

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMERGENCY COMMUNICATIONS
NETWORK, LLC,

Petitioner,

vs.

Case No. 15-6333BID

DIVISION OF EMERGENCY
MANAGEMENT,

Respondent,

and

EVERBRIDGE, INC.,

Intervenor.

RECOMMENDED ORDER

On December 14 through 16, 2015, an administrative hearing in this case was conducted in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the proposed award by the Division of Emergency Management (DEM) of the contract referenced herein to Everbridge, Inc. (Everbridge) is contrary to DEM's governing statutes, rules or policies, or to the solicitation specifications.

PRELIMINARY STATEMENT

On September 1, 2015, DEM posted a Request for Proposals seeking to procure a statewide emergency notification and alert system.

Proposals were received from five vendors including Emergency Communications Network, LLC (ECN) and Everbridge.

On October 19, 2015, DEM issued notice of its intent to award the contract to Everbridge. ECN filed a protest challenging the proposed award and requesting a hearing.

On November 12, 2015, DEM forwarded the challenge to the Division of Administrative Hearings (DOAH), which scheduled and conducted the proceeding.

On November 13, 2015, a Notice of Intervention was filed by Everbridge, which was granted by Order dated November 16, 2015.

On November 18, 2015, ECN filed a Motion for Leave to Amend Formal Written Protest and Petition for Formal Administrative Hearing that was granted without objection at the commencement of the hearing.

On December 14, 2015, the parties filed a Joint Pre-hearing Stipulation that included a statement of admitted facts that have been adopted and incorporated herein as necessary.

Also on December 14, 2015, Everbridge filed a Motion to Dismiss for Lack of Standing or, Alternatively, to Relinquish Jurisdiction (Motion to Dismiss) and two Motions in Limine. The Administrative Law Judge (ALJ) denied the Motions in Limine at the commencement of the hearing. The ALJ reserved ruling on the Motion to Dismiss and advised the parties to address the arguments raised therein in proposed recommended orders.

At the hearing, Joint Exhibits 1 through 22 were admitted by stipulation of the parties. ECN presented the testimony of six witnesses and had Exhibits 8 through 11 admitted into evidence. DEM presented no witnesses and had Exhibit 1 admitted

into evidence. Everbridge presented the testimony of one witness.

A Transcript of the hearing was filed on December 28, 2015. All parties filed proposed recommended orders that have been reviewed in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On September 1, 2015, DEM posted RFP-DEM-15-16-037 (RFP), titled "Florida Statewide Emergency Alert and Notification System," on the state's Vendor Bid System ("VBS").

2. The purpose of the RFP is to procure a statewide emergency alert and notification system as mandated by section 252.35(2)(a)(6) Florida Statutes, which requires the DEM to "[e]stablish a system of communications and warning to ensure that the state's population and emergency management agencies are warned of developing emergency situations and can communicate emergency response decisions."

3. DEM is a separate budget entity established within the Executive Office of the Governor. Tara Walters, the purchasing manager for DEM, was responsible for the RFP and the procurement process.

4. According to the RFP, the system is to be "vendor-hosted" and capable of providing "mass notification" of "imminent or sudden hazards" through voice telephone calls, text messages,

emails, social media, and "Telecommunications Device of the Deaf/TeleTYpewriter (TDD/TTY)" systems.

5. ECN and Everbridge are vendors of mass notification systems.

6. Section 5 of the RFP provided, in relevant part, as follows:

RESPONSIVENESS

a) Vendor. In order to qualify as a responsive vendor as that term is defined by section 287.012(27), Florida Statutes, a Proposer must submit a proposal that conforms in all material respects to this solicitation.

b) Proposal. In order to qualify as a responsive proposal as that term is defined by section 287.012(26), Florida Statutes, a proposal must conform in all material respects to this solicitation.

1. The Division shall not consider any proposal that contains a material deviation from the terms of this solicitation. However, the Division reserves the right to consider a proposal that contains a minor deviation or irregularity so long as that minor deviation or irregularity does not provide a competitive advantage over the other proposers.

2. The Division shall not permit a vendor to amend a proposal after the due date for submissions - even if to correct a deviation or irregularity.

* * *

5. A proposal may fail to qualify as responsive by reasons that include, but are not limited to:

a. Failure to include a material form or addendum;

b. Failure to include material information;

c. Modification of the proposal specifications;

d. Submission of conditional proposals or incomplete proposals; and,

e. Submission of indefinite or ambiguous proposals.

