

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AT AND T CORP.,

Petitioner,

vs.

Case No. 14-1024BID

BREVARD COUNTY SCHOOL BOARD,

Respondent,

and

BRIGHT HOUSE NETWORK, LLC,

Intervenor.

_____ /

RECOMMENDED ORDER

Pursuant to notice, this case was tried before
J. D. Parrish, an Administrative Law Judge with the Division of
Administrative Hearings (DOAH), on July 10 and 11, 2014, in
Viera, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the Brevard County School Board (Board) erred in issuing its preliminary decision to award a contract for proposal #14-P-081-WH for internet provider wide area network services to Intervenor, Bright House Network, LLC (Bright House).

PRELIMINARY STATEMENT

On or about December 23, 2013, the Board issued a request for proposal (RFP) designated as #14-P-081-WH seeking vendors who could provide internet provider (IP) wide area network (WAN) services as described in the proposal documents. The RFP set forth a pre-proposal meeting to allow interested parties to ask questions and seek additional information if needed in order to accurately prepare a proposal.

The deadline for the submittal of proposals was January 22, 2014, at 2:00 p.m. Petitioner, AT and T Corp. (AT and T), timely

submitted a proposal for the contract award as did Bright House. Eventually, AT and T and Bright House were chosen as the two final candidates to be considered for the contract. In accordance with the RFP they were invited to make oral presentations. The selection committee was to then rank the companies to determine which would receive the contract. After the deliberations were completed, AT and T did not receive the award. Based upon the manner and timing of the oral presentations along with technical claims raised against the Bright House proposal, AT and T timely filed a challenge to the proposed award to Bright House.

The Board referred this case to DOAH on March 7, 2014. The Formal Written Protest (the protest) filed by Petitioner requested that the Board "cancel/rescind its proposed award to Bright House Network Enterprise Solutions and instead award this contract to AT and T, the only responsive bidder between the two finalists." Petitioner's protest alleged that Bright House should not be awarded the contract because: a. Intervenor's proposal was non-responsive to the RFP, and b. Intervenor obtained an unfair advantage in the evaluation process. Bright House has maintained its proposal substantially met all requirements of the RFP (this claim is accepted by the School Board) and that it did not receive an unfair advantage during the oral presentation portion of the evaluation (this claim is disputed by the School Board).

During the discovery portion of the instant case, Respondent determined its initial decision to award the contract to Bright House was incorrect. Thereafter, the Board joined AT and T in its assertion that Bright House participated in the oral presentation with an unfair advantage and that by its conduct should not receive the award.

The case was originally scheduled for hearing for March 31 and April 1, 2014. Thereafter, the case was continued twice before it was transferred to the undersigned. The parties engaged in significant discovery that ultimately reduced the hearing time required for the case and limited the factual issues to be tried.

At hearing, Petitioner presented testimony from Erik Lindborg, Craig Cowden, Gabino Nieto, and Kristine Rumping. Respondent presented the testimony of Cheryl Olson. Intervenor offered testimony from the following witnesses: William Henzmann, Brad Freathy, Carrie Smith, Jeffrey Cook, and Tom E. Lewis. The parties offered exhibits as described in the transcript of the proceedings. All objections to exhibits, documents, depositions, testimony, or motions to strike were ruled upon at hearing and are accurately noted in the transcript. The only unresolved motions pending are those filed by Petitioner and Intervenor seeking attorneys' fees in connection with this case. Those motions are addressed herein.

The Transcript was filed with DOAH on July 29, 2014. All parties timely filed Proposed Recommended Orders that have been reviewed and considered in the drafting of this Recommended Order.

FINDINGS OF FACT

1. The Board is a lawful entity of the State of Florida fully authorized to enter into contracts for the purchase of goods and services for the Brevard County School District.

2. As part of its responsibility to acquire IP WAN services to its properties, the Board's Office of Purchasing & Warehouse Services issued RFP #14-P-081-WH on December 23, 2013.

