria to determine whether a variance is substantial and hence cannot be waived.

[F]irst, whether the affect of a waiver would be to deprive the municipality of its assurance that the contract would be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a

bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

See Robinson Electrical Company, Inc. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982) and Harry Pepper and Associates, Inc. vs. City of Cape Coral, supra.

79. If Morpho prevails, FDCF's waivers for Lockheed become moot, but the chronology and accumulation of waivers for both responding proposers matters for assessing the affect of agency action on the competitive bid process.

80. Morpho's general conditional language in its transmittal letter is boilerplate language which is commonly used to provide a hedge on future contract negotiations. In a flat-price contract such isolated language by itself has no ability to change the terms of the RFP or relate significant cost or pricing data, and FDCF was not arbitrary in letting it pass.

81. FDCF's failure to immediately rule Lockheed's proposal materially unresponsive on the basis of its transmittal letter's omission of subcontractor information mandated by the RFP was clearly erroneous and contrary to competition. The omission constituted a material deviation. Had other potential proposers known FDCF would waive this RFP requirement, they might have submitted proposals. Any bidder might prefer to wait to qualify its subcontractors until after getting the bid award. See North Florida Construction v. Pro-Steel Builders, Inc., DOAH Case No. 94-2353BID (RO 6/13/94; FO 9/12/94). Requiring subcontractors

and their eligibility to be in effect on the date proposals are opened ensures competitive bidding objectives are met and prevents unscrupulous persons from manipulating the process to their own advantage. Waiving this vital requirement gave Lockheed an unfair cost advantage over Morpho and otherwise was not in the best interests of the State because the RFP requirement had conceivably eliminated potential bidders who could have competed had there been no such requirement in the RFP. E.M. Watkins & Co. v. Board of Regents, 414 So. 2d 583 (Fla. 1st DCA 1982). More dangerous to the State's interest, however, would be if Lockheed were to be awarded the bid and then unable to perform because the RFP also banned undisclosed contractors. See also City of Opa Locka v. Trustees of the Plumbing Industry Promotion Fund, 193 So. 2d 29 (Fla. 3d DCA 1996).

82. FDCF's failure to rule materially unresponsive Lockheed's inability to match prints after minutiae editing and a search was clearly erroneous. It also gave Lockheed an advantage over Morpho because Morpho had incurred costs in developing a workable system and had complied with the mandatory technical language of this RFP requirement. It is disingenuous to suggest the RFP did not specify that FDCF wanted this part of the total system to work. Waiving this mandatory RFP requirement was contrary to competition because in effect, it altered the RFP requirements after proposal submission. There is no telling how

many proposers FDCF might have had for its RFP if potential proposers had known in advance that FDCF would throw out this mandatory requirement.

83. Lockheed's language conditioning the time for implementing its thumb print option is a minor irregularity in the same way as Morpho's transmittal letter language. However, even though the technical thumb print option offered by Morpho would work, Morpho failed to submit Schedule 4 permitting a cost analysis. Because Schedule 4 was not ranked for either responding proposer, Morpho and FDCF have argued that waiving the mandatory language to submit an option constituted waiving only a minor irregularity. Morpho's failure to submit Schedule 4 here is not akin to the situation in Overstreet Paving v. Department of Transportation, 608 So. 2d 851 (Fla. 2d DCA 1992), where a proposer's submitted document was lost after bid opening by the Agency and there was affirmative evidence that no competitive advantage accrued from submitting the document. Herein, we have a classic case of an incomplete proposal due to the proposer's inadvertence to include a required schedule. The situation is not solveable in the Amdahl mode since it deals with a mandatory requirement and neither responding proposer was ranked.

84. Waiving the mandatory RFP requirement to submit a thumb print option, even though the RFP reserved to the Agency the unilateral right to not exercise that option, amounted to rejecting all bids and chills competitive bidding because there

is no way for potential bidders to guess which RFP requirements are "really" mandatory.

85. An agency abuses its discretion when that agency does not use the standards contained in the invitation to bid or request for proposal in evaluating the various submittals, and the agency's decision would be arbitrary and capricious under those circumstances. Aurora Pump Division of General Signal Company v. Gould Pumps, Inc., 424 So. 2d 70 (Fla. 1st DCA 1982); Eccelstron Properties Ltd. v. HRS, 11 FALR at 1184, 1195 (1989); Wharton Investment Group, Inc. vs. HRS, 12 FALR 5001, 5008 (1990). Using improper award factors, incorrect weighting of criteria, and erroneous or inaccurate information in its evaluation also constitutes arbitrary and capricious action by FDCF. Dr. D.C. Courtney v. HRS, 12 FALR 2226 (1988).

86. Here, FDCF suggests that since it did not really want the thumb print option anyway, it was free to waive that mandatory requirement after the proposals were opened, but that position is contrary to competitive bidding, and true competitive bidding is always in the State's best interest and "represents the best value for the State.

