

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PROMETHEAN, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 11-3136BID
)
 ORANGE COUNTY SCHOOL BOARD,)
)
 Respondent,)
)
 and)
)
 SMART TECHNOLOGIES CORPORATION,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

Pursuant to notice to all parties, the final hearing was conducted in this case on August 23, 2011, in Orlando, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case, a bid protest, is whether the intended decision of Respondent, Orange County School Board (the "School Board"), to award a contract for interactive devices and associated equipment to Intervenor, SMART Technologies Corporation ("Smart"), instead of to Promethean, Inc. ("Promethean"), is clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

Pursuant to an Invitation to Negotiate ("ITN"), the School Board issued its Notice of Intent to award a contract to Smart on May 24, 2011. Promethean timely filed a notice of its intent to protest the award of the contract. Promethean's Petition and Formal Written Bid Protest was filed at the Division of Administrative Hearings ("DOAH") on June 21, 2011. On that same date the School Board filed a motion to dismiss the petition.

On July 11, 2011, Smart filed a Petition to Intervene in the proceeding. Smart's petition was granted by Order dated July 18, 2011. On August 8, 2011, Paul H. Amundsen, Esquire, filed a notice of appearance for Promethean. The School Board's motion to dismiss was denied by Order dated August 9, 2011.

Thereafter, the parties each submitted unilateral pre-hearing statements; no pre-hearing stipulations were reached.

Just prior to the final hearing in this matter, Smart filed a motion seeking to strike various allegations from Promethean's petition. At the final hearing, the only disputed allegation had to do with Promethean's existing relationship with the School Board. Based on the decision reached below, the motion is moot.

At the final hearing Promethean called as a witness Scott Willett, director of sales for Promethean's east region. Promethean's Exhibits 1 through 3 and 5 through 12 were admitted into evidence. The School Board called two witnesses: Marcel Martinez, senior manager of Procurement Services; and George Perreault, director of Instructional Technologies and Library Media. The School Board Exhibits 2, 6, 7, 13 through 17, and 20 were admitted into evidence. Smart did not call any witnesses, but offered Exhibit 1 into evidence.

A transcript of the final hearing was ordered by the parties. The Transcript was filed at the DOAH on August 29, 2011. By rule, parties were allowed ten days to submit proposed recommended orders. The School Board and Smart, jointly, and Promethean each timely submitted a Proposed Recommended Order, and each was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Promethean is a Delaware corporation. Its parent company, founded some 15 years ago in the United Kingdom, has operations throughout North America, Europe and elsewhere. The original reason for founding the company was to develop interactive whiteboard technology. Promethean is now one of the leaders in interactive technology and has prior experience with the School Board, with as many as 1,900 interactive whiteboards installed in Orange County schools.

2. The School Board is the public entity responsible for investigating, purchasing, and implementing interactive technology into the classrooms of the Orange County public school system. The School Board is the tenth largest school district in the nation and the fourth largest in Florida. It is the second largest employer in Orange County, Florida, with over 21,000 full and part-time employees. The district consists of over 180 schools and has over 179,000 students.

3. Smart is also a leader in the interactive technology field. Smart, a Delaware corporation, has offices in Arlington, Virginia and Calgary, Canada. Smart and Promethean, combined, have 80 to 90 percent of the K-12 market for interactive technology.

4. On or about August 17, 2010, the School Board issued Request for Information No. 1008466RFI (the "RFI"), inviting

manufacturers and retailers to demonstrate interactive devices to the School Board's Audio Visual Committee. Timely responses to the RFI were made by several entities, including both Promethean and Smart.

5. On or about February 16, 2011, based on its review of information received, the School Board issued Interactive Devices and Associated Equipment ITN No. 1102044ITN. The submittal date for responses to the ITN was set for March 10, 2011.

6. An ITN goes through a process whereby the School Board posts a solicitation and vendors submit their proposals. Then a committee is formed to evaluate the proposals. Based upon their review, a short list of responding firms is created, narrowing the number of proposals that will be further considered. The short list firms' proposals are then opened for further negotiation and discussion. At that point, the School Board's procurement experts take over the process for doing the negotiations with each vendor. After completion of the negotiations, a recommendation is made for approval of one vendor.

7. The purpose of the ITN was to "request solicitations from manufacturers who can provide the interactive device solutions (with or without a board), portable stands or permanent wall installation throughout the school year in

varying quantities from individual location sites within the District. These purchases will be made through the Procurement Services Department on an as requested basis. The purchases will not be made on any schedule[d] purchase plan." The ITN also stated that manufacturers must be able to provide a complete classroom solution including the following components and suggestions:

- A board or board-mounted solution;
- A tablet or slate type device that allows remote control;
- A document camera that can be controlled via the manufacturer's software;
- Student response systems that interface with the manufacturer's software;
- Multi-touch capability (two or more people interacting with the surface simultaneously) "would be desirable"; and
- Use of Bluetooth wireless connections is "discouraged."

