

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COMPAQ COMPUTER CORPORATION,)
)
 Petitioner,)
)
vs.) Case No. 02-1721BID
)
DEPARTMENT OF REVENUE,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for administrative proceeding and hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, on June 24 and 26, 2002, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: David W. Moye, Esquire
Linda Loomis Shelley, Esquire
Fowler, White, Boggs, Banker, P.A.
Post Office Box 11240
Tallahassee, Florida 32302

For Respondent: O. Earl Black, Esquire
Cindy Horne, Esquire
Florida Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether the rejection of Petitioner Compaq Computer

Corporation's (Compaq) submission in response to an invitation to negotiate #01/02-31 for the Child Support Enforcement (CSE) Automated Management Systems (CAMS) case management informational technology system is "clearly erroneous, contrary to competition, arbitrary or capricious." Embodied within that general issue are the considerations of whether the proposal by Compaq was responsive and whether the submittal by Compaq of a "Form 7105," with the absence of the vendor certification purportedly required on the front, or first page of that form, and the signature by the representative of Compaq in a signature area designated for an agency representative is a material irregularity.

PRELIMINARY STATEMENT

This cause arose upon the filing of a formal written protest and Petition for Administrative Hearing by Compaq on April 22, 2002. The Petition challenged the posting of the initial review of proposals for the procurement at issue. The protest petition was filed with the Department of Revenue (DOR) and was transmitted to the Division of Administrative Hearings and this proceeding ensued.

The cause came on for hearing as noticed on June 24 and 26, 2002. The Petitioner called witnesses Wayne Fountain, Michael Angely, Kevin French, Debbie Stephens, and Barbara Phillips at hearing. The Petitioner's Exhibits 1-7, 9-13, 19 and 21, were

admitted into evidence. The DOR called two witnesses, Barbara Philips and H. P. Barker, Jr., and had three exhibits admitted into evidence.

Upon the conclusion of the hearing a transcript was ordered and the parties all availed themselves of the opportunity to submit Proposed Recommended Orders. Those Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, Compaq, is a Texas Corporation. It is authorized to do business in the State of Florida. The Respondent, DOR is a state agency charged with the responsibility of administering the Child Support Enforcement Program for the State of Florida in accordance with Section 20.21(h), Florida Statutes. The DOR issued an Invitation to Negotiate (ITN) for the CAMS compliance enforcement implementation on February 1, 2002. This procurement is designed to give the DOR a "state of the art system" that will meet all Federal and State regulations and policies for Child Support Enforcement, improve effectiveness of collections of child support and automate enforcement to the greatest extent possible. It will automate data processing and other decision support functions and allow rapid implementation of changes in regulatory requirements resulting from updated Federal and State

regulation policies in Florida initiatives, including statutory ones.

2. The ITN provided for a multi-phased process to be followed by negotiations with the selected proposers. The first phase of review consisted of a review of mandatory items. There followed evaluations of key proposal topics, management and technical and cost items. The top scoring proposers would then be invited to make oral presentations which would also be scored and which would then be followed by negotiations.

3. The Department of Management Services has promulgated several forms with the designation "PUR" followed by a numerical reference. The numerical reference corresponds to the procurement methodology being used for the particular procurement at issue. For instance, the PUR 7105 is for invitations to negotiate. The other PUR forms identified in Rule 60A-1.002(7), Florida Administrative Code, are PUR 7028 for invitations to bid for commodities, PUR 7031 for invitations to bid for contractual services, PUR 7051 for requests for proposals for commodities, and PUR 7033 for requests for proposals for contractual services.

4. Section 7.2.1.3 of the ITN advises proposers that the State of Florida invitation to negotiate acknowledgement form, PUR 7105 must be signed and included with the original of a proposer's package. It also notified the proposers that this

form would be provided with the ITN on the DMS Vendor Bid System (the internet).

5. "DMS" refers to the State of Florida Department of Management Services which maintains the Vendor Bid System referred to by the ITN. Form PUR 7105 is a purchasing form developed and produced by the Department of Management Services.

