

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SPRINT PAYPHONE SERVICES, INC., )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 01-0189BID  
 )  
 DEPARTMENT OF CORRECTIONS, )  
 )  
 Respondent, )  
 )  
 and )  
 )  
 MCI WORLDCOM COMMUNICATIONS, INC., )  
 )  
 Intervenor. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

A formal hearing was held pursuant to notice, on February 15, 2001, in Tallahassee, Florida, before Barbara J. Staros, assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jonathan Sjostrom, Esquire  
Rex Ware, Esquire  
Steel, Hector & Davis  
215 South Monroe Street, Suite 601  
Tallahassee, Florida 32301-1804

For Respondent: Obed Dorceus, Esquire  
Veronica McCrackin, Esquire  
Department of Corrections  
2601 Blairstone Road  
Tallahassee, Florida 32314

For Intervenor: Carolyn S. Raepple, Esquire  
Shannon L. Novey, Esquire  
Hopping, Green, Sams & Smith, P.A.  
Post Office Box 6526  
Tallahassee, Florida 32314

STATEMENT OF THE ISSUE

Whether the proposal Petitioner submitted in response to Respondent's Request for Proposal No. 00-DC-7295 was non-responsive.

PRELIMINARY STATEMENT

On December 5, 2000, the Florida Department of Corrections (Department) posted its intended award of the contract for RFP No. 00-DC-7295 for an inmate telephone system to MCI Worldcom Communications, Inc. (Worldcom). Petitioner Sprint Payphone Services, Inc. (Sprint) timely filed a protest to this intended award. Petitioner T-Netix, Inc. (T-NETIX) also timely filed a protest to this intended award. The cases were forwarded to the Division of Administrative Hearings on or about January 16, 2001. The protest filed by Sprint was assigned Case No. 01-0189BID, and the protest filed by T-Netix was assigned Case No. 01-0190BID.

Case Nos. 01-0189BID and 01-0190BID were consolidated by an Order issued January 18, 2001. WorldCom petitioned to intervene in both cases. Sprint moved to intervene in Case

No. 01-0190BID. T-NETIX moved to intervene in Case No. 01-0189. All motions to intervene were granted.

In its Formal Written Protest and Petition for Formal Administrative Hearing, Sprint asserted that the Department incorrectly and arbitrarily rejected Sprint's proposal as non-responsive. Sprint also asserted that the intended award of the contract to Worldcom is contrary to the Department's governing statutes, rules, or policies or the proposal specifications. Sprint requested that its proposal be deemed responsive and the most advantageous to the state, that Worldcom's and T-NETIX's proposals be disqualified and, in the alternative, that all bids be rejected and the Respondent rebid the contract.

The Department filed a Motion to Dismiss or in the Alternative Motion for Summary Recommended Order. The Department argued in its Motion that Sprint was a non-responsive bidder and, therefore, lacked standing to bring this protest. On February 7, 2001, an Order was issued denying the motion without prejudice to raise the issue of standing at hearing and in Proposed Recommended Orders.

On February 14, 2001, Petitioner T-NETIX filed a Notice of Voluntary Dismissal resulting in the dismissal of Case No. 01-0190BID. Therefore, only Case No. 01-0189BID was considered at the final hearing.

The parties filed a Prehearing Stipulation. At hearing, Petitioner presented the testimony of Mike Jewell and Genanne Wilson. Petitioner's Exhibit 35 was admitted into evidence. Petitioner's Exhibit 39 was not admitted into evidence and was proffered. Respondent did not present any witnesses. Respondent's Exhibits 23 and 38 were admitted into evidence. Intervenor Worldcom did not present any witnesses. Joint Exhibits 1, 2, 4-9, 11, 12, 15, and 16 were also admitted into evidence.