7. Section 28 of the RFP included specific proposal format instructions. Each proposal was to contain two parts: a "Technical Proposal" (Part I) and a "Price Proposal" (Part II). The RFP explicitly identified the contents to be set forth within each part.

8. The Technical Proposal was to include multiple sections, including a table of contents, an executive summary, and a "Management Plan."

9. According to the RFP, the Management Plan was required to include four elements: the vendor's relevant experience; significant examples of the vendor's other clients and pertinent references; a project staffing plan; and a completed "data sheet," the form for which was included in the RFP.

10. The RFP also required that the Technical Proposal include a section identified as "Technical Plan/Minimum System Requirements" related to the "Scope of Work" necessary to implement the system. The referenced minimum requirements were explicitly set forth at Exhibit "A" to the RFP.

11. Finally, the RFP required that the Technical Proposal include the vendor's financial statements for the prior three years as follows:

The Proposer shall provide information regarding its financial status in order to demonstrate that it is financially stable and has the resources necessary to perform the services outlined in this RFP on a statewide basis. Proposers are to include financial statements created in accordance with Generally Accepted Accounting Principles for the last three years. (Financial documentation may be combined into one file and are not included in the page count). The Division reserves the right to evaluate the financial status of any or all Proposers before making an award decision.

12. The Price Proposal was to be submitted separately from the Technical Proposal by using the "Price Proposal Form" included in the RFP.

13. According to the Schedule of Events set forth in the RFP, proposals were due on September 30, 2015.

14. DEM received five proposals in response to the RFP. DEM determined that three of the proposals were not responsive, and they received no further evaluation.

15. The two proposals that advanced into the evaluation process were those submitted by ECN and Everbridge.

16. The RFP identified the process by which each proposal would be evaluated, including the formulas by which some scores would be calculated.

17. Technical Proposals and Price Proposals were separately evaluated.

18. The Technical Proposals were reviewed by a group of six evaluators, several of whom had extensive experience in emergency management and notification systems.

19. The evaluators subjectively scored the three Management Plan elements pertaining to relative experience, examples/references, and staffing plan. Based on the evaluation, proposals could be awarded up to 30 points allocated between the referenced elements. The scores assigned by the evaluators to ECN and Everbridge for the three Management Plan elements were as follows:

<u>Evaluator</u>	<u>ECN</u>	<u>Everbridge</u>
Danny Hinson	13	30
Scott Nelson	30	30
Brian Misner	24	29
Phil Royce	29	27
Kevin Smith	24	25
Scott Warner	20	26

20. The fourth element of the Management Plan, the data sheet, was worth up to 20 points, and was scored through a formula included in the RFP. The data sheet required a vendor to identify a "guaranteed minimum number of concurrent recipient contacts" obtainable by various methods and timeframes.

21. Using this formula, Everbridge received a data sheet score of 20 and ECN received a data sheet score of 3.99.

22. An assertion by ECN that Everbridge cannot achieve the guaranteed minimums set forth on its data sheet was unsupported by evidence.

23. The RFP specifically provided that the "Technical Plan/Minimum System Requirements" section of the Technical Proposal section would be evaluated on a pass/fail basis as follows:

The minimum requirements of the system are broken down in to five (5) sections in the Exhibit "A", Scope of Work, and are as follows: Minimum System Requirements, Minimum Geographical Information System Requirements, Minimum Notification Requirements, Minimum Security Requirements, and Minimum Support Requirements.

Vendor's responses shall state each requirement and detail how the system they are proposing meets or exceeds that requirement. This portion of your response is very important as proposed systems that do not meet each of the minimum requirements shall fail the Responsibility Requirements of the RFP

and shall not be considered for additional review or scoring.

24. Three of the six evaluators determined that ECN's proposal failed to comply with all of the minimum requirements and accordingly failed to comply with the "Responsibility Requirements" of the RFP. Nonetheless, DEM completed the review and scoring of the ECN proposal.

25. Price Proposals were reviewed and scored by Ms. Walters according to a formula specified in the RFP. Pricing was worth up to 10 points. Everbridge received a price score of 7 points. ECN received a price score of 10 points.

26. There is no evidence that Ms. Walter's review of the Price Proposals failed to comply with the applicable requirements of the RFP.