6. When downloading the form PUR 7105 from the Vendor Bid System (VBS) on the internet, the first page containing the vendor information, certification and signature space, is not identified as being the first portion of form PUR 7105. The second and third pages, with the title "General Conditions" are the only ones denoted as being part of form PUR 7105.

7. Compaq became aware that the procurement was going to proceed and began assembling a staff in order to be prepared to respond to the procurement and submit a proposal. Michael Angeley was designated project manager of the Global Services Division of Compaq to head the evaluation of the ITN for Compaq and to be in charge of preparation of Compaq's response to the ITN.

8. As indicated above, the availability of the ITN was posted on the internet and made available on the VBS of the DMS.

9. When accessing the ITN by computer, the applicable computer screen, which first becomes available, advises the viewer to "click here to view the bid specifications." If the

viewer clicks "here," the first document which comes up on the screen is an unnumbered form, identified by its Universal Resource Locator (URL) line as follows:

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http://fen.state.fl.us.owa_vbs/owa/vbs_www.boiler_plate.show?
boiler_plate_key_str=1129.
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10. At the bottom of the unidentified form, is the direction to "click here for additional required files." If the viewer clicks for additional required files at the bottom of the unidentified form, a document identified as "Downloadable Files for ITN-CAMS Compliance Enforcement Implementation" appears on the screen.

11. The "Downloadable Files" screen provides a list of filed documents, and an indication of their type, with a check mark beside each file and a notation at the bottom of the page which states that a check mark "indicates required file."

12. The first file document on the "Downloadable Files" screen is described as "General Conditions," with the "Type" indicated as PUR 7105, and a check mark indicating that it was a required file.

13. If the viewer clicks to download the file designated as PUR 7105, a two-paged document entitled "General Conditions" appears in the Adobe Acrobat format with the statement at the bottom of each page that it is "PUR7105Rev.6/1/98."

14. Michael Angeley, as Project Manager for Compaq, journeyed to Tallahassee to a pre-proposers conference. In response to statements by DOR representatives at the pre-proposers conference, Mr. Angeley went directly to Compaq's office in Tallahassee and downloaded the PUR 7105 form which was identified as such on the list of required files. In doing so, Mr. Angeley followed the procedure set forth in paragraphs 9-13 above.

15. The Petitioner's Exhibit three, which the Respondent asserts is the first page of form PUR 7105, is not part of the "Downloadable Files for ITN-CAMS" which is listed as "required" on the VBS screen.

16. Compaq did not download the first page or include it in its proposal response. Compaq perceived the downloaded document entitled "General Conditions" as the correct form based on its designation as such on the form and from the URL which reads: "http://fcu.state.fl.us/fcu/centers/purchase/vbs/pur7105.pdf."

17. After downloading the files indicated as required on the VBS, Mr. Angeley placed the entire document in a separate system file on his local network, and thereafter did not have to access the documents through the original process.

18. Mr. Angeley, along with four other Compaq representatives, attended the mandatory pre-proposers conference that was held in Tallahassee on February 13, 2002.

19. At the pre-proposers conference, which was attended by over 100 persons, questions which had been previously asked of DOR in writing, were answered in writing and a hand-out containing the answers was provided to each attendee. No additional questions were permitted at the pre-proposers conference.

20. At that conference a DOR representative (Ms. Phillips) held up a document in front of the audience and advised the attendees that the form, identified by her as PUR 7105, needed to be included in the proposal. The document held up to the audience was not handed out, nor was it clearly visible to all attendees at the pre-proposers conference. Compaq representatives in attendance at the pre-proposers conference understood that form PUR 7105 was required to be included in the proposal package and, therefore, made no further inquiry regarding the form.

21. Compaq's belief was that it was following the directions provided by DOR with regard to form PUR 7105, including those received at the pre-proposers conference and as contained in the ITN and the other computer accessible

documents. That belief has been shown to reasonable under the circumstances.

