

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GROWADOT, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 02-4439BID
)
 ESCAMBIA COUNTY UTILITIES)
 AUTHORITY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on December 2, 2002, in Pensacola, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Archibald Hovanesian, Jr., Esquire
21 East Garden Street, Suite 201
Pensacola, Florida 32501

For Respondent: Bradley S. Odom, Esquire
Stephen G. West, Esquire
Kievit, Kelly & Odom
15 West Main Street
Pensacola, Florida 32501

STATEMENT OF THE ISSUE

The issue is whether Respondent properly awarded a contract for automated payment options to E-Commerce Group, a non-party.

PRELIMINARY STATEMENT

On or about August 7, 2002, Petitioner Growadot, Inc. (Petitioner), filed a bid protest with Respondent Escambia County Utilities Authority (ECUA/Respondent). The protest challenged Respondent's award of a contract for services to enable Respondent's customers to pay monthly utility bills using credit cards to E-Commerce Group, a non-party. On November 18, 2002, Respondent referred the case to the Division of Administrative Hearings.

A Notice of Hearing dated November 19, 2002, scheduled the hearing for December 2, 2002.

The parties filed Pre-Hearing Statements and Stipulation on December 2, 2002.

Before the hearing commenced, Petitioner filed a Trial Memorandum and Statement of the Case. During the hearing, Petitioner presented the testimony of one witness and offered one exhibit (P1), which was admitted into evidence.

After Petitioner presented its case-in-chief, Respondent filed a Memorandum of Law in Opposition to Petitioner's Bid Protest and in Support of Respondent's Motion for Directed Verdict. The undersigned denied the Motion for Directed Verdict. Respondent then presented the testimony of three witnesses and offered one composite exhibit, consisting of eight sections (R1, A-H), which was admitted into evidence.

The parties did not file a transcript of the proceeding with the Division of Administrative Hearings. The parties filed their proposed findings of fact and conclusions of law on December 11, 2002, and December 12, 2002, respectively.

FINDINGS OF FACT

1. Respondent is a local governmental body, corporate and politic, organized pursuant to Chapter 2001-324, Laws of Florida. Respondent is responsible for providing certain water, wastewater, and sanitation services in Escambia County, Florida.

2. Petitioner is a Florida for-profit corporation. It is organized and authorized to do business under Florida Law.

3. Currently, Respondent offers its utility customers several different types of payment options, including the following: (a) over-the-counter payments; (b) drive-in payment; (c) mail-in payments; (d) automatic bank drafts; and (e) in-person payments.

4. In May 2002, Respondent released Request for Proposal (RFP) 2002-36. Through the RFP, Respondent was seeking the lowest and most responsible proposal for automated payment options for Respondent's utility customers. According to the RFP, the vendors needed to be capable of providing Internet and telephone payment options so that Respondent's customers could use their credit cards to pay their utility bills. The RFP stated that the sealed bids would be opened on June 27, 2002.

5. Section 1, the administrative section of the RFP, provides the following information regarding Respondent's operations as of September 30, 2001: (a) Respondent served 85,000 water customers; (b) Respondent served 55,800 sewage collection and treatment system customers; (c) Respondent served 59,900 solid waste customers; (d) Respondent generates approximately \$64,000,000 in revenue per year; and (e) Respondent's average residential bill is \$60.

6. Section 2 of the RFP discusses Respondent's current management information system. This section states that Respondent needed to "know about and understand all the costs and changes necessary to implement the solution proposed."

7. Section 3 of the RFP requests information about the vendor. This section includes a vendor questionnaire and request for information about the vendor's prior customers.

8. Section 4 of the RFP sets forth the project requirements. Of particular note is the following reference to a convenience fee in Section 4.1:

Convenience Fee

Since the convenience fee is the method the vendor will [use to] generate compensation for this service, ECUA requires the rate (fixed or sliding) to be fixed for the duration of the contract. You may propose a sliding scale for lowering or raising the fee based upon use of the solution once a preliminary period has

expired (the preliminary period to be set in vendor's contract).

9. Section 4.3 of the RFP sets forth the project considerations. A cost-effective and timely solution is listed as one of six considerations.

