

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE NTI GROUP, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 06-4449BID
)
 DEPARTMENT OF EDUCATION,)
)
 Respondent,)
)
 and)
)
 TECHRADIUM, INC.,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on December 6, 2006, in Tallahassee, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are: whether Respondent's intent to award a contract to Intervenor for an immediate response notification system pursuant to Request for Proposal 2007-01 (the RFP) was contrary to Respondent's governing statutes, rules, policies, and solicitation specifications and whether Petitioner has standing to protest the intended award.

PRELIMINARY STATEMENT

On September 29, 2006, the Respondent, Department of Education (Department) posted its intended award of a contract pursuant to the RFP for an immediate response notification system. The intended award was to TechRadium, Inc.

(TechRadium). Petitioner, The NTI Group, Inc. (NTI), filed a protest to the intended award. The protest was forwarded to the Division of Administrative Hearings on November 7, 2006.

US Netcom, Inc. (US Netcom) also filed a protest to the intended award. On November 16, 2006, US NetCom filed a voluntary dismissal withdrawing its protest.

On November 15, 2006, TechRadium filed a Motion to Intervene, which was granted by order dated November 27, 2006. On November 28, 2006, NTI filed a Motion for Leave to File Amended Formal Written Protest, which was granted by an order dated December 6, 2006. NTI's Amended Petition was deemed filed as of November 30, 2006.

At the final hearing, NTI called the following witnesses: Martha K. Asbury, Regina Johnson, Julie Andrea Collins, Paula Gail Wolgast Shea, Tom Motter, and Ross Gonzalez. Joint Exhibits 1 through 11 were admitted into evidence. Petitioner's Exhibits 1 through 28 were admitted into evidence. Petitioner was given leave to file the deposition of Harold R. Rowe as a late-filed exhibit. The deposition was filed on December 7, 2006, and is admitted into evidence as Petitioner's Exhibit 29. The Department and TechRadium did not call any witnesses or offer any exhibits for admission into evidence.

The parties filed a Joint Pre-Hearing Stipulation, in which they agreed to certain facts contained in Section E of the Joint Pre-Hearing Stipulation. To the extent relevant, those facts are incorporated in the Findings of Fact of this Recommended Order.

The two-volume Transcript was filed on December 12, 2006. On December 22, 2006, the parties filed their proposed

recommended orders, which have been considered by the undersigned in rendering this Recommended Order.

FINDINGS OF FACT

1. The Florida legislature designated funds in the amount of \$1,500,000 in Specific Appropriation 116 of House Bill 5001, the 2006 General Appropriations Act (Specific Appropriation 116) for pilot implementation of an immediate response notification system in seven Florida school districts. The appropriation provided:

Funds for School Safety/Emergency Preparedness are provided for pilot implementation of an immediate response information system in one large, two medium, and four small school districts. The system will serve to enhance the safety of school children in emergency situations, such as impending hurricane and severe weather, fire, bomb threat, homeland security and other critical school safety events. The system must be real-time and multi-lingual with the ability to notify parents of emergency and non-emergency situations in at least ten different languages through email, telephone, and other communication devices. The Department of Education shall competitively bid this project in accordance with the provisions of chapter 287, Florida Statutes. To allow for early implementation, all funds shall be under contract no later than September 15, 2006.

2. The Department issued the RFP on or about September 1, 2006. Pertinent portions of the RFP provided:

PROPOSALS ARE DUE BY: 2:30 EST, ON SEPTEMBER, 15, 2006. ESTIMATED POSTING BEGINS SEPTEMBER 25, 2006, AND ENDS SEPTEMBER 28, 2006. [Cover Sheet]

The Department is seeking qualified vendors to provide pilot implementation of an

immediate response notification system to be piloted in seven (7) Florida school districts. Additional school districts may be added in subsequent years based on appropriations and periodic performance reviews. The Proposer must have a notification system that currently exists. The system must have undergone rigorous field testing and evidence must be provided to demonstrate successful implementation for similar school districts. The Proposer must have demonstrated the ability to coordinate and integrate all components of the system. The proposed system shall not require the school districts to purchase or lease any additional hardware or software or infrastructure upgrade to obtain the service. The pilots will be in one large, two medium, and four small districts. For purposes of this proposal a large district would be any district with over 150,000 students, a medium would be any district of 50,000-100,000 students and a small district would have up to 50,000 students.
[Page 29]

The State's performance and obligation to pay under this contract are contingent upon an annual appropriation by the Legislature.
[Page 11]

Any protest concerning this solicitation shall be made in accordance with Sections 120.57(3) and 287.042(2) of the Florida Statutes and chapter 28-110 of the Florida Administrative Code. Questions to the Procurement Office shall not constitute formal notice of a protest. It is the Buyer's intent to ensure that specifications are written to obtain the best value for the State and that specifications are written to ensure competitiveness, fairness, necessity and reasonableness in the solicitation process.
[Page 16]

Any person who is adversely affected by the specifications contained in this RFP must

file the following with the Department . .