A Transcript, consisting of two volumes, was filed on March 8, 2001. On March 19, 2001, the parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### Stipulated Facts

1. On or about August 14, 2000, the Department issued RFP No. 00-DC-7295 for an Inmate Telephone System.
2. Generally, RFP No. 00-DC-7295 requests proposers to submit proposals to provide local, intralata, interlata, and international telephone services for inmates in the Department's facilities identified in the RFP and coin-operated telephones at each site for staff and visitors. The proposer awarded the contract under RFP No. 00-DC-7295 (the Contractor) must provide and install all telephone instruments

and all wiring. The Contractor must also provide system administrators and site technicians who will implement and manage pin numbers and calling lists for inmates, and must provide various specified reports and data to the Department

3. All services, equipment, etc., addressed in RFP No. 00-DC-7295 must be provided to the Department at no cost. Instead, the Contractor must pay the Department a commission calculated as a percentage of gross revenues. Consequently, the contract to be awarded under RFP No. 00-DC-7295 is a revenue-generating contract for the Department.

4. Sprint, T-NETIX, WorldCom at AT&T timely submitted proposals to the RFP.

5. On November 6, 2000, the assigned Department Purchasing Staff member, Genanne Wilson, determined the AT&T and Sprint proposals to be non-responsive for failing<sup>1</sup> to meet the mandatory requirements of the RFP.

6. Sprint's proposal was also determined to contain a material deviation<sup>2</sup> from the RFP.

7. The determination that the Sprint proposal failed<sup>3</sup> to meet the mandatory requirements of the RFP and contained a material deviation was based on Sprint's inclusion of the following underlined language on the Supplemental Proposal Sheets wherein the proposers were instructed to appropriately

initial in understanding and agreement each paragraph of the RFP:

Liquidated Damages  
With the express understanding the total liquidated damages are limited to \$100,000.00 by the Limitation of Remedies in Section 7.32.

8. Following the determination that the Sprint proposal failed<sup>4</sup> to meet the mandatory requirements of the RFP and contained a material deviation, Sprint's proposal was not further evaluated by the Department.

9. The T-NETIX<sup>5</sup> and WorldCom proposals were individually evaluated by each member of an Evaluation Team pursuant to the criteria specified in the RFP.

10. On Tuesday, December 5, 2000, the Department posted its intended award of the contract for RFP No. 00-DC-7295 to WorldCom.

11. Sprint and T-NETIX each timely filed a protest to this intended award.

#### Findings of Fact Based on the Evidence of the Record

12. On or about October 13, 2000, the Department issued Addendum No. 1 to RFP No. 00-DC-7295 which reprinted the original RFP in its entirety and included 67 revisions.

13. Section 4.3.6 of the RFP specifies that, "[t]he Department shall reject any and all proposals not meeting mandatory responsiveness requirements."

14. Section 5.1 of the RFP, reads in pertinent part as follows:

5.1 Tab 1 - Mandatory Responsiveness Requirements

The following terms, conditions, or requirements must be met by the proposer to be responsive to this RFP. These responsiveness requirements are mandatory. Failure to meet these responsiveness requirements will cause rejection of a proposal. Any proposal rejected for failure to meet responsiveness requirements will not be evaluated.

5.1.1 It is mandatory that the proposer supply one (1) original and ten (10) copies of both the Project and the Cost Proposals. Project and Cost Proposals shall be in separately sealed packages each clearly marked "Project Proposal - RFP-00-DC-7295" or "Cost Proposal - RFP-00-DC-7295" respectively. Inclusion of any commission rates or pricing data in the Project Proposal shall result in rejection of the entire proposal.

5.1.2 It is mandatory the proposer return, under Tab 1, the Supplemental Proposal Sheets (Attachment 1) of this RFP document, appropriately initialed in understanding and agreement of each paragraph of the RFP and signed by the person with authority to properly bind the proposer.

5.1.3 It is mandatory the proposer complete, sign and return, under Tab 1, the PUR Form 7033, State of Florida Request for Proposal/Contractual Services Acknowledgment which is the front cover of this RFP document. A copy of the document that includes both front and back sides is acceptable. (emphasis in original)

15. Section 6.1 of the RFP further provides:

6.1 Review of Mandatory Responsiveness Requirements

Proposals will be reviewed by Department staff to determine if they comply with the mandatory requirements listed in Section 5 of the RFP. This will be a yes/no review to determine if all requirements have been met. Failure to meet any of these mandatory requirements will render proposal non-responsive and result in rejection of the proposal. Further evaluation will not be performed.

