

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROAM SECURE, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 07-5454BID
)
 DIVISION OF EMERGENCY)
 MANAGEMENT,)
)
 Respondent,)
)
 and)
)
 NTI GROUP, INC.,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

Pursuant to written notice, the above matter was heard before the Division of Administrative Hearings by its duly-designated Administrative Law Judge, Don W. Davis, on February 27-28, 2008.

APPEARANCES

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For Respondent: Thomas F. Congdon, Esquire
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STATEMENT OF THE ISSUES

The issues presented for decision in this case are:

- 1) whether DEM's proposed award of the contract pursuant to Request for Proposals, DEM 06/07-10 "Emergency Notification System Pilot Program" (RFP) to NTI is contrary to DEM's governing statutes, rules, policies or the solicitation specifications;
- 2) whether DEM's failure to reject Roam's proposal as non-responsive is contrary to DEM's governing statutes, rules, policies or the solicitation specifications;
- 3) whether DEM's failure to disqualify Roam from consideration of a contract award because of Roam's contact with DEM during the no contact period is contrary to DEM's governing statutes, rules, policies or the solicitation specifications;
- 4) whether DEM's failure to reject NTI's proposal as non-responsive for failure to include pricing information beyond the seven month pilot period is contrary to DEM's governing statutes, rules, policies or the solicitation specifications;
- 5) whether NTI has violated Section 287.075, Florida Statutes, and is ineligible for an award of the contract; and
- 6) whether pursuant to Section 120.57(3), Florida Statutes, a de novo proceeding to determine

whether DEM's action deeming Roam's proposal responsive to the RFP by virtue of scoring that RFP is contrary to DEM's governing statutes, its rules or policies or the solicitation specifications.

PRELIMINARY STATEMENT

DEM issued the RFP to implement an emergency notification pilot program in Brevard, Pasco, Polk and Orange counties which would deploy unlimited complete, time-sensitive notices to warn citizens, local emergency management entities and state and regional entities against disasters. The deployed system was required to be able to send voice calls to landlines and cell phones; text to cell phones and email accounts; and messages to TTY/TDD receiving devices for the hearing impaired.

On October 9, 2007, NTI, Roam and nine other vendors submitted proposals for consideration of a contract award. Two proposals were rejected by DEM upon opening for failure to meet form requirements. The remaining nine proposals were scored by an evaluation committee consisting of three evaluators employed by DEM, Charles Hagan, III, James Montague, James Roberts, III, along with two evaluators employed by the Department of Management Services (DMS), Danette McBride and Mahmoud Sondossi. The evaluation committee short-listed five of the nine vendors and invited them to make oral presentations demonstrating their proposed systems to the committee in meetings taking place on October 15-16, 2007. After the oral presentations and

consistent with the timetable set forth in the RFP, on October 17, 2007, DEM posted its notice of intent to award the contract under the RFP to NTI. Roam was listed as the second ranked vendor.

On October 22, 2007, Roam filed a notice of intent to protest DEM's intended award to NTI. Roam's formal written protest and petition for administrative hearing alleged that DEM erroneously modified its cost proposal causing Roam to come in second place. Roam alleged that if DEM had not modified its cost proposal, Roam would have had the lowest cost proposal, thus receiving the highest number of points in the evaluation and would have been ranked first ahead of NTI. Specifically, Roam alleged that DEM improperly added \$135,000 to its proposal for additional voice minutes, \$135,000 for additional text messages and \$100,000 for implementation of its proposed system in Orange County.

On November 30, 2007, NTI filed its petition to intervene in these proceedings. NTI's petition to intervene was granted on December 10, 2007. On December 11, 2007, NTI filed a motion to amend its petition to intervene alleging that Roam's proposal should have been rejected by DEM as non-responsive for its failure to offer unlimited voice and text messages at a fixed price as was required under the RFP. NTI further alleged that DEM should have deemed Roam's proposal non-responsive for its

failure to allocate any funds for implementation of a system in Orange County. The system Roam had installed in Orange County only provided for text notifications, whereas the RFP required a system that would deploy unlimited text and voice messages for the duration of the pilot period. NTI alleged that instead of deeming Roam's proposal non-responsive to the material terms of the RFP, DEM inappropriately estimated the cost for a minimal level of voice and text minutes for testing Roam's system in the pilot counties. NTI's motion to amend its petition to intervene was initially denied on December 18, 2007, but was later granted on January 7, 2008, in response to NTI's motion for reconsideration.