1. A written Notice of Intent to Protest within seventy-two (72) hours after posting of this RFP specifications, and
 2. The Formal Written Protest by petition and Protest Bond in compliance with Section 120.57(3), Florida Statutes, within ten (10) days after the date on which the written Notice of Protest is filed.
- Failure to file a protest within the time prescribed in Section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under Chapter 120, Florida Statutes. [Page 19]

A responsive proposal is a proposal submitted by a responsive and responsible vendor which conforms in all material respects to the solicitation. A responsive and responsible vendor is a vendor that has submitted a proposal that conforms in all material respects to the solicitation and who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good-faith performance. Material requirements of the RFP are those set forth as mandatory, or without which an adequate analysis and comparison of proposals is unreasonable or impossible, or those which affect the competitiveness of proposals or the cost to the State. Proposals may be rejected if found to be irregular or non-responsive by reasons that include, but are not limited to, failing to utilize or complete prescribed forms, modifying the proposal requirements, submitting conditional proposals or incomplete proposals, submitting indefinite or ambiguous proposals, or executing forms or the proposal sheet with improper and/or undated signatures. Proposals found non-responsive will not be considered. Proposers whose proposals, past performance or current status do not reflect the

capacity, integrity or reliability to perform fully and in good faith the requirements of the Contract may be rejected as non-responsible. The Department reserves the right to determine which proposals meet the material requirements of the RFP, and which proposers are responsible. A responsive proposal is an offer to perform the scope of services called for in this Request for Proposal in accordance with all requirements of this Request for Proposal and receiving seventy (70) points or more on the Technical Proposal. [Page 21]

The Department will determine whether the Proposer is qualified to perform the services being contracted based upon their proposal demonstrating satisfactory experience and capability in the work area. [Page 25]

REFERENCES: (ATTACHMENT 3)
Provide at least three (3) references, which demonstrate efforts comparable to the one described in the RFP. Provide a list of school districts and other venues where this technology is currently in use. The Department reserves the right to contact the references regarding the services provided. [Pages 27-28]

ATTACHMENT '3'
WORK REFERENCES

Provide the following reference information for a minimum of three (3) similar school districts or other venues where services of similar size and scope have been completed. [Page 37]

Proposals will be evaluated and graded in accordance with the criteria detailed below.

a. Technical Proposal (100 Points)
Technical evaluation is the process of reviewing the Proposer's Executive Summary,

Management Plan, and Technical Plan for understanding the project, qualifications, approach and capabilities, to assure a quality product. Only those proposals that are found to meet the verification of Section 4.2 Mandatory Submittal Documents will have the technical proposal evaluated. For this purpose, evaluators will consider a Proposer's description and explanation of the proposed products and services as described in the proposal and the supporting documents. The proposal evaluation committee, acting independently, will assign ratings of the quality of the proposed technical solutions to the work tasks specified in the RFP. Of these ratings the high and the low score will be discarded and the remaining scores averaged.

The following point system is established for scoring the technical proposals: . . .
a. Qualifications and Experience including rigorous testing of the system (10 [points]). . .

b. Price Proposal

Price analysis is conducted through the comparison of price quotations submitted. By submitting a proposal, Proposers agree to serve the seven (7) districts selected by the Department even if the total cost for the districts selected will exceed the amount of the Appropriation.

Only proposals that are found to meet the mandatory minimum requirements and which receive an average rating of seventy (70) or more points for the Technical Proposal will have the cost proposal evaluated. The Department will determine if a cost proposal is sufficiently responsive to the requirements of this RFP to permit a complete evaluation. Any cost proposal that is incomplete may be rejected by the Department.