No points will be awarded for passing the mandatory requirements. (emphasis in original)

16. RFP Section 7.30, entitled, "Liquidated Damages," addresses liquidated damages for various requirements and services to be provided by the successful proposer under the contract for an inmate telephone system. Section 7.30 does not contain a cap or limitation on liquidated damages.

17. RFP Section 7.32, entitled "Limitation of Remedies," addresses the limitation of remedies for the performance or non-performance of machines and programming. There is no cap or limitation on liquidated damages established by RFP Section 7.32.

18. Sprint altered the Supplemental Proposal Sheets by limiting liquidated damages under Section 7.30 to \$100,000 based upon its understanding of the relationship between Sections 7.30 and 7.32 of the RFP. Specifically, Sprint read



Sections 7.30 and 7.32 in para materia and concluded that total liquidated damages would be "limited to \$100,000 by the limitation of remedies in Section 7.32."

19. Mike Jewell, who at the time the RFP was issued, was Sprint's Vice President of Sprint Payphone Services, Inc., was responsible for "oversight over the responses that Sprint submitted and to make sure that they were in keeping with the corporation's business interests." Mr. Jewell testified that the purpose of inserting this language in the proposal was to, "point out to the Department of Corrections that our agreement to 7.30 had to be read in conjunction with the language in the agreement in [sic] 2.7.3.2." Mr. Jewell acknowledged that vendors had the opportunity to ask questions prior to the submittal of their proposals to the Department and that Sprint did not ask any questions regarding the relationship between Sections 7.30 and 7.32 of the RFP.

20. A letter written by Paul Eide, Customer Care Manager for Sprint, and faxed to the Department on November 21, 2000, after the opening of the proposals, stated in pertinent part:

In response to the RFP, we found the liquidated damages section to [sic] vague and confusing to the exact dollar amount of a penalty situation. Our intentions were to point out the ambiguity and merely cap the amount so the winning vendor was not liable for an infinite amount of money.

21. Although Sprint requested permission from the Department to remove the \$100,000 cap on liquidated damages after the opening of the proposals, the Department did not permit Sprint to do so.

22. Genanne Wilson, a purchasing analyst in the Department's bureau of purchasing, was the person charged with reviewing the proposals for responsiveness. Ms. Wilson determined that Sprint did not meet the requirement of Section 5.1.2 and, therefore, failed to meet the mandatory responsiveness requirements of the RFP. That determination was confirmed by her bureau chief. As specified in Section 6.1 of the RFP, further evaluation was not performed on Sprint's proposal.

23. The evidence submitted by Sprint is not sufficient to establish that Sprint's proposal was responsive. Rather, the evidence establishes that Sprint chose to alter or modify the Supplemental Proposal Sheets even though those who submitted proposals were advised in Sections 5.1 and 6.1 that failure to meet any of the mandatory responsiveness requirements would render a proposal non-responsive and result in rejection of the proposal and that further evaluation would not be performed.

24. Sprint's failure to signify its understanding and agreement to Section 7.30 by initialing the supplemental proposal sheets without more resulted in a failure to meet the mandatory requirement in Section 5.1.2.

25. Sprint's failure to meet the mandatory requirement constitutes a material deviation from the RFP.

26. The Department's determination that Sprint's proposal was non-responsive was consistent with the clear, express language of the RFP which informed proposers of mandatory requirements and that proposals found to be non-responsive would not be further evaluated. Sprint's proposal was not responsive to the RFP because it failed to meet a mandatory requirement and it contained a material deviation. Both defects arise from Sprint's attempt to limit its exposure to liquidated damages.

#### CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case pursuant to Sections 120.569, 120.57(1), and 120.57(3), Florida Statutes.

28. Petitioner has challenged the Department's proposed agency action of determining that Sprint's proposal is non-responsive and the Department's intention to award the contract for inmate telephone services to Worldcom.

29. The burden of proof resides with the Petitioner. See Section 120.57(3)(f), Florida Statutes.

30. The underlying findings of fact in this case are based on a preponderance of the evidence. Section 120.57(1)(j), Florida Statutes.

31. The threshold burden which Petitioner Sprint must meet is that their submission was responsive to the RFP and, therefore, that Sprint has standing to bring this protest. Petitioner has failed to meet this burden.