87. Let there may be no misapprehension concerning the foregoing conclusions with regard to FDCF's waiver of the mandatory thumb print option requirements. Agencies are able to draft RFPs in order to legitimately accomplish what was done in this case. Agencies that know they do not want a possible option

at the present time, can a) omit that requirement from their RFP, or b) include the option in their RFP using permissive, rather than mandatory, language and provide for optional/bonus/additional points in the RFP ranking system for proposers who choose to offer such a function, or c) include the option in the RFP in mandatory language, and if no proposals are made, then eliminate the option from the RFP and reissue it without the option. Any of these time-honored methods would encourage competitive bidding and all are reasonable for agencies to pursue, but waiver of mandatory requirements after opening of proposals is neither fair nor reasonable.

88. FDCF's solution of correcting omissions in Morpho's unbundled schedules should not be encouraged. The competitive bid process will fail if vendors believe that agencies are free to unilaterally change the dollar value on line items in proposals after opening.

89. The required schedules, specific RFP instructions, and the problems with the original computer program which arose from FDCF's substitution of zero on Morpho's behalf clearly show that the drafters intended the RFP to compare bundled and unbundled prices. However, since no decision to use the bundled price was made until after the rankings, and since removal of any adjustments FDCF made to Morpho's unbundled schedules would not alter Morpho's rank as apparent low bidder, the Amdahl solution of removing any altered points scored by Morpho is reasonable

except for the discouraging message it sends to potential proposers and the problem with maintenance costs.

90. Morpho's extra maintenance cost schedule and conditional language with regard to offering only initial 12 month warranties and subsequent negotiation of maintenance contracts constitute material irregularities in Morpho's proposal, but they are material irregularities which would be of no real world consequence except for the mathematical contradictions resulting therefrom. The mathematical contradictions constitute a "significant inconsistency" within Morpho's proposal, which confuse what bottom-line price Morpho actually is offering. Such a "significant inconsistency" by the terms of the RFP, is fatal to Morpho's proposal.

91. Whether the RFP standard (Finding of Fact 45) or Rule 16A-1.001(16)'s definition (Finding of Fact 47) is applied, the test of materiality in RFP compliance is not just whether the proposers' scores are affected but whether the cost to the Agency is affected by a proposal's irregularities.

92. Accordingly, the only two proposals FDCF received were each materially and substantively nonresponsive in one or more respects. In individual instances as related above, and by the cumulative effect of so many waivers for both responding proposers, FDCF's handling of this proposal evaluation, while conscientious and innovative, has been contrary to competition.



RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law,  
it is

RECOMMENDED that the Florida Department of Children and  
Family Services enter a final order rejecting all proposals.

DONE AND ENTERED this 21st day of December, 1998, in  
Tallahassee, Leon County, Florida.

---

ELLA JANE P. DAVIS  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847

Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of December, 1998.

ENDNOTES

<sup>1/</sup> Rule 68-1.001(16), Florida Administrative Code is not contained in the RFP but applies to all competitive procurements under Chapter 283, Florida Statutes. It defines "minor irregularity" as

a variation from the ITB/RFP terms and conditions which does not affect the price of the bid proposal or give the bidder or offeror an advantage or benefit not enjoyed by other bidders or offerors or does not adversely impact the interest of the Agency

<sup>2/</sup> Because FDCF has determined to exercise the option of "bundled" pricing, as defined by the spreadsheet, the cost for the system, if it is awarded to Morpho, will be less than one-half of the cost of the system if awarded to Lockheed and a 121% difference in overall cost offer exists, and that difference will remain constant regardless of the numbers of transactions the system performs.

<sup>3/</sup> If FDCF's adjusted spreadsheet is to be believed, the difference between the cost proposed by Lockheed under the bundled option is 121% more than the cost proposed by Morpho, and under that option, the difference would remain constant if bundled prices are selected. However, under the terms of the RFP, FDCF should have been able to compare the two options adequately before making its choice "to bundle or not to unbundle." The mathematical discrepancies pointed out by Lockheed constitute a material flaw in Morpho's proposal that affects Morpho's "bottom line."

COPIES FURNISHED:

William E. Williams, Esquire  
Huey, Guilday & Tucker, P.A.  
Post Office Box 1794  
Tallahassee, Florida 32302

William F. Frieder, Esquire  
Melease Jackson, Esquire  
Department of Children and  
Family Services  
Building 2, Room 204  
1323 Winewood Boulevard  
Tallahassee, Florida 32399-0700

Mary M. Piccard, Esquire

Vezina, Lawrence & Piscitelli, P.A.  
319 North Calhoun Street  
Tallahassee, Florida 32301

Gregory D. Venz, Agency Clerk  
Department of Children  
and Family Services  
Building 2, Room 204  
1317 Winewood Boulevard  
Tallahassee, Florida 32399-0700

Richard A. Doran, General Counsel  
Department of Children  
and Family Services  
Building 2, Room 204  
1317 Winewood Boulevard  
Tallahassee, Florida 32399-0700

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.