10. Section 5 of the RFP sets forth the requirements for vendor responses. Section 5.3 includes the following evaluation criteria:

These criteria are to be utilized in the evaluation of qualifications for development of the shortlist of those vendors to be considered by interviews and/or potential negotiations. Individual criteria may in all probability be assigned varying weights at the ECUA's discretion to reflect relative importance. Vendors are required to address each evaluation criteria in the order listed and to be specific in presenting their qualifications. (Emphasis added)

- a) Experience/qualifications of Vendor. Vendors (sic) proposed staff, experience with contracts for services similar in scope.
- b) Capabilities, features, etc. of the proposed services and the degree to which the proposed services meet the needs of the ECUA.
- c) References of only similar contracts. The Vendor must have a demonstrative history of professional, reliable and dependable service.
- d) Demonstrated quality assurance procedures and schedule to insure a timely, effective and professional provision of services.
- e) Costs.

11. Section 5.4 of the RFP discusses the process for scoring responses. It provides as follows in relevant part:

Selection Procedure

Selection shall be made of two or more vendors deemed to be fully qualified and best suited among those submitting proposals. The selection will be made on the basis of the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal. Selected vendors will then conduct a presentation to the selection committee. After all presentations are made the selection committee will select the vendor which, in its opinion has made the best proposal and make a recommendation to ECUA's Board. ECUA's Board will award a contract to that vendor. Should the ECUA determine that only one vendor is fully qualified or that one vendor is clearly more highly qualified than the others under consideration, the presentation phase may be skipped. (Emphasis added)

* * *

Basis for Award

Information and/or factors gathered during the interviews and any reference checks, in addition to the evaluation criteria stated in the RFP, and any other information or factors deemed relevant by the ECUA, shall be utilized in the final award.

12. Section 6 of the RFP sets forth the functional requirements. This section is not at issue here.

13. Section 7 of the RFP is entitled "Cost Summary." Section 7.1 includes the proposal form, which states as follows in relevant part:

ITEM A - Customer Convenience Fee: _____

ITEM B - Set Up Cost: _____

ITEM C - Other (explain): _____

14. The RFP does not have a section for definitions. It does not define the term "cost" other than as set forth above.

15. The following four vendors submitted timely proposals to Respondent: (a) E-Commerce Group; (b) Petitioner; (c) Link2Gov Corp.; and (d) BillMatrix.

16. The proposals were as follows:

Vendor Name	Customer Convenience Fee	Setup Cost	Other
E-Commerce Group	\$2.95* for \$1-\$500 pymt.	None	N/A Optional E Bills fee \$.35 per bill**
Petitioner	\$2.50* per I/O, IVR & Web Trans.	\$3,750	Development hourly rate-- \$75** \$125 per unit swipe device
Link2Gov Corp.	\$2.49 Internet/\$2.89 IVR	None	\$95.00 hosting fee per month
BillMatrix	\$3.95 Per Credit Card Trans.	None	N/A

E-Commerce Group: *If average payment more than \$60, or if American Express payments to be accepted in addition to other major credit card associations, the convenience fee would be higher; no costs to ECUA for software use. **No other costs for using software, but if ECUA would like billing services, the fee per bill presented would be \$0.35.

Petitioner: *Will request review of convenience fee if average payment is more than \$60 for three consecutive months. **To be

charged only upon request from ECUA for specialized development tasks or if implementation requirements exceed est. setup costs, but only upon negotiation between parties.

17. The proposals were initially reviewed by Respondent's finance department. In reviewing them, the director of finance recognized that the number of users of the automated payment option was unknown. However, Respondent's experience with other alternate payment options had generated very limited customer participation. Therefore, the director of finance concluded that it would be best if Respondent did not absorb a high set-up cost for a service that might have very limited use. Additionally, the director of finance believed it was in Respondent's best interest if the customers electing to use the automated payment option bore the fees and costs associated with those services, rather than having all ratepayers absorb this expense regardless of whether they were using it. Accordingly, the director of finance decided to recommend that Respondent select E-Commerce Group's proposal, as it was the lowest bid with no cost to Respondent.

18. The director of finance's recommendation was presented to Respondent's finance advisory committee on July 16, 2002. The finance advisory committee is composed of members who are not Respondent's employees.