On January 23, 2008, NTI filed a second motion for leave to amend its petition to intervene alleging that Roam also should have been disqualified from participation in the RFP process because Roam's representative, Richard Tiene, had improper contacts with evaluation committee chair, Charles Hagan, III, both by phone and through email during the period of no-contact under the terms of the RFP and Chapter 287, Florida Statutes. NTI's motion for leave to file its second amended petition to intervene was granted on February 26, 2008.

On February 22, 2008, Roam also filed a motion to amend its petition. In its amended petition, Roam added allegations that NTI's proposal failed to provide cost information that would

allow DEM to calculate a renewal price beyond the seven-month pilot period and also alleged that NTI's representatives improperly participated in drafting language that appeared in the RFP. Roam's motion to amend its petition was granted on February 25, 2008.

The parties filed a Joint Pre-Hearing Stipulation on February 26, 2008. The final hearing was held on February 27 and 28, 2008 in Tallahassee, Florida. Joint exhibits 1 through 31 were offered and received into evidence. Roam presented the testimony of evaluation committee members, James Roberts, III, James Montague, Danette McBride and Mahmoud Sondossi, along with Roam corporate representative, Richard Tiene. DEM and NTI presented the testimony of Charles Hagan, III, DEM employee and evaluation committee chair. The transcript of the final hearing was filed on March 13, 2008, with the Division of Administrative Hearings. The parties filed proposed recommended orders, which have been duly considered and utilized in the preparation of this Recommended Order.

References to Florida Statutes or Laws of Florida are to the 2007 edition unless otherwise noted.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of the proceeding,

including the Joint Pre-Hearing Stipulation of the parties, the following findings of fact are made:

1. DEM issued a Request for Proposals, entitled DEM 06/07-10 "Emergency Notification System Pilot Program" ("RFP") on September 18, 2007, for the purpose of implementing an emergency notification pilot program in Brevard, Pasco, Polk and Orange counties which would deploy unlimited complete, time-sensitive notices to warn citizens, local emergency management entities and state and regional entities against disasters. The deployed system was required to send voice calls to landlines and cell phones; text to cell phones and email accounts; and messages to TTY/TDD receiving devices for the hearing impaired. The pilot program was to be funded through "Specific Appropriation 1621W" for two million dollars in non-recurring funds from the Emergency Management Preparedness and Assistance Trust Fund. The pilot program was to last seven months beginning on December 1, 2007, and ending June 30, 2008. The RFP did not request pricing for the pilot program to extend beyond June 30, 2008.

2. The RFP set forth certain mandatory requirements that could not be waived as minor irregularities by DEM. Specifically, the Evaluation Criteria section of the RFP stated in pertinent part: "A non-responsive proposal shall include, but not be limited to, those that: i) are irregular or are not

in conformance with the requirements and instructions contained herein . . .; iii) fail to utilize or complete prescribed forms; iv) are conditional proposals . . .; vi) propose a project that . . . will require additional funding to implement . . .” The RFP further stated with emphasis: “THE RESPONSIVENESS OF A PROPOSAL SHALL BE DETERMINED BASED UPON THE DOCUMENTS SUBMITTED WITH THE PROPOSAL. A NON-RESPONSIVE PROPOSAL WILL NOT BE CONSIDERED.”

3. The RFP further explained:

DEM may waive minor irregularities in the proposals received where such are merely a matter of form and not substance, and the corrections of such ARE NOT PREJUDICIAL to other respondents. Variations which are not minor shall not be waived.

(Emphasis in original.)

4. The RFP mandated that all proposals comply with the language in the legislative appropriation for the project, which stated as follows:

From the funds in Specific Appropriation 1621W, \$2,000,000 in non-recurring funds in the Emergency Management Preparedness and Assistance Trust Fund shall be used to implement a pilot program in Brevard, Pasco, Polk and Orange counties for the purpose of deploying unlimited complete, time-sensitive notices quickly and easily to citizens, local emergency management entities, and state and regional entities to warn against disasters and provide community outreach and education notifications. The deployed service should be able to send voice calls to landlines and cell phones; text to cell

phones and email accounts; and TTY/TDD receiving devices for the hearing impaired.

5. The RFP further stated in the Scope of Work section:

This Pilot Program is subject to Legislative appropriation and as such, all annual subscriber costs and maintenance fees for the life of the project must be anticipated by the responsive bidder when calculating proposal, and will not be billable upon implementation as a separate charge to the State, Counties, or individuals participating in this program.

Id. at 25. (Underlining in original.)