8. The ITN also describes the process that would be used in evaluating responses. Pertinent portions of the ITN are set forth below:

Proposal Evaluation Committee

A Proposal Evaluation Committee (PEC) consisting of District Staff will convene, review, evaluate and rank all valid responses submitted based on the evaluation criteria developed by the Committee.

The Proposal Evaluation Committee reserves the right to interview any, all or none of the Manufacturers that responded to the ITN and to require formal presentations with the key personnel who will administer and be assigned to work on behalf of the contract before recommendation of the award. This interview is to be based upon the written proposal received.

* * *

Evaluation Criteria

Only proposals that meet the minimum requirements will be scored. Proposal that meet the minimum Technical requirements will be evaluated based on the following criteria:

<u>Shortlist Evaluation Criteria</u>	<u>Possible Points</u>	<u>Maximum Weight Value</u>
I. Experience, Qualifications	150	30%
II. Equipment Solution	250	70%

Should the PEC members request presentation or interview from shortlisted Manufacturers, the following evaluation criteria will apply:

<u>Presentation/Interview Evaluation Criteria</u>	<u>Possible Points</u>	<u>Maximum Weight Value</u>
I. Education Impact & Operational Effectiveness	100	50%
II. Experience	100	20%

III. Price & Cost

Containment Strategies 100 30%

* * *

The Procurement Representative shall calculate all scoring and determine a ranking of the short listed firms based on the presentation/interview evaluation criteria.

* * *

The District deserves the right to negotiate the price and contract terms and conditions with the most qualified firm(s) to provide the requested service. If a mutually beneficial agreement with the first selected Manufacturer [cannot be reached], the Committee reserves the right to enter into contract negotiations with the next highest ranked Manufacturer and continue the process until agreement is reached.

* * *

The District reserves the right to negotiate, either serially or concurrently, with any and all Manufacturers at any point in the solicitation process. The District reserves the right to finalize the negotiations at any point and post an "Intent to Award" notice. Manufacturers should recognize the District's right to finalize the negotiation process without the need to explicitly request an interim revised response or a best and final offer. The District reserves the right to award based on the offer that is deemed the best value to the State. . . .

9. Timely responses to the ITN were submitted by six manufacturers: Promethean, Smart, Sanford Brands, QOMO Hite Vision, PolyVision, and AVerMedia. The responses were reviewed by the PEC which was composed of a diverse group of School Board officials with varying backgrounds in finance, academia, and

school administration. The PEC ranked the proposals submitted by each manufacturer based upon the first two general criteria: I. Experience and qualifications; and II. Equipment solution. Price and cost containment strategies were not considered at that time.

Promethean and Its Proposal

10. Promethean initially began its business operations with a product called the ActivBoard 78, or AB78, a 78-inch (diagonally measured) board with certain desired functions. It was the first active board furnished to the School Board. In 2009, Promethean developed the AB164 and AB178, the next series in the development of active boards.

11. The next series of active boards it developed was the 300 series. That series included the AB378 and an upgraded version, the AB378PRO. The latter version includes speakers and sound capability built into the board and has dual pen capability. That is, the AB378PRO allows the teacher to operate the board with one pen, while the student operates at the same time with a separate pen. The AB378 can have dual pen capability, but it must be added as an option, rather than being part of the board's basic functions. The two pens operate on different frequencies so that the student's interaction can be distinguished from the teacher's movements on the board. The

AB378 or AB378PRO is used in most of Promethean's demonstrations to potential school customers.

12. Of the 1,900 whiteboards installed by Promethean for the School Board, approximately 620 are AB378PROs, about 700 are AB378s, and the rest are primarily the AB78s, predecessor to the AB178s.

13. As part of its response to the ITN, Promethean also included a slate, basically a small whiteboard held by students at their desks. Promethean also offered the ActivExpression device, referred to in the industry as a student response system or learner response system. Using ActivExpression, a teacher could pose questions to students who would respond on their slate. The responses would then be tallied into the ActivExpression device, telling the teacher whether the students were keeping up or needed more instruction on a particular area of instruction.

14. The Promethean proposal included an ActivHub, a device which plugs into a USB port on the whiteboard or a computer and allows wireless access to other products offered by Promethean, such as the slate. The proposal also included a document camera called an ActivView. Students use it to display copies of documents on the whiteboard and then annotate the document using the pens.

