

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHOICEPOINT GOVERNMENT)
SERVICES, INC.,)
)
Petitioner,)
)
vs.) Case No. 06-1466BID
)
DEPARTMENT OF LAW ENFORCEMENT,)
)
Respondent,)
)
and)
)
LEXISNEXIS,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH) held a final hearing in the above titled cause on May 19, 2006, in Tallahassee, Florida.

APPEARANCES

For Petitioner: J. Stephen Menton, Esquire
Rutledge, Ecenia, Purnell
and Hoffman, P.A.
Post Office Box 551
Tallahassee, Florida 32302

For Respondent: John Booth, Esquire
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489

For Intervenor: Mary Piccard Vance, Esquire
Vezina, Lawrence and Piscitelli, P.A.
413 East Park Avenue
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether the State of Florida, Department of Law Enforcement (FDLE), issued a Notice of Intent to Award a contract, pursuant to an Invitation to Negotiate (ITN), to LexisNexis (Intervenor), which was contrary to FDLE's governing statutes, rules, policies, or any applicable bid or proposal specification.

PRELIMINARY STATEMENT

On November 2, 2005, FDLE issued ITN No. B1003 in order to secure proposals from vendors for a contract to provide information and technology services to support domestic security and other criminal investigations by FDLE.

By December 14, 2005, eight proposals were received by FDLE. Two proposals were eliminated on opening due to omission of required materials. Four other vendors were eliminated following oral presentations during the week of January 3, 2006.

FDLE's evaluation team recommended that the two remaining vendors, Choicepoint Government Services, Inc. (Petitioner), and Intervenor be chosen for negotiations with FDLE to obtain the Best and Final Offer (BAFO) of each vendor. The decision was publicly posted on January 25, 2006.

Following subsequent negotiations between FDLE and the two vendors, both vendors submitted their BAFOs on February 23, 2006. Notice was posted on March 7, 2006, that an award to Intervenor was recommended as offering the best overall value to the State of Florida.

On March 10, 2006, Petitioner timely filed a Notice of Protest of the Notice of Intent to award to Intervenor and, later, on March 20, 2006, a Formal Written Protest. The matter was then referred to DOAH by FDLE.

At the final hearing, the parties presented eight joint exhibits, which were received into evidence. FDLE also presented testimony of two witnesses and offered two exhibits, which were admitted into evidence. Petitioner presented the testimony of three witnesses.

A Transcript of the hearing was filed with DOAH on June 8, 2006. All parties filed Proposed Recommended Orders, which have been reviewed and utilized in the preparation of this Recommended Order.

References to Florida Statutes are to the 2005 edition, unless otherwise noted.

FINDINGS OF FACT

Stipulated Facts

1. FDLE issued Invitation to Negotiate #B1003 (the ITN) on November 2, 2005, seeking detailed and competitive proposals to

provide information and technology services to support domestic security and other criminal investigations.

2. FDLE received and evaluated responses to the ITN from six firms, including Petitioner and Intervenor.

3. On January 25, 2006, FDLE posted its notice of intent to enter into negotiations with Petitioner and Intervenor.

4. FDLE issued final instructions to Petitioner and Intervenor, including a request for BAFOs on February 15, 2006.

5. Petitioner and Intervenor submitted timely BAFOs on February 23, 2006.

6. FDLE posted a notice of intent to award the contract to Intervenor on March 7, 2006.

7. Petitioner timely filed a notice of intent to protest followed by a formal written protest and appropriate protest bond.

8. Intervenor filed a petition to intervene, which was granted.

Other Facts

9. Initial replies to the ITN were received, reviewed for responsiveness, evaluated, and ranked by FDLE. Both Petitioner and Intervenor replies to the ITN were deemed to be responsive, and, subsequently, to constitute the top two proposers. In accordance with the ITN specifications, negotiations ensued with both Petitioner and Intervenor. FDLE's negotiation team met

with Petitioner representatives and then with Intervenor representatives between February 6 and 8, 2006.

10. During the negotiations, the vendors and FDLE's negotiation team engaged in substantive discussions regarding the vendors' respective proposals. Both vendors agreed to changes both in technical areas and in pricing. Both vendors had the opportunity to fully explain the merits of their respective proposals and to discuss with the negotiation team FDLE's needs and concerns. The negotiation process was conducted in accordance with the terms of the ITN and the requirements of Section 287.057(3), Florida Statutes.