22. Compaq Vice President Kevin French signed the signature line on the only signature line available on the downloaded portion of form PUR 7105 in Compaq's possession. Mr. French had the authority to bind Compaq to the terms and conditions listed on the form.

23. The signature of Mr. French on form PUR 7105 and in three other places in the submittal, including the transmittal letter, was intended by Compaq to and did bind it to the terms and conditions of the ITN. No unfair or competitive advantage was obtained by Compaq by signing the last page of form PUR 7105 by mistake, instead of the first page which it had not downloaded, consisting of the "Acknowledgement Form."

The Evaluation Process

24. The evaluation of proposals submitted in response to the ITN was designed to be a multi-stepped process. The evaluation was conducted by a review committee comprised of representatives from DOR's Purchasing Division and from the CSE Division as well as from DMS.

25. The relevant portions of the evaluation process consist of the following steps:

8.1 Evaluation Process

Proposers are responsible for thoroughly reviewing all ITN requirements to ensure that the proposal and the proposed approach are fully compliant with ITN requirements and approach are fully compliant with ITN requires and thereby avoid the possibility of being ruled non-compliant.

FDOR will evaluate and score proposals with the following methodology that is more fully described in the following subsections.

FDOR will:

1) Perform Mandatory Items Compliance Evaluation to validate proposals against the mandatory items listed in Table 8-1. Proposals that do not respond to all mandatory items will be rejected and not considered further.

2) Score Key Proposal Topics to ensure a proposal achieves the minimum acceptable score for these key topics before the effort is expended to fully evaluate it. Proposals that fail to achieve a minimally acceptable score for these key topics will be rejected and not considered further. (Emphasis supplied)

26. The minimum score for the second step of the evaluation process was 150 points out of a possible 230.

27. Section 8.1.1. of the ITN, "Table 8-1 (Selected Mandatory Items) lists 24 separate items in question format, with a reference to the ITN setting forth the location of the requirement.

28. The Steering Committee selected the 24 items listed as mandatory but did not rank the items as to importance because all were considered mandatory.

29. Section 2.3.8 of the ITN states as follows:

2.3.8 Rejection of Proposals

FDOR will reject a proposal that FDOR deems to have a material defect. A material defect is any part of the proposed solution that violates a mandatory requirement and results in an unacceptable system or unacceptable risk.

FDOR will reject proposals that fail to pass the Mandatory Items Compliance Evaluation (see Section 8.1.1). FDOR will reject proposals that include, in proposal Volume 3 (Contract), contract wording identified as mandatory by the proposer that is unacceptable to FDOR (see Section 7.4.1.2).

FDOR will reject proposals that fail to achieve the minimum acceptable score for Key Proposal Topics (see Section 8.1.2).

FDOR reserves the right to reject any and all proposals received if FDOR determines such action is in the best interest of the State of Florida or FDOR.

30. Item 12 on Table 8-1 queries, "Did the proposer submit a PUR 7105 form signed by an authorized representative?", with a reference to ITN 7.2.1.3.

31. Section 7.2.1.3 of the ITN states as follows:

7.2.1.3 State of Florida Invitation to Negotiate Acknowledgement Form, PUR 7105

The proposal shall include a form PUR 7105, completed and signed. The form will be provided with the ITN and the DMS Vendor Bid System. The original form PUR 7105 must be included with the Original/Master Copy (copy one) of Volume 1 of the proposal.

32. Ms. Barbara Phillips, a purchasing specialist with DOR who was assigned to duties as an initial evaluator of the proposals, created a check list for the initial screening process and selected items 1, 2, 6, 8, 11, and 12, from the list of 24 "Mandatory Items" on Table 8-1.

33. If a proposal received a negative ranking, indicated by an "N" as to one of the items on the check list, no further evaluation was done on the proposal.

34. Seven proposals were submitted to DOR in response to the ITN. Compaq's proposal was the only proposal rejected as not responsive by DOR.

35. Compaq's proposal was rejected on the basis of Compaq's failure to include a complete form PUR 7105 as part of its proposal and for signing the last page of form PUR 7105 on the line marked for the "Authorized Agency Signature" instead of on the first page.