6. DEM proposed to award a "fixed fee contract" under the RFP.

7. Respondents were allowed to submit written questions regarding the RFP to DEM in letter or email form on or before October 1, 2007. According to the RFP, Respondents were not permitted to contact DEM between the advertisement of the RFP on September 18, 2007, until the end of the 72-hour period following the agency posting of the notice of the intent to award, except to submit questions regarding the RFP in written form on or before October 1, 2007.

8. The closing date for submission of proposals in response to the RFP was October 9, 2007. Eleven proposals were submitted, with two being rejected upon opening as non-responsive for failure to meet form requirements. Each of the nine remaining proposals was reviewed by the evaluation

committee. Of the nine proposals scored, only the proposal submitted by NTI offered unlimited voice and text messages at a fixed price.¹ Although the RFP required an unlimited, fixed-price system, and the evaluation committee could not determine what would be the ultimate price to the state for proposals that did not offer a fixed price, the evaluation committee scored all nine proposals, regardless of whether they offered unlimited messages for a fixed price.

9. The evaluation committee did not make a determination of whether the nine remaining proposals were responsive to the RFP, but rather chose to evaluate all proposals, regardless of whether the vendor offered unlimited minutes for a fixed price, so that they "could evaluate all potential technologies" in making a recommendation of what system would be of most benefit to the state.

10. The evaluation committee, however, was unable to perform an "apples-to-apples" comparison of the proposals because they did not all offer unlimited voice and text minutes for a fixed price. Many proposals such as the one submitted by Roam, offered a set number of voice and text minutes at a fixed price, and then offered additional voice and text minutes at a per minute rate above the base price. Although the Roam system had the ability to provide unlimited voice and text messages, Roam did not give the state a firm price for such unlimited

usage. Thus, there was no way DEM could determine the ultimate cost to the state of Roam's system.

11. Since the evaluation committee could not compare pricing proposals among vendors simply by looking at the proposals, the committee decided to compare systems by applying a minimum level of usage to all proposals that did not offer unlimited voice and text minutes to arrive at an estimate of what DEM might spend on testing any given system. This usage assumption by DEM regarding a number of voice minutes and text messages for testing the system is because many vendors, including Roam, did not follow the instructions of the RFP and failed to submit a fixed price for unlimited messages. Had all vendors submitted fixed price unlimited proposals, as required under the RFP, DEM would not have had to engage in estimating how many voice and text minutes it would use to test the system under the pilot program and would not have adjusted vendors' proposed prices.

12. DEM made a minimum estimate of three million messages to be sent via voice and three million messages to be sent via text over the course of the pilot period simply to test the system. This figure was based on three messages being sent to an estimated one million households in the pilot area. DEM evaluators admitted, however, that there was really no way to tell how many messages would be used in the pilot program and

that the actual number could easily exceed the three million message estimate. DEM tests each of its systems at least monthly. Notably, DEM's estimates did not take into account actual usage of the system apart from testing. As established by testimony at the final hearing, during just one weather event, it is possible that the number of messages offered in Roam's base proposal would be exceeded and the state would incur additional costs.

13. Roam's proposal offered 300,000 voice minutes included in its base price. Based on DEM's minimum usage estimate, the Evaluation Committee added \$135,000 to Roam's proposal for the additional 2,700,000 minutes at five cents per minute to reach an estimated price for voice minutes. Roam admits that DEM has the right to project any number of voice minutes for use in the pilot program and does not contest that DEM could use the three million estimate if applied evenly to all proposals.

14. Roam's proposal also offered 300,000 "Enhanced SMS" text messages as included in its base price, and indicated that additional messages were available at a rate of five cents per message, "if necessary." Although Roam's proposal stated that DEM would only be charged for additional messages over the base 300,000 if the messages did not go through Roam's free gateway and an aggregator were used, the necessity for usage of such an aggregator is unclear. The evaluation committee could not

determine from Roam's proposal how many messages would go through the free gateway and how many would be charged at five cents per message.

15. DEM was under no obligation to seek clarification from Roam regarding its proposal, and was not allowed to consider any additional information outside of Roam's proposal in making its award decision.

16. NTI met the RFP's requirements for unlimited minutes for unlimited voice and text messages at a fixed price. Because NTI's proposal provided for unlimited voice and text messages, DEM did not add any additional amounts to NTI's cost proposal.