11. After the negotiations were completed and as a result of the information gained through these negotiation meetings, FDLE prepared and issued Addendum 7 to the ITN, which requested a BAFO from each vendor.

12. Addendum 7 modified certain provisions of Section 6 of the ITN.

13. FDLE received and evaluated the BAFOs submitted by Petitioner and Intervenor. Mark Scharein, Kevin Patten, and Larry Shaw, FDLE employees and members of the FDLE negotiation team, prepared a memorandum to Mark Zadra, Chief of Investigations for the Office of Statewide Intelligence, providing a recommendation for award to Intervenor and the rationale for that recommendation. Zadra concurred, and FDLE

ultimately decided to award the contract to Intervenor and issued an official intent to make such an award.

Alleged Deficiencies of Intervenor BAFO

14. Petitioner's protest with respect to Intervenor's BAFO centers around two provisions of the ITN - section 6 (C)(7) and section 6 (F)(1).

15. Sections 6 (C)(7) of the ITN was revised in Addendum 7. Section 6 (F)(1) was not, however, revised in Addendum 7.

16. Section 6 (C)(7) of the ITN, as revised by Addendum 7, provides:

The solution shall include proactive notification capability. This will include flagging subjects individually or batch via user interface or FTP site. The system will match these records against new public records data at regular intervals (such as each 24 hours). Notifications will then be sent on matching records to the user with this new information. This capability will be made available to selected users as enabled by an FDLE administrator.

17. Intervenor's response in its BAFO to Section 6 (C)(7) provides:

This functionality, which describes our Accurint Watchdog service, has not been previously discussed and is outside of the scope of requirements in the original ITN. However, this functionality is available for an additional fee and [Intervenor] is open to negotiating supplying this service.

This response occurred during the negotiation phase and is included in the final, firm price proposal submitted by

Intervenor. FDLE properly considered that price proposal binding and used that firm price proposal in reaching its determination that Intervenor offered the best value to the state.

18. Section 6 (F)(1) of the ITN provided that "[t]he system shall provide support structured as well as unstructured (free-text) search capabilities." This requirement in the ITN was not altered by Addendum 7, and Intervenor's BAFO response to this requirement, the same response that was in its original reply to the ITN, was not timely subjected to challenge.

BAFO Evaluation By FDLE

19. After FDLE received the BAFOs, they were reviewed by FDLE personnel which then undertook a cost analysis to determine which offer provided the best value to the state. The analysis is memorialized in a memorandum dated March 7, 2006, and a summary chart.

20. FDLE undertook the cost analysis fully cognizant of its experience and knowledge of the existing system, its experience with replacement contracts, and its reasonable understandings with respect to future needs. As a first step in the process, a comparison was made of the price offered by each vendor as derived directly from their respective BAFOS.

21. Committed to paying no more than the amounts denoted in the vendors' BAFO price sheets, FDLE could move to final

negotiation with Petitioner in the event that Intervenor refused to contract for the price listed in its pricing sheet.

22. The second step in FDLE's pricing analysis was consideration of implementation costs that are internal to FDLE.

23. FDLE had asked both vendors to identify the amount of time and effort required of FDLE for development and implementation of their respective systems. Utilizing this information provided by the vendors, the implementation costs were calculated by analyzing the implementation requirements in terms of man-hours as provided by the vendors. FDLE multiplied the man-hours provided by the vendors with the average salary rates of the various FDLE employees needed to complete implementation of the system. As a result of this exercise, FDLE concluded that the implementation costs to FDLE for Petitioner's system was \$340,000. The implementation costs to FDLE for Intervenor's system was \$0.

24. In the third step of FDLE's exercise to determine the real cost impacts of contracting with the respective vendors, FDLE considered the cost of purchasing licenses for additional users over the full term of the contract. Based on experience, FDLE personnel determined an additional 1000 users could be reasonably anticipated over the next ten (10) years. Accordingly, the original ITN called for pricing based on a minimum of 1000 users.