32. The language of Sections 5.1 and 6.1 of the RFP is clear and unambiguous. Section 5.1 clearly states that the responsiveness requirements are mandatory. Section 6.1 clearly states that failure to meet any of the mandatory requirements will render a proposal non-responsive resulting in rejection of the proposal and that further evaluation would not be performed.

33. A variance is material when it gives the bidder or offeror a substantial advantage over other bidders and restricts or stifles competition. See Tropabest Foods, Inc. v. State of Florida, 493 So. 2d 50 (Fla. 1st DCA 1986). Whether an irregularity in a bid is material or immaterial turns on "whether the variation affects the amount of the bid by giving the bidder an unfair advantage or benefit not enjoyed by the other bidders." Harry Pepper & Associates,

Inc. v. City of Cape Coral, 352 So. 2d 1190,1193 (Fla. 2d DCA 1977).

34. A "responsive offeror" means a person who has submitted a . . . proposal which conforms in all material respects to the . . . request for proposals." Section 287.012(17), Florida Statutes.

35. Sprint's unauthorized limitation of the Liquidated Damages part of the Supplemental Proposal Sheet constitutes a material deviation. Such a deviation would give Sprint an unfair advantage or benefit not enjoyed by the other bidders.

36. By failing to establish its standing, Sprint is without the ability to further pursue its protest of the Department's intended action. To establish entitlement to a Section 120.57 hearing, a party must show that its substantial interests will be affected by the proposed agency action. See Agrico Chemical Co, v. Department of Environmental Protection, 406 So. 2d 478 (Fla. 2d DCA 1981). When a proposer would not be in a position to be awarded the contract based upon its material deviation from the expectations of the RFP, it does not have a substantial interest to support the protest. Only responsive bidders have standing to protest agency contract awards. Cf. Intercontinental Properties, Inc. v. Department of Health & Rehabilitative Services, 606 So. 2d 381, 384 (Fla. 3d DCA 1992.)(Party protesting award of government contract to

low bidder must be prepared to show not only that low bid was deficient but also that protestor's own bid does not suffer from the same deficiency).

37. Because Sprint's proposal is non-responsive as a matter of law, it is not necessary to address the question of whether the Department's award of the contract to Worldcom is contrary to the agency's governing statutes, rules or policies, or the bid or proposal specifications. Section 120.57(3)(f), Florida Statutes.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Department of Corrections enter a final order dismissing the bid protest filed by Sprint.

DONE AND ENTERED this 6th day of April, 2001, in Tallahassee, Leon County, Florida.

---

BARBARA J. STAROS  
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  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of April, 2001.

ENDNOTES

1/ The Pre-hearing Stipulation contained the word "allegedly" here.

2/ See Endnote 1.

3/ See Endnote 1.

4/ See Endnote 1.

5/ While the Department's purchasing staff determined that the proposal submitted by T-NETIX was responsive, at hearing, the remaining parties stipulated that T-NETIX's proposal was non-responsive.

COPIES FURNISHED:

Jonathan Sjostrom, Esquire  
Rex Ware, Esquire  
Steel, Hector & Davis  
215 South Monroe Street, Suite 601  
Tallahassee, Florida 32301-1804

Carolyn S. Raepple, Esquire  
Shannon L. Novey, Esquire  
Hopping, Green, Sams & Smith, P.A.  
Post Office Box 6526  
Tallahassee, Florida 32314

Obed Dorceus, Esquire  
Veronica McCrackin, Esquire  
Department of Corrections  
2601 Blairstone Road  
Tallahassee, Florida 32399-2500

Louis A. Vargas, General Counsel  
Department of Corrections  
2601 Blair Stone Road  
Tallahassee, Florida 32399-6563

Michael W. Moore, Secretary  
Department of Corrections  
2601 Blair Stone Road  
Tallahassee, Florida 32399-2500

INFORMATIONAL COPY:

William E. Williams, Esquire  
J. Andrew Berton, Jr., Esquire  
Huey, Guilday & Tucker, P.A.  
1983 Centre Point Boulevard, Suite 200  
Post Office Box 12500  
Tallahassee, Florida 32317-2500

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.