3. The RFP gave potential vendors the opportunity to attend a pre-proposal conference. Additionally, questions concerning any portion of the RFP could be directed in writing or by email to the Board's designated employees. The deadline for submitting questions was seven days before the closing date. If questions were posed, the Board's staff afforded all vendors the opportunity to review questions and answers.

4. The RFP terms and conditions were not challenged by any vendor.

5. Five vendors timely submitted proposals for the RFP. Of those, AT and T and Bright House were deemed responsive and responsible and, as the highest ranked vendors, were invited to make oral presentations to the selection committee.

6. AT and T was selected to present first at the oral presentations on February 5, 2014. Its presentation began at 8:30 a.m. The Bright House presentation was scheduled to begin at 10:00 a.m.

7. Since both vendors were deemed responsive and responsible, the criteria for evaluating the proposals was designated by the RFP as follows:

5.0 **ORAL PRESENTATION EVALUATION CRITERIA**

After evaluation of the proposals, the evaluation committee may conduct interviews or presentations from a short list of vendors. If this is determined, your company will be contacted for presentation to occur on the date specified in Attachment "A." Again, this is an optional presentation to be determined by the evaluation committee.

The Respondent's response will be scored by Committee member in accordance with the following scale:

0= Unsatisfactory: Not responsive to the question.

1= Below Minimum Standards: Responsive to the question but below acceptable standards.

2= Marginal: Minimal acceptable performance standards and responsive to the question.

3= Satisfactory: Above minimum performance, Effective and Responsive to the question.

4= Exceeds Expectations for effectiveness and responsiveness to the question.

All presentations shall include at minimum:

1. Ability, Capacity, and Skill of the Proposer-(Weighted Value 25) The ability,

capacity, and skill of the firm to be able to provide the services here in addressed.

2. Relevant Experience-(Weighted Value 25)

The experience of the respondent with Florida School Boards and/or other political subdivisions.

3. Approach and Methodology-(Weighted Value 10) The Firm's approach and methodology of how the services herein addressed will be provided.

4. Best and Final Fee Schedule-(Weighted Value 40) Completed Table 1.1-Fee Schedule and Attachment "B" Proposal Form and Statement of Compliance. List any relevant services that are in addition to the duties outlined in this solicitation and/or revisions in the attached draft contract.

8. The events that transpired at the oral presentations led to the protest filed by AT and T. As previously noted, AT and T was scheduled to begin its presentation at 8:30 a.m. The AT and T team arrived timely for the demonstration and noted that members of the Bright House group were present in the room where the presentations were to be made. AT and T sought assurances that the Bright House presence would not adversely impact the chances of AT and T to receive the contract. It never occurred to the Board's selection committee members that Bright House might receive an unfair advantage by being able to view the AT and T demonstration before their presentation would be offered.

9. As the presentations were "open to the public," Bright House was allowed to remain in the room and reluctantly AT and T

proceeded with its demonstration and explanation of its proposal, the equipment it planned to use, and its best and final fee schedule. During the oral presentation, AT and T acknowledged that their "best and final fee schedule" was different from the numbers previously listed in their proposal. In the time between the original proposal submittal and the oral presentation, AT and T had whittled its pricing down to its "best and final offer."

10. When Bright House heard the final fee schedule AT and T was proposing had changed in the interim, Bright House quickly did a spreadsheet to reduce its prices below those proposed by AT and T. It is undisputed that in the time between the two presentations Bright House modified its oral presentation to include information drafted in response to the AT and T oral presentation.

11. AT and T did not know the pricing Bright House had included in its initial submission. Bright House did not know the pricing AT and T had included in its initial submission. Both vendors should have known that the highest ranked vendor following the oral presentations would likely be awarded the contract. As the weighted value for pricing was the heaviest weighted criteria, Bright House obtained an unfair advantage by changing its proposal after hearing and seeing the fee schedule proposed by AT and T.

12. After the oral presentations, the selection committee reviewed the proposals and selected Bright House for the intended award. Once the Board discovered that Bright House changed its presentation and fee schedule in response to the AT and T proposal, it announced its intention to rescind the proposed award to Bright House and to give the contract to AT and T.