19. After receiving the director of finance's recommendation, the committee members discussed which of the

proposals were best for Respondent. Respondent's finance advisory committee decided to recommend that Respondent "select E-Commerce Group, the lowest bidder when considering there is no set-up cost to ECUA, as the vendor to provide these automated payment solutions, and enter into a one-year contract with an optional one-year extension."

20. On July 25, 2002, Respondent considered the finance advisory committee's recommendation. During the meeting, Respondent's director of finance stated that approximately 13,000 people per year used credit card payment services to pay the Escambia County tax collector. There is no evidence that the director of finance had sufficient additional information to calculate the percent of the tax collector's customers that used credit cards.

21. One of Petitioner's employees, John Parkin, also spoke at Respondent's July 25, 2002, meeting. He confirmed the number of people that pay the Escambia County tax collector using a credit card payment option provided pursuant to a contract between the tax collector and Petitioner. However, Mr. Parkin did not provide Respondent with any information about the percentage of taxpayers who availed themselves of this service. He provided no information to show how bills paid to Respondent and the tax collector were similar or dissimilar.

22. During the meeting, Mr. Parkin stated that Petitioner would waive its \$3,750 set-up costs. He did not otherwise attempt to explain how Petitioner's set-up costs could be amortized or recaptured over the first year of operation.

23. Respondent did not allow Petitioner to amend its proposal to eliminate the \$3,750 set-up costs. Instead, Respondent accepted the finance advisory committee's recommendation, awarding the contract to E-Commerce Group.

24. Petitioner filed a timely protest. The finance advisory committee considered the protest in an informal hearing. During this proceeding, Petitioner had an opportunity to demonstrate why it should have been considered the lowest bidder.

25. Respondent considered Petitioner's protest on October 24, 2002, in a regularly scheduled meeting. During the meeting, Respondent voted to refer the case to the Division of Administrative Hearings.

26. Respondent acted within the requirements of the RFP when it determined that E-Commerce Group was the lowest responsible bidder primarily because there was no cost to Respondent to start the program. Respondent's RFP clearly indicated that set-up costs would be considered as one of the evaluation criteria. The RFP did not require Petitioner to designate any part of its proposed costs as set-up costs.

27. Petitioner's set-up cost amortized over the estimated first year's transactions is approximately \$2.63 per transaction. Additionally, it would take Respondent approximately 108 days (and over 8,000 transactions) to recapture the set-up costs by passing them along to the ratepayers. However, the RFP did not require Respondent to recalculate Petitioner's proposed costs using projected customer usage to amortize or recapture Petitioner's set-up costs before making a decision. In fact, Petitioner's proposal on its face did not indicate that Petitioner intended for Respondent to make such recalculations.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearing has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569, 120.57(3), and 120.65(7), Florida Statutes.

29. Petitioner has the burden of proving by a preponderance of the evidence that Respondent's proposed action is contrary to Florida law, Respondent's rules or policies, or the RFP terms/specifications. Section 120.57(3)(f), Florida Statutes.

30. Section 120.57(3), Florida Statutes, states as follows:

(f) In a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered. 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. In any bid-protest proceeding contesting an intended agency action to reject all bids, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

31. In this case, Petitioner has not met its burden of proving that Respondent violated its governing statutes, rules or policies, or the proposal specifications. The RFP clearly required vendors to itemize all costs, including set-up costs. Therefore, Petitioner had notice that Respondent would consider each vendor's set-up costs in evaluating the proposals. The RFP also gave notice to all vendors that Respondent retained the discretion to weigh the various aspects of each proposal. There was no "ex post facto" change to the RFP when Respondent chose E-Commerce Group primarily because it had the lowest convenience fee with no start-up costs to Respondent.

32. Respondent had no obligation to engage in the analysis advocated by Petitioner. Rather, Respondent acted within its discretion in deciding that customers who elected to pay by credit card should bear all of the associated fees and costs. Respondent's decision to award the contract to E-Commerce Group was not clearly erroneous, contrary to competition, arbitrary, or capricious.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That Respondent enter a final order awarding the contract to E-Commerce Group.

DONE AND ENTERED this 17th day of December, 2002, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of December, 2002.

COPIES FURNISHED:

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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.