Cost analysis is conducted through the comparison of price quotations submitted. A total of 20 points is possible. The

fractional value of points to be assigned will be rounded to two decimal points. The criteria for price evaluation shall be based on the following formula:

$$\frac{(\text{Low Price}/\text{Proposer's Price}) \times \text{Price Points}}{\text{Proposer's Awarded Points}}$$

[Pages 32-33]

The price proposal must be submitted on the form provided as Attachment '4'. [Page 29]

ATTACHEMENT '4'
VENDOR'S BID SHEET

We propose to provide the services being solicited within the specifications of RFP 2007-01. All work shall be performed in accordance with this Request for Proposal, which has been reviewed and understood. It is also understood that the Proposer will serve the seven (7) districts selected by the Department even if the total cost for the districts selected will exceed the amount of the Appropriation.

<u>DESCRIPTION</u>	<u>TOTAL</u>
<u>COST</u>	

PRICE PER STUDENT	\$ _____ /per
<u>student</u>	

[Page 38]

3. NTI did not file a protest concerning any of the specifications of the RFP within 72 hours of the issuance of the RFP.

4. Addendum No. 1 to the RFP was issued on or about September 8, 2006, to provide answers to questions submitted by vendors during a question and answer period. Addendum No. 1 was the only addendum to the RFP and provided an answer to a question submitted by Roam Secure, Inc. (Roam Secure) regarding pricing. The question and answer provided:

Q. Our pricing is based on total number of users. Because there is a significant amount of up front work involved, i.e. server setup, network optimization, data import, registration customization, and training, it is not feasible for us to supply a solution based on a few users. As such we are hoping that [the Department] will allow us to provide a total price for this RFP based on unlimited number of users for the 7 districts. Would that be acceptable to [the Department]?

A. This would be acceptable, as the RFP states the vendor will serve the entire population of the seven districts chosen by the Department of Education. The large district will have more than 150,000 students, the two medium districts will range between 50,000 students and 150,000 students and four small districts will include districts with student populations of up to 50,000. See page 29.5.0 Scope of Services in the RFP.

5. Addendum No. 1 did not address how the Department was going to compare a total price with a per student price as set out in the original RFP. The RFP does not specify what process the Department would have used to determine whose cost proposal would be the lowest or how the Department would determine the number of cost points to be awarded when there is a mix of per student prices and total prices. The Department had not determined which school districts would participate in the pilot program prior to the submission of the proposals and, as of the date of the final hearing, it was still not determined which school districts would participate.

6. The deadline for receipt of proposals in response to the RFP was September 15, 2006, at 2:30 p.m. The Department received ten proposals in response to the RFP. The Department determined that six of the ten proposals submitted did not meet the mandatory requirements of the RFP. The Department's Selection Committee evaluated proposals submitted by NTI, US Netcom, TechRadium, and Roam Secure.

7. Based on the RFP tabulation posted by the Department on September 29, 2006, NTI received the highest technical points of all the proposers. The technical points that were awarded by the Department's Selection Committee were as follows:

NTI	89 points
US Netcom	84.4 points
TechRadium	80.6 points
Roam Secure	67.4

8. Roam Secure's proposal was disqualified, and its cost proposal was not evaluated because it failed to receive an average rating of 70 or more points for its technical proposal as required by Section 6.1 of the RFP.

9. By submitting a proposal, all proposers agreed to provide the services being procured through the RFP for a price of no more than \$1,500,000 regardless of the districts selected by the Department or the number of students in such districts.

10. TechRadium submitted a proposal to provide the requested services for \$1.95 per student. US Netcom submitted a cost proposal of \$3.00 per student and included a charge of \$135.00/hr for [a]dditional customization [that] may be required to meet some of the application requirements." NTI submitted a cost proposal as follows:

PRICE PER STUDENT	
Large District shall not exceed	\$2.60/per student
Medium District shall not exceed	\$3.00/per student
Small District shall not exceed	\$3.00/per student.
SUPPORT FEE	\$1,000/per district
	\$100/per site/per district

11. The Department determined that NTI's cost proposal was non-compliant. The Department awarded TechRadium 20 cost points for a total score of 100.6 and awarded US Netcom 13 cost points for a total score of 97.4. At the final hearing, the Department represented that it now considered US Netcom's cost proposal as non-compliant, but, as of the date of the final hearing, the Department had not posted its intent to determine US Netcom's proposal non-compliant.

12. In response to the RFP requirement that the proposers provide at least three references, "which demonstrate efforts comparable to the one described" in the RFP, TechRadium listed the Klein Independent School District, Northwest Indiana Educational Service Center, and Goose Creek CISD. The Klein Independent School District has a total population of less than 50,000 students. The software license agreement between TechRadium and the Klein Independent School district states that the authorized number of seats is 37,000.¹ The Goose Creek Consolidated Independent School District has a total student population of less than 25,000. The contract between TechRadium and Goose Creek Consolidated Independent School District provides for 21,500 authorized seats. The contract between TechRadium and the Northwest Indiana Educational Service Center provides for 185 authorized seats, but TechRadium has provided services to approximately

90 individuals annually in the Northwest Indiana Educational Service Center.