17. In addition to cost adjustments for voice and text messages, DEM also added an additional \$100,000 to the price of Roam's proposal for implementation of a system in Orange County. Roam asserts in its formal written protest that the reason it did not allocate funds for deployment in Orange County was because "Orange County is an existing fully deployed customer, and that, as a result, implementation of the pilot project in that county presents an opportunity for cost savings." Although Roam's proposal stated that there was an existing system in Orange County, this system is owned by Orange County, not by Roam. Roam's proposal gave no indication whether Orange County had given approval for use of its system in the pilot program. Additionally, DEM could not determine from Roam's proposal

whether the state would incur additional charges for use of Orange County's system. Roam has nothing in writing from Orange County confirming that the state could use that system in the pilot program without charge. Roam further admits that the Orange County system is currently only set up to provide text notifications.

18. As a result of the cost adjustments made to Roam's base proposal of \$300,000.00 for additional voice and text messages and for deployment of the system in Orange County, DEM assigned Roam's proposal a cost of \$670,000.00. Since NTI had offered unlimited voice and text messages at a fixed price in its proposal, DEM did not need to make any adjustments to its cost proposal of \$583,333.00.

19. The RFP required that vendors provide a cost for implementing and operating the proposed system for the seven-month pilot period and that vendors supply a cost analysis referring to cost categories as set forth on page 27 of the RFP. NTI's proposal provided all cost information required by the RFP. There is no indication that vendors were to provide cost information for any period beyond the seven-month pilot period. Evaluation committee members testified that they only evaluated cost effectiveness of a proposal for the pilot period as was required under the RFP. Roam's proposal also did not offer pricing beyond the pilot period.

20. Roam's representative, Richard Tiene, violated the requirement that a vendor not contact the agency during the period of "no contact" as set forth in the RFP. The general prohibition on contact between vendors and the agency issuing a procurement is stated in Section 287.057(24), Florida Statutes, and set forth in the RFP is as follows:

No Contact Period: Respondents to this solicitation or persons acting on their behalf may not contact, between the release of the solicitation and the end of the 72-hour period following the agency posting the notice of intended award, excluding Saturdays, Sundays, and state holidays, any employee or officer of the executive or legislative branch concerning any aspect of this solicitation, except in writing to the procurement officer or as provided in the solicitation documents. Violation of this provision may be grounds for rejecting a response.

21. Since the RFP was released on September 18, 2007, and the notice of intended award posted on October 17, 2007, the period of no contact between vendors and the agency began on September 18, 2007, and extended through October 20, 2007. The only exception to the general prohibition on contact with the agency during the "no contact" period was that vendors were permitted to send questions in writing to the chair of the evaluation committee, Charles Hagan, relating to the procurement through October 1, 2007. Specifically, vendors were instructed by the RFP as follows:

No verbal inquiries will be accepted.
Written questions from prospective contractors will be accepted in letter form or by email by the contact person through the date specified above under Proposal Solicitation Schedule/Timetable (refer to Deadline for Submission of Written Inquiries). Responses to written questions timely received by the contact person will be posted as an Addendum to this RFP on the DMS Vendor Bid System website on or before the date specified above under Proposal Solicitation Schedule/Timetable (refer to Deadline for Posting an Addendum on the DMS Vendor Bid System).

(Underlining in original.)

22. On October 17, 2007, Roam's representative, Richard Tiene, telephoned evaluation committee chair, Charles Hagan, on his cell phone after business hours to make inquiries regarding the RFP. Mr. Hagan advised Mr. Tiene that he could not speak with him and advised him to put anything he had to say in writing.

23. On October 18, 2007, Mr. Tiene again contacted Mr. Hagan by sending him an email attempting to persuade the evaluation committee to select Roam's proposal over NTI's. The phone call and email to Mr. Hagan were both within 72 hours of DEM's posting its notice of intent to award the contract under the RFP to NTI on October 17, 2007.

24. Roam asserts that NTI should be disqualified for bid award because NTI participated in the drafting of the RFP through involvement in creating the language for Specific

Appropriation 1621W that was incorporated by DEM in the RFP. No proof establishes any request by NTI that the appropriations language be included in the RFP, and this assertion by Roam is not credited. The only recorded evidence regards NTI's participation in the appropriations process and establishes that NTI's representative simply requested to review the appropriations language prior to submission to the Legislature and Governor for approval.

25. NTI's substantial interests are affected by Roam's attempt to overturn DEM's intended award of the contract under the RFP to NTI.

CONCLUSIONS OF LAW

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

27. Section 120.57(3)(f), Florida Statutes, provides in pertinent part:

In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement 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, 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.

(Emphasis supplied.)

28. "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. Dep't of Environ. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

29. To determine whether an agency acted in an arbitrary or capricious manner, it must be determined "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enterprises v. Dep't of Environ. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

30. The agency actions challenged here are DEM's intended award of the contract under the RFP to NTI and DEM's decision to treat Roam's proposal as responsive to the RFP by ranking Roam second in this procurement.