36. The confusing manner in which the information regarding form PUR 7105 was presented in the VBS substantially contributed to Compaq's inclusion of only two of the three pages of form PUR 7105 in its proposal.

37. Once the decision was made to reject Compaq's proposal on the basis of form PUR 7105, evaluation of the proposal was stopped.

38. Compaq's proposal was not scored in the second step of the evaluation process relating to Key Proposal Topics, therefore, it is not known whether it would have received the minimum score of 150 in order to proceed further in the process.

39. Covansys Corporation submitted a proposal which was deemed responsive by DOR even though only the first unnumbered page of what DOR refers to as an "Acknowledgement Form" was included in its proposal and not the "General Conditions" which are listed as "Required" in the VBS system.

40. Accenture, LLP submitted a proposal which was deemed responsive by DOR even though it made a notation on the Acknowledgement Form: "Subject to Accenture's Exceptions and Reservations in Volume 3, Section 1."

41. The only difference between signing at the end of the two page "General Conditions" document listed in the VBS system as: "PUR FORM 7105" and not signing the "Acknowledgement Form" is that the vendor does not make a representation of non-collusion. However, the agency's representative made it clear that this provision is subject to negotiation and that the signature did not actually bind the vendor to that certification.

42. When Accenture was deemed responsive and moved to the next stage of the evaluation process, the DOR reviewers did not check and did not know how many of the General Conditions were

subject to Accenture's exceptions and reservations, nor the extent of the exceptions and reservations. In fact, they did not know whether or not Accenture agreed to any or all of the terms and conditions provided on form PUR 7105.

43. Unisys submitted a proposal which was deemed responsive by DOR even though several Mandatory Items including Volumes 1 and 2 of the electronic copy (CD) of its proposal, as well as the Microsoft Project Plan, were not submitted.

44. TIER submitted a proposal which was deemed responsive by DOR even though the reviewers found that Mandatory Items were not submitted in accordance with the directions in the ITN and despite the reviewers' determination that the documentation submitted from the Secretary of State's Office regarding its corporate status had expired. KPMG submitted a proposal which was deemed responsive by DOR even though the reviewers stated on the evaluation form that KPMG did not comply with certain Mandatory Items listed on Table 8-1.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Sections 120.569 and 120.57(1), Florida Statutes (2001).

46. The final hearing in this case was de novo for the purpose of evaluating the action by the agency. State

Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998).

47. The burden is on Compaq to establish grounds for invalidating the decision of Respondent to reject Compaq's proposal. GTech Corp. V. Florida Department of Lottery, 737 So. 2d 615 (Fla. 1st DCA 1999).

48. The burden of proof in these proceedings is whether the proposed agency action is "clearly erroneous, contrary to competition, arbitrary or capricious." Section 120.57(3)(f), Florida Statutes. Compaq must meet that standard by a preponderance of the evidence. Section 120.57(1)(j), Florida Statutes.

49. A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic. Agrico Chemical Co., v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). A decision is clearly erroneous when unsupported by substantial evidence or contrary to the clear weight of the evidence or induced by an erroneous view of the law. Black's Law Dictionary, Revised Fourth Edition (1968).

50. An act is contrary to competition when it offends the purpose of competitive bidding. That purpose has been stated as follows:

To protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for exact comparison of bids. (Emphasis supplied).

Wester v. Belote, 103 Fla. 976, 138 So. 721, 723-24 (Fla. 1931);
Harry Pepper and Associates, Inc. v. City of Cape Coral, 352 So.
2d 1190, 1192 (Fla. 2nd DCA 1977).

51. In this case, the action of DOR, if carried out, would hamper the competitive process. Clearly, the subject ITN involves an enormous financial and technological undertaking to which relatively few firms are capable of responding. Removal of Compaq from the negotiations so early in the process cannot be justified on these facts.