25. Section 6 (L) of the ITN specifically states that FDLE shall have the option to acquire additional licenses for additional users. The vendors were informed during negotiations that FDLE would like to know the price for additional users beyond 1000. Neither vendor was informed how many more users FDLE anticipated adding over the next ten years. Both vendors knew, however, that FDLE currently has demand for additional users to its system. Both vendors were told that FDLE would likely add more users to the system.

26. FDLE was seeking a system capable of supporting at least 1000 simultaneous users and with the option of purchasing rights for additional users who could use the system simultaneously. Opportunity for Petitioner was available to find out the historical growth rate of users during the negotiation phase if that was information of interest to that vendor.

27. Prior to issuance of the ITN, FDLE informed potential vendors that it was reasonable to assume that the number of users would grow beyond 1000 and that FDLE could have 1500 users over time. Petitioner received that pre-ITN information which was made public as part of a request for information relating to the ITN.

28. Based on FDLE's experience, it is common for a software vendor to be required to offer a price per user without

any idea as to how many licenses for users the state will eventually need.

29. Petitioner offered a price of \$9,000,000 based on 1000 users, with a price of \$1400 for each additional user over the first 1000. By contrast, Intervenor offered a price of \$10,379,658.62 based on 1500 users, with a price of \$1028 for each additional user over the first 1000 -- a forty (40) percent difference in favor of Intervenor for the price of each additional user.

30. Without even considering the 500 additional users included in Intervenor's BAFO, FDLE determined that Intervenor provided a lower total cost to FDLE by almost one million dollars. Further, if an additional 500 users are included in the analysis, the price difference spreads to as much as five million dollars in favor of Intervenor.

31. FDLE appropriately and properly concluded that Intervenor offered the best overall value to the state.

CONCLUSIONS OF LAW

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

33. Petitioner has standing to challenge FDLE's proposed action to award the subject contract to Intervenor.

Additionally, Intervenor has standing to intervene in this proceeding. § 120.57(1) and (3), Fla. Stat.

34. As the party challenging FDLE's proposed action, Petitioner has the burden of proof in this proceeding. § 120.57(3)(f), Fla. Stat.

35. Section 120.57(3)(f), Florida Statutes, provides, in relevant part:

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.

36. Petitioner has the burden of showing that FDLE's intent to negotiate a contract for Information and Technology Services to Support Domestic Security and Other Criminal Investigations with Intervenor is contrary to the agency's governing statutes, rules or policies, or the ITN specifications. The proposed award will not be overturned so long as the decision is based on an honest exercise of discretion. Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991).

37. After an agency evaluates and ranks responsive replies to an ITN against all evaluation criteria set forth in the ITN, the agency must select, based on the ranking, one or more vendors with which to negotiate. § 287.057 (3)(b), Fla. Stat. (2005). After the negotiations are conducted, the agency must award the contract to the vendor that provides the best value to the state. Id.

38. Best value is defined by statute and means "the highest overall value to the state based on objective factors that include, but are not limited to, price, quality, design, and workmanship." § 287.012 (4), Fla. Stat. (2005).

39. "Absent a showing that Respondent . . . was not engaged in an honest exercise to obtain the best value for the state, Respondent . . . was free to use whatever criteria in the negotiation phase that it chose." M/A-Com, Inc., v. Dept. of Management Services, DOAH Case No. 04-1091BID (May 25, 2004).

40. The main thrust of Petitioner's protest, that Intervenor's response to two technical requirements, unstructured (free-text) search capability, from the ITN, and proactive notification capability, from the BAFO, were non-responsive or not in compliance with the ITN specifications, is not supported by the substantial competent evidence elicited in this proceeding.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That Respondent enter a final order denying Petitioner's protest.

DONE AND ENTERED this 12th day of July, 2006, in Tallahassee, Leon County, Florida.



DON W. 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
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of July, 2006.

COPIES FURNISHED:

John P. Booth, Esquire
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489

J. Stephen Menton, Esquire
Rutledge, Ecenia, Purnell & Hoffman, P.A.
Post Office Box 551
Tallahassee, Florida 32302

W. Robert Vezina, III, Esquire
Vezina, Lawrence & Piscitelli, P.A.
413 East Park Avenue
Tallahassee, Florida 32301

Michael Ramage, General Counsel
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

Gerald Bailey, Commissioner
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

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.