15. Software on the various versions of Promethean's whiteboards can be different. The AB178, for example, includes their ActivInspire basic edition. The AB378 and AB378PRO come with ActivInspire Professional Edition. The ActivExpression learner response systems come with ActivInspire Professional. That software is available on the AB178, but it must be added. With ActivInspire Professional Edition, Promethean makes the site license available to the schools. The site license was offered as part of Promethean's proposal to the School Board in its ITN response.

16. Promethean also offered the School Board the right to use ActivInspire Professional Edition on their existing whiteboards provided by the competitor, Smart. However, that offer was contingent upon Promethean being the sole provider of whiteboards for future purchases.

Smart and Its Proposal

17. Smart proposed a whiteboard from its D680 series. That whiteboard also had dual touch capability. Smart's boards had a different design than Promethean's boards and provided a touch screen that could be operated by the touch of a person's finger, rather than using a pen. Smart uses a resistive technology as opposed to Promethean's electromagnetic technology.

18. Smart's product included a math package as part of the offered software. That software was extremely attractive to the School Board due to the manner in which it might assist teachers.

19. Smart offered a volume discount for purchases if the School Board would make Smart the sole provider for equipment during the two-year contract period. There is no evidence that the School Board accepted that offer.

20. Smart also proposed its SRP-XE-24 high-end learner response system. A \$30,000 credit was offered to the School Board on this system, but only if the School Board purchased 60 of the units at a cost of \$106,000. Again, there is no evidence that the School Board availed itself of that credit offer.

21. There was no testimony or evidence presented as to the elements of any other entity involved in the negotiations. The School Board appears to have given both Smart and Promethean's proposals full consideration.

The School Board's Review

22. Upon receipt of the responses to the ITN, on March 15, 2011, the School Board issued an Evaluation Ranking based upon the general review criteria. Promethean achieved the top rank with a total of 220 points; Smart was second with 197.10 points, and Sanford Brands was third with 142.50 points. Each of the

other applicants received less than 100 points. The PEC agreed by consensus to invite the three top ranked firms for interviews and presentations. Notice was posted on March 15, 2011, identifying the three selected applicants.

23. The interviews and presentations were scheduled as follows: Sanford Brands--March 21, 2011, at 11:00 a.m.; Promethean--March 21, 2011, at 2:45 p.m.; and Smart--March 22, 2011, at 1:00 p.m. As directed by the ITN, the PEC scored each manufacturer on the basis of the Educational Impact/Operational Effectiveness criteria and the Experience criteria. It did not, however, assign any scores for the Price and Cost Containment criterion.

24. On March 31, 2011, the School Board issued another evaluation ranking based on the PEC's scoring of the first two evaluation criteria. This time, Smart was ranked first with 63 points; Promethean was second with 61.50 points; and Sanford Brands was third with 42.50 points. The PEC agreed by consensus to invite the top two firms to enter into negotiations with the School Board.

25. Representatives of Promethean and Smart met with the School Board's procurement staff in separate negotiation sessions on May 4, 2011. Both Promethean and Smart then entered into an exchange of documents and information with the School

Board, including final specifications for relevant models, final pricing lists, and various other data.

26. Promethean initially asked for additional time to submit its documentation and information, but that request was denied by the School Board. Promethean then provided its first updated data on the afternoon of May 5, 2011, the day after meeting with the procurement staff. At that time, Promethean provided the School Board with its "lowest and best offer" for its proposal. The offer included "value added" items, such as spare parts and software licensing, a rebate arrangement, training, and professional development, all at no cost to the School Board. Promethean, thereafter, provided corrections to its pricing list and an updated equipment list to a procurement representative via a telephone call on May 12, 2011, followed up by an email.

27. Smart submitted its first updates just after midnight, i.e., technically on May 6, 2011. Smart, thereafter, on May 10 and 12, 2011, submitted updates further reducing the prices for its proposal. There is no evidence in the record as to why Smart submitted further updates to the School Board, but there is no direct prohibition in the ITN against doing so.

28. Based upon the information provided, the live presentations, and a review of the School Board's needs, the School Board posted its Notice of Intent awarding the contract

to Smart on May 24, 2011. The notice was based on a price comparison between Smart's D680 model and Promethean's AB378PRO. The School Board did not consider Promethean's AB178 model because, although it can be upgraded to comply with the requirements in the ITN, it was not an acceptable system without the updates.

29. The cost comparisons forming the final decision by the School Board are as follows:

<u>Component</u>	<u>Smart</u>	<u>Promethean</u>
Interactive Board	\$1,197.00	\$1,259.57
Slate/Tablet	\$ 272.00	\$ 351.02
Response System	\$1,088.00	\$1,544.49
Document Camera	<u>\$ 692.00</u>	<u>\$ 486.62</u>
TOTAL	\$3,249.00	\$3,641.70

The comparison was based on prices submitted by Promethean on May 5, 2011, and on prices submitted by Smart on May 5, 2011, as revised on May 10 and 12, 2011. Promethean also made suggested changes to its prices on May 24, 2011, but the School Board's decision had already been made by that time.