13. The Department reserved the right to contact the references listed in the proposals. None of the references of any of the proposers was contacted by Department during the evaluation process to verify the experience of the proposers with systems comparable to the one required by the RFP. The Department considered the listing of the references sufficient if the references included some school districts.

14. On September 29, 2006, the Department posted its intent to award the contract arising out of the RFP to TechRadium. On October 4, 2006, NTI filed a Notice of Intent to Protest the Department's intent to award the contract to TechRadium. NTI filed its Formal Written Protest and Petition for Formal Administrative Hearing on November 7, 2006. The protest was accompanied by a bond which satisfied the requirements of applicable statutes and the RFP.

15. NTI is not contesting whether TechRadium has the infrastructure or capacity to fulfill the pilot program requested in the RFP.

16. No funds allocated for School Safety/Emergency Preparedness in Specific Appropriation 116 were under contract on or before September 15, 2006. NTI was aware of Specific Appropriation 116 prior to the Department's issuance of the

RFP. NTI did not object to the time limitations for opening bids or posting the rankings until it filed its formal written protest on October 13, 2006. NTI was aware of the time limitation of which it now complains more than 72 hours prior to the filing of its formal written protest.

17. Prior to the issuance of the RFP, Michael Arnim, the Director of Sales at TechRadium, sent e-mails to school districts in Florida containing multiple untrue representations regarding the pilot project. Mr. Arnim had misunderstood some conversations he overheard at the TechRadium office in Texas and thought that TechRadium had been awarded the pilot project. He sent e-mails to some of the school districts stating that the Commissioner of Education could verify that TechRadium would be providing the notification systems for the pilot project and requesting the school districts to send letters of intent on the school districts' letterhead indicating the school districts wanted to participate. When the Department brought the e-mails to the attention of others at TechRadium, Mr. Arnim was reprimanded, and no further representations were made.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2006)²

19. Subsection 120.57(3)(f), Florida Statutes, provides:

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, proposals, or replies, 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 solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

20. A protester who is seeking the award of a contract must demonstrate that it would have been awarded the contract but for the decision to award the contract to another. In other words, the protestor must demonstrate that its proposal is responsive, that it is a responsible proposer, and that it had the second highest ranked proposal. Intercontinental Properties v. Department of Health and Rehabilitative Services, 606 So 2d. 380 (Fla. 3rd DCA 1992); Preston Carroll Co. v. Florida Keys Aqueduct Authority, 400 So. 2d 524 (Fla. 3d DCA 1981). NTI has failed to establish that its proposal was responsive to the RFP.

21. NTI submitted a cost proposal that did not conform to the requirements of the RFP, which required a single cost-per-student price as set out in the original RFP or a total price as allowed by Addendum No. 1. NTI submitted one price

for students in large school districts and another price for students in medium and small school districts. Additionally, NTI also included a support fee for each district and for each site. NTI does not have standing to bring a protest in which it seeks the award of the contract pursuant to the RFP.

22. NTI argues that Addendum No. 1 would require the Department to do some calculations to determine the per student price when a total price was included; therefore, a price other than a single price per student could be used as long as the Department could figure out a way to calculate the average cost per student so that it could be compared with the other cost proposals. NTI does not address how the support fees were to be calculated in determining a cost per student for evaluation purposes. NTI's argument is without merit. Nothing in the RFP or Addendum No. 1 allows for the submission of more than one price per student or for support fees. Addendum No. 1 did allow for a total price to be submitted, but none of the cost proposals that were evaluated contained a total price. Thus, the procedure for submitting a cost proposal and the evaluation method for cost proposals set out in the RFP were applicable. The proposers were to submit a single price per student, and the points to be awarded were to be calculated using the formula in the RFP.

23. NTI does have standing to bring a protest in which

it is seeking the rejection of all proposals. Capelletti Brothers v. Department of General Services, 432 So. 2d 1359 (Fla. 1st DCA 1983). NTI has two bases for its claim that all proposals be rejected: 1) The Department is without authority to award a contract because Specific Appropriation 116 required that the funds appropriated be under contract by September 15, 2006, and the Department failed to do so; and 2) no proposals were responsive to the RFP.