13. Bright House maintains that because AT and T was allowed to change its pricing from the sealed proposal, it, too, was justified in changing its fee schedule. Bright House believes that the sealed proposal price was the pricing the Board was required to consider. Bright House claims that it did not act unethically in changing its oral presentation materials since it only did what AT and T was allowed to do (change its pricing).

14. The Board now requires sealed documents from all vendors making oral presentations so that no vendor may change its proposal in response to an earlier presentation. It did not occur to Board staff that a vendor would ever make such changes.

15. In Florida, there are three competitive solicitation processes that are used for the procurement of goods and services. They are distinct under the law. An invitation to bid (ITB) is used when the agency is able to define the product or service needed and when the acquisition is price-driven and evaluated based upon the lowest responsive bid.

16. The second process for the procurement of goods and services is the request for proposals (RFP). This process

affords more flexibility in that while the agency can define and specify what it needs in terms of goods and services the price-driven process is not practicable as other considerations need to be reviewed.

17. And finally, the third process for the procurement of goods or services is called invitation to negotiate (ITN). This method is more time consuming and is designed to allow the agency to negotiate in order to receive the best value.

18. In this case, the Board attempted to follow a hybrid of the RFP and ITN processes. By allowing the vendors to fine-tune their pricing between the submission of the original proposal and the oral presentation, the Board sought to obtain the vendor's lowest and best price.

19. The letter dated January 30, 2014, from Board employee, Cheryl Olson, to Bright House and AT and T reiterated the oral presentation evaluation criteria. The letter further provided, "should you have any questions regarding the presentations, please do not hesitate to contact Wil Henzmann, the Purchasing Agent responsible for this project" and gave his contact information. Neither vendor contacted Mr. Henzmann regarding the oral presentation evaluation criteria.

20. The issue of this case resulted because Bright House did not know that "best and final fee schedule" as stated in the oral presentation evaluation criteria (as interpreted by the

Board) allowed AT and T to do what it did: lower its fee schedule to the lowest it could for the work proposed.

21. The Board determined that both the Bright House and AT and T proposals materially met the terms and conditions of the RFP. That determination was correct based upon the weight of the credible evidence presented in this case. Both proposals demonstrate the vendors were "responsive and responsible" as described in the RFP.

22. It is further determined that AT and T timely filed its protest in this cause and submitted the appropriate bond as required by law and section 3.45 of the RFP.

23. No vendor timely challenged the terms "best and final fee schedule" as stated in section 5.0 of the RFP.

24. Allowing Bright House to change its presentation in response to the AT and T presentation gave it an advantage not extended to AT and T.

25. The selection committee did not authorize the changes Bright House made to its oral presentation in response to AT and T's presentation.

26. Bright House did not readily admit it had made changes to its presentation after viewing and hearing the AT and T presentation.

27. Bright House does not acknowledge it took unfair advantage by changing its proposal in response to the AT and T oral presentation.

28. None of the pricing schedules were made public until the oral presentations on February 5, 2014.

29. Section 3.10 of the RFP provides:

The School Board reserves the right to award the contract to the respondent(s) that the School Board deems to offer the best overall proposal(s). The School Board is therefore not bound to accept a proposal on the basis of lowest price. In addition, the School Board at its sole discretion, reserves the right to cancel this RFP, to reject any and all proposals, to waive any and all informalities, if it is deemed to be in the best interest of the School Board to do so. The School Board also reserves the right to make multiple awards, based upon experience and qualifications if it is deemed to be in the School Board's best interest. The District reserves the right to further negotiate any proposal, including price, with the highest rated respondent. If an agreement cannot be reached with the highest rated respondent, the District reserves the right to negotiate and recommend award to the next highest respondent or subsequent respondents until an agreement is reached.
[Emphasis added.]