31. Each party challenging proposed agency action must prove by a preponderance of the evidence that the agency action is arbitrary, capricious, or beyond the scope of DEM's discretion as a state agency. Dep't of Transp. v. Groves-

Watkins Constructors, 530 So. 2d 912, 913-914 (Fla. 1988); see also § 120.57(1)(j), Fla. Stat. (2007).

32. Roam's protest contends that DEM acted arbitrarily and capriciously and contrary to competition when it added additional costs to its proposal for voice minutes, and text minutes and implementation of its system in Orange County.

33. Roam's deviations from the requirements of the RFP, through its failures to provide a fixed price proposal and to provide sufficient information regarding its system proposed for Orange County are material variances from the requirements of the RFP, however, rendering Roam's proposal non-responsive.

34. As the RFP stated: "A non-responsive proposal shall include but not be limited to, those that: i) are irregular or are not in conformance with the requirements and instructions contained herein . . .; iii) fail to utilize or complete prescribed forms; iv) are conditional proposals; v) are incomplete proposals . . . [or] vi) propose a project that cannot be implemented upon completion for any reason . . . "

35. DEM was permitted to waive minor irregularities, but no requirement of the RFP could be waived unless it was "merely a matter of form and not substance, and the corrections of such ARE NOT PREJUDICIAL to other respondents." (Emphasis in RFP.)

36. Roam's failure to provide pricing for unlimited voice and text messaging was not a simple matter of form, but rather

goes directly to the substantive requirement of the RFP that the proposed system be able to provide "unlimited complete, time-sensitive notices." The pricing provided in Roam's proposal only supplied a limited number of messages at a fixed price leaving DEM unable to determine the ultimate cost to the state of Roam's system.

37. Based on Roam's failure to submit a responsive proposal, DEM's ranking of Roam's proposal and treatment of the proposal as responsive is clearly erroneous, contrary to competition, arbitrary, capricious, violative of the specifications in the RFP, and contrary to the statutes governing DEM's procurement under this RFP including Section 287.057(2), Florida Statutes.

38. It was only by virtue of Roam submitting a non-responsive proposal that that DEM made price adjustments to its proposal in an attempt to score it notwithstanding the proposal's deficiencies. Such price adjustments, therefore, were meaningless since Roam's proposal should not have been scored in the first instance.

39. Additionally, Roam's representative, Richard Tiene, had improper contacts with DEM during the period of no contact as set forth in the RFP and Section 287.057(24), Florida Statutes. Although the RFP states that a failure to comply with the prohibition on no contact "may be grounds for rejecting a

response," the nature of Mr. Tiene's communications for the purpose of persuading DEM to select Roam's proposal over NTI's was anti-competitive. DEM's failure to disqualify Roam after receiving these communications from Mr. Tiene was therefore, contrary to competition, arbitrary and capricious.

40. Roam argues that its communications to DEM during the no-contact period were harmless since DEM chose NTI's proposal over Roam's proposal. Notably, the success or lack thereof of a prohibited communication is not what makes it unlawful.

Mr. Tiene chose to both call and email Mr. Hagan with unsolicited information during the no-contact period. Roam, thus, should have been disqualified from participation in the RFP process.

41. Roam's allegations that NTI should have been disqualified from the RFP process are without merit and are rejected. There is no evidence that NTI improperly participated in the preparation of the RFP document. Section 287.075, Florida Statutes, which sets forth the prohibition on vendors participating in preparation of a purchase request provides:

A contractor, as defined in this chapter, or its employees, agents, or subcontractors, may not knowingly participate, through decision, approval, disapproval, or preparation of any part of a purchase request, investigation, or audit, in the procurement of commodities or contractual services by a state agency from an entity in which the contractor, or its employees,

agents, or subcontractors, has a material interest.

42. NTI did not fail to provide any pricing information required under the RFP. As noted in the above-stated findings of fact, the RFP did not require pricing beyond the seven-month pilot period. NTI's pricing sheets provided all information requested by the RFP and thus, NTI's proposal was responsive.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is recommended the Division of Emergency Management award the contract under Request for Proposals, DEM 06/07-10 "Emergency Notification System Pilot Program" to the NTI Group, Inc.

DONE AND ENTERED this 23rd day of April, 2008, in Tallahassee, Leon County, Florida.

Don W. Davis

DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of April, 2008.

ENDNOTE

1/ One other vendor submitted an unlimited fixed price option along with a per minute/message option.

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.