24. The RFP stated that the proposals would be submitted on September 15, 2006, and the evaluation results would be posted beginning September 25, 2006. This timeline was part of the conditions of the RFP. NTI was aware of Specific Appropriation 116 prior to the posting of the RFP on September 1, 2006. NTI did not file a notice of protest within 72 hours of the posting of the RFP and did not protest the timeline until it filed its written formal protest on October 13, 2006, after it learned that the Department intended to award the contract to TechRadium.

25. Subsection 120.57(3)(b), Florida Statutes, provides

Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision. With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies,

awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation. The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under [Chapter 120].

26. Having failed to timely file a protest to the timeline in the RFP, NTI has waived its right to protest whether a contract must be awarded by September 15, 2006. Additionally, the RFP provides that the Department's performance and obligation to pay under the contract are contingent upon an annual appropriation by the Legislature. If the funds are not available, the Department has no obligation to perform the contract.

27. In order to have all proposals rejected, NTI must demonstrate that the proposals submitted by US Netcom and TechRadium are not responsive to the RFP or that the proposers are not responsible vendors. US Netcom's cost proposal is not responsive to the RFP. In addition to submitting a price per student, US Netcom included a customization fee of \$135 per hour. There is no definite number of hours included in the cost proposal. Additionally, the RFP does not provide that additional charges may be allowed and does not provide for a method of evaluating such costs.

28. NTI seeks to have TechRadium's proposal deemed nonresponsive because the three references submitted by TechRadium were for school districts or other venues that were serving less than 50,000 individuals. NTI does not challenge TechRadium's capacity to perform the contract, only that the references did not include systems that were serving over 50,000 individuals.

29. The RFP did not require the Department to check the references listed in Attachment '3.' The Department did not use the information contained in Attachment '3' to determine the qualifications of any of the proposers other than to determine that on its face the attachment included some references for school systems. The references were not checked for any of the proposers. Thus, the references contained in all the proposals were evaluated in the same manner. Whether there was a reference for a large, a medium, and a small school district would go to the number of points that would be assigned for experience in evaluating the technical proposals, if the Department had considered the references in determining the qualifications of a proposer.

30. NTI has not established the Department's determination that TechRadium's Attachment '3' met the requirement in the RFP for submission of references is clearly erroneous, contrary to competition, arbitrary, or capricious.

"Clearly erroneous" means the Department's interpretation will be upheld if it falls within the permissible range of interpretations. Colbert v. Department of Health, 890 So. 2d 1165 (Fla. 1st DCA 2004). The Department's interpretation that submission of references pertaining to school districts meets the requirement for submission of references is within the permissible range of interpretations of the RFP.

31. "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." Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979). The Department's decision to accept TechRadium's Attachment '3' as satisfying the reference requirement is neither capricious nor arbitrary.

32. The determination that Attachment '3' was responsive was not contrary to competition. None of the references of the proposers were contacted. All the proposers were evaluated in the same manner. If the proposers listed school districts in their references, their proposals were deemed to meet the reference requirements.

33. NTI contends that TechRadium was not a responsible vendor because of the actions of its Director of Sales prior to the issuance of the RFP. The actions of Mr. Arnim were a

result of his misunderstanding a conversation between two other employees of TechRadium. Once the problem was brought to the attention of officials at TechRadium, misrepresentations ceased and Mr. Arnim was reprimanded. The evidence did not show that Mr. Arnim knew at the time he made the representations to the school districts that they were untrue.

34. In its evaluation of TechRadium's proposal, the Department did not consider the actions of Mr. Arnim to be a basis for rejecting TechRadium as a proposer based on integrity or reliability. The evaluation was not clearly erroneous, arbitrary, capricious, or contrary to competition. Mr. Arnim's actions resulted from a misunderstanding and were promptly corrected.

35. The Department's intended decision to award the contract to TechRadium is not contrary to the Department's governing statutes, the Department's rules or policies, or the RFP.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered awarding the contract for an immediate response notification system pursuant to RFP 2006-01 to TechRadium.

DONE AND ENTERED this 9th day of January, 2007, in Tallahassee, Leon County, Florida.

Susan B. Harrell

Hearings

SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative

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Hearings

Filed with the Clerk of the
Division of Administrative

this 9th day of January, 2007.

ENDNOTES

1/ As used in TechRadium's contracts, the number of seats means the number of persons who are eligible to receive notification.

2/ Unless otherwise indicated, all references to the Florida Statutes are to the 2006 version.

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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.