52. A "responsive bid" or "responsive proposal," is a bid or proposal submitted by a responsive, and responsible or qualified bidder, or offeror, which conforms in all material respects to the invitation to bid or request for proposals. Section 287.012(16), Florida Statutes.

53. Not every deviation from a request for proposal or an invitation to negotiate will invalidate a response. Minor irregularities may be waived by an agency if the proposal is

otherwise valid. See Rule 60A-1.002(10), Florida Administrative Code.

54. The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by the other bidders. Tropabest Foods, Inc. v. State of Florida, Department of General Services, 493 So. 2d 50 (Fla. 1st DCA 1986).

55. A variation in a bid is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition. Tropabest Foods, Inc., supra.

56. In light of the rather lenient treatment enjoyed by the majority of other vendors whose proposals contained irregularities which were no less substantial in either kind or degree from those of Compaq, it cannot be concluded that Compaq's continued participation is competitively unfair.

57. Given that the present case involves an ITN in its earliest stages, one could hardly argue that there is any adverse impact on the agency by permitting Compaq to remain involved in the negotiations; in fact, the opposite is true.

58. There is a strong public interest in favor of saving tax dollars in awarding public contracts. There is no public interest in disqualifying the proposal for technical

deficiencies in form, if the proposer did not derive any unfair competitive advantage by reason of the technical omission. See Overstreet Paving Co. v. Department of Transportation, 608 So. 2d 851 (Fla. 2nd DCA 1992); Robinson Electrical Co. v. Dade County, 417 So. 2d 1032 (Fla. 3rd DCA 1982); Intercontinental Properties, supra, at 386.

59. An improperly executed signature on a required form is not a material irregularity, particularly where the intent of the bidder to be bound is evident. Ranger Construction Industries, Inc. v. Department of Transportation, DOAH Case No. 92-1538BID (April 20, 1992). Compaq evidenced its intent to be bound to the General Conditions by its authorized signature appearing on the last page of form PUR 7105, as well as its authorized signature appearing on the cover letter.

60. Compaq's failure to include all three pages of form PUR 7105 and the fact that its signature appeared on the last page instead of the first page is, at worst, a minor technical irregularity, and not a material deviation from the requirements of the ITN.

61. The disparate treatment by DOR of similar types of minor technical irregularities in the proposals of other vendors would be arbitrary and not based on any significant factual or legal difference in the nature and extent of the technical deficiencies. Where similar omissions were waived in other

proposals that were not disqualified, it would be arbitrary and capricious to disqualify Compaq's proposal. See Palm Beach County Youth Coalition v. Palm Beach County Workforce Development Board, Inc., DOAH Case No. 00-1527BID (October 20, 2000); J. Ruiz School Bus Service, Inc. v. Dade County School Board, DOAH Case No. 99-4021BID (March 24, 2000), adopted in toto in Final Order (May 18, 2000).

62. The effect of rejecting Compaq's proposal on the basis of a minor technical irregularity would be to deprive DOR of the potential for increased competition in contravention of the public policy which favors competition.

63. Compaq has established by preponderant persuasive evidence that a decision by DOR to reject Compaq's proposal was arbitrary and contrary to competition.

RECOMMENDATION

RECOMMENDED that a final order be entered by the State of Florida Department of Revenue deeming Compaq's proposal to be responsive to the Invitation to Negotiate and entitled to proceed to the next step in the evaluation process.

DONE AND ENTERED this 23rd day of September, 2002, in
Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
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 Clerk of the
Division of Administrative Hearings
this 23rd day of September, 2002.

COPIES FURNISHED:

O. Earl Black, Esquire
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32399-0100

David W. Moye, Esquire
Fowler, White, Gillen, Boggs,
Villareal, and Banker, P.A.
Post Office Box 11240
Tallahassee, Florida 32302

Bruce Hoffman, General Counsel
Department of Revenue
204 Carlton Building
Tallahassee, Florida 32399-0100

James Zingale, Executive Director
Department of Revenue
104 Carlton Building
Tallahassee, Florida 32399-0100

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 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.