30. Section 3.29 of the RFP provided:

It is the School Board's intent to award a contract(s) to the respondent(s) deemed most advantageous to the School Board in accordance with the evaluation criteria specified elsewhere in this RFP. The School Board reserves the right however, to conduct post-closing discussions with any respondent who has a realistic possibility of contract award including, but not limited to: request for additional information, competitive negotiations, and best and final offers.
[Emphasis added.]

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.57(1) and (3), Fla. Stat. (2013).

32. Section 120.57(3), Florida Statutes, provides, in part:

(3) ADDITIONAL PROCEDURES APPLICABLE TO PROTESTS TO CONTRACT SOLICITATION OR AWARD.—Agencies subject to this chapter shall use the uniform rules of procedure, which provide procedures for the resolution of protests arising from the contract solicitation or award process. Such rules shall at least provide that:

* * *

(f) 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. In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply 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. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an

administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.
[Emphasis added.]

33. An agency action will be found to be "clearly erroneous" if the agency's interpretation conflicts with the plain and ordinary intent of the law. Colbert v. Dep't of Health, 890 So. 2d 1165 (Fla. 1st DCA 2004). Colbert provides that in such a case, "judicial deference need not be given" to the agency's interpretation. In this regard, the Board has maintained that it is the trend among school districts to allow the two-step pricing described by the RFP. Such argument conflicts with the plain and unambiguous language of the law.

34. An act is "contrary to competition" if it unreasonably interferes with the objectives of competitive bidding, which are:

[T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the county at the lowest possible expense; and to afford equal advantage to all desiring to do business with the county, affording an opportunity for an exact comparison of bids.

Wester v. Belote, 103 Fla. 976, 981, 138 So. 721, 723-724 (Fla. 1931). In this case, Bright House took an unfair advantage of the situation and enjoyed a competitive edge not afforded AT and T.

35. Acts unsupported by logic or the necessary facts are arbitrary. Similarly, decisions are capricious if adopted without thought or reason, or if irrational. See Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34 (Fla. 1st DCA 2006).

36. In this case, the Board announced its decision to change its award mid-protest. After learning that Bright House changed its presentation and pricing in response to the AT and T oral presentation, the Board determined that unfair advantage had resulted. The Board has not, however, addressed the fundamental issue related to the procurement process of this case: that the RFP cannot be read to allow submittals that would amend or supplement the proposals already opened. See § 120.57(3)(f), Fla. Stat. Although information clarifying a submittal or answering questions posed by staff may be permitted after the proposals were opened, an RFP cannot allow proposers to amend their proposals after they have been opened. The Board's attempt to employ a hybrid process of RFP and ITN is not allowed by law.

37. The plain and ordinary reading of the statute prohibited AT and T and Bright House from changing the pricing schedules at the oral presentation. Neither vendor should have been allowed to do so.

38. In this case, the evaluation committee did not use the correct pricing to determine which vendor should be afforded the weighted value (40 per the RFP document). More critical, however, is the prospect of negotiating with one vendor and,

should that not work out to the Board's satisfaction, the intention to negotiate with the other. The acquisition process used by the Board does not contemplate that type of negotiation.

39. It is concluded that the intended award to Bright House must be withdrawn based upon the inappropriate actions of the vendor in changing its pricing in direct response to the AT and T oral presentation. It is contrary to fair and competitive processes to allow a vendor to modify its presentation after viewing another vendor's pricing. It is further concluded that allowing AT and T to modify its pricing was contrary to the law governing the RFP process.


40. Finally, as to the parties' requests for attorneys' fees, it is determined that neither Bright House nor AT and T complied with the strict letter of the rules governing this proceeding. Neither afforded the information sought during discovery in a timely, full, and complete manner. With regard to Bright House it is determined that the failure to disclose its "expert witness" in a timely manner was of no consequence or prejudice to AT and T as the testimony was largely discounted and deemed unpersuasive. It is concluded no party is entitled to recover attorneys' fees based upon the record of this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Brevard County,

Florida, enter a Final Order rejecting all proposals for this RFP.

DONE AND ENTERED this 1st day of October, 2014, in Tallahassee, Leon County, Florida.



J. D. PARRISH
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Filed with the Clerk of the
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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.