30. It was later determined that one of the added costs anticipated by the School Board for Promethean's proposal would not be necessary if the AB378PRO model was considered. Also, the price for Promethean's slate should have been \$265.12, rather than as stated. The combination of those two changes

could reduce Promethean's total price to \$3,406.80, but that would still be higher than Smart's price.

The Warranty Issue

31. The ITN called for a minimum 5-year replacement or repair warranty, postage paid--advanced replacement or on-site support, with a maximum 48-hour response time.

32. The standard warranty on Promethean's AB178 is one year, plus one additional year at registration. On the AB378 and AB378PRO, the standard warranty is three years plus two additional years at registration. Neither of the warranties is an advanced replacement warranty; they are only standard warranties.

33. None of the other components of Promethean's proposal normally comes with a standard five-year warranty. In fact, Promethean does not even offer those warranties for purchase for the various components.

34. In order to obtain five-year warranties for the whiteboard component, a customer would have to purchase them at an additional cost. However, as part of its pricing component for the ITN response, Promethean added in a five-year advanced replacement warranty for both the whiteboard and the other components of its proposal.

35. Smart's interactive boards have five-year warranties, but they are not specifically advance replacement warranties. They would constitute repair warranties, however.

The Final Decision

36. The School Board's review of the two proposals considered Smart's D680 series to be most similar to Promethean's AB378 or AB378PRO whiteboard. Its review of the proposals presumed the inclusion of dual pen or dual touch technology. The ability to add that technology to a whiteboard not equipped with it as a standard feature was not acceptable to the School Board.

37. If the School Board had compared Smart's D680 series to Promethean's AB178, it is likely Promethean's proposal could have come in at a lower overall cost. However, there is insufficient evidence to suggest that Promethean intended its AB178 to be considered or that the School Board would be satisfied with the AB178 series interactive boards.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(3), Florida Statutes (2011). Unless stated specifically herein, all references to Florida Statutes shall be to the 2010 codification.

39. The burden of proof is on Promethean, as the petitioner, to establish grounds for invalidating the proposed procurement decision. State Contracting & Eng'g Corp. v. Dep't of Trans., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Section 120.57(3) describes that burden, stating:

[I]n 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.

40. It is a basic principle of administrative law in Florida that formal proceedings conducted by the DOAH regarding decisions which affect a party's substantial interest are de novo. Dep't of Transp. v. J.W.C., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); McDonald v. Dep't of Banking and Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

41. In a bid case, however, the Administrative Law Judge does not put himself in the role of the agency in determining if bids are responsive, in scoring bids, or by performing similar tasks. The purpose of the bid hearing is merely to review the proposed agency action. State Contracting, 709 So. 2d at 609; Intercontinental Properties, Inc. v. Dep't of HRS, 606 So. 2d

380, 386 (Fla. 1st DCA 1992). It is the ALJ's role to determine whether the agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

42. "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 Chem. Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978). A decision is considered to be clearly erroneous when, although there is evidence to support it, after review of the entire record the tribunal is left with the definite and firm conviction that a mistake has been committed. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

43. In Florida, "a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree." Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982).

44. The School Board did a thorough and comprehensive review of all proposals sent in response to the ITN. Admitting that it could not compare "apples to apples" due to the fact that each manufacturer's equipment is somewhat unique, the School Board nonetheless engaged in a reasonable and logical

approach in their review. Each proposal was given a complete and honest appraisal. The School Board's decision was based upon its understanding of the applicants' proposals as applied to the needs of the Orange County public school system.

45. There is no evidence of capricious or arbitrary behavior by the School Board as it relates to their review and consideration of the proposals by Promethean and Smart. The School Board did not do anything during its review that would be anti-competitive as to one applicant versus another.

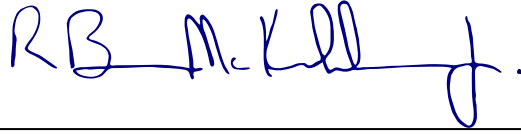
46. The decision to award the contract to Smart rather than Promethean was reasonable and based upon the sound exercise of the School Board's discretion. Nothing suggests that the decision was inherently wrong.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Orange County Public Schools upholding its Notice of Intent to award the contract to Smart Technologies Corporation and denying the Petition filed by Promethean, Inc.

DONE AND ENTERED this 23rd day of September, 2011, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 23rd day of September, 2011.

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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.