27. At the conclusion of the evaluation process, Everbridge's total score was 54.83 and ECN's total score was 37.32.

28. On October 19, 2015, DEM posted its Notice of Intent to Award the contract under the RFP to Everbridge.

29. ECN filed a Notice of Protest on October 20, 2015.

30. ECN filed a Formal Written Protest on October 30, 2015.

31. ECN asserts that at least some of the Management Plan scoring deviated from the RFP and the instructions provided to

the evaluators. ECN specifically asserts that the evaluations conducted by three of the evaluators included consideration of information extrinsic to the RFP and the vendor proposals, that the information was flawed, and that the scores awarded were therefore inappropriate.

32. The evidence fails to establish that the evaluation of the Management Plan materially failed to comply with procedures or criteria set forth in the RFP.

33. The evidence establishes that the individuals selected to evaluate the proposals understood the requirements of the RFP, and that they conducted their evaluations according to their understanding of the evaluation criteria at the time the evaluations were performed.

34. The evidence further fails to establish that any alleged deficiencies in the evaluation process, even if established, would have altered the total scores sufficiently to change the intended award of the contract as set forth in the DEM Notice of Intent.

35. ECN asserts that the Question and Answer process employed by DEM was irrational and materially impaired the competitiveness of the procurement process.

36. Pursuant to the RFP, vendors were permitted to submit questions to DEM. On September 21, 2015, DEM posted the

questions and the DEM responses, including this question submitted by ECN:

If a prospective bidder utilizes third parties for completing the RFP requirements, shall the bidder's service level agreements (SLAs) with those third parties be submitted within the proposal response?

37. DEM's posted response to the question was "Yes."

38. Everbridge did not include SLAs within its proposal.

ECN asserts that DEM should have rejected the Everbridge proposal as nonresponsive because Everbridge failed to include SLAs in its proposal.

39. ECN submitted SLAs within its proposal, although the SLAs submitted by ECN were unexecuted or incomplete.

40. There is no requirement in the RFP that vendors submit SLAs as part of a response to the RFP.

41. Section 15 of the RFP (titled "Oral Instructions/Changes to the Request for Proposal (Addenda)") provided in material part as follows:

No negotiations, decisions, or actions will be initiated or executed by a proposer as a result of any oral discussions with a State employee. Only those communications which are in writing from the Division will be considered as a duly authorized expression on behalf of the Division.

Notices of changes (addenda) will be posted on the Florida Vendor Bid System at:

http://vbs.dms.state.fl.us/vbs/main_menu. It is the responsibility of all potential proposers to monitor this site for any changing information prior to submitting your proposal. All addenda will be acknowledged by signature and subsequent submission of addenda with proposal when so stated in the addenda.

42. DEM's response to the question posed by ECN did not amend the RFP. DEM did not issue any notice of change or addenda to the RFP that required a vendor to include SLAs within a response to an RFP.

43. ECN asserts that Everbridge is not a responsible vendor because Everbridge failed to comply with Section 18 of the RFP (titled "Qualifications"), which provided, in relevant, part as follows:

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

* * *

In accordance with sections 607.1501, 608.501, and 620.169, Florida Statutes, foreign corporations, foreign limited liability companies, and foreign limited partnerships must be authorized to do business in the State of Florida. "Foreign Corporation" means a corporation for profit incorporated under laws other than the laws of this state. Such authorization should be obtained by the proposal due date and time, but in any case, must be obtained

prior to posting of the intended award of the contract.

44. ECN, a Delaware-incorporated limited liability company, complied with the referenced requirement. Everbridge, a Delaware-incorporated corporation, did not.

45. Although Everbridge asserts that the statutes referenced in the requirement did not require it to be registered prior to the posting of the intended award, the issue is not whether Everbridge complied with state law, but whether Everbridge met the RFP's qualification requirements.

46. The RFP specifically provided that in order to qualify as a responsive vendor "as that term is defined by section 287.012(27) Florida Statutes," proposals were required to conform in all material respects to the solicitation. The RFP provided as follows:

The Division shall not consider any proposal that contains a material deviation from the terms of this solicitation. However, the Division reserves the right to consider a proposal that contains a minor deviation or irregularity so long as that minor deviation or irregularity does not provide a competitive advantage over the other proposers.

47. The issue is whether the registration requirement was "material" to the RFP. It was not. The foreign corporation registration requirement was "boiler plate" language, apparently included by DEM in the RFP with little thought. Neither Ms.

Walters, nor any other DEM employee, made any effort to determine whether the vendors that submitted proposals in response to the RFP complied with the requirement.

48. The evidence fails to establish that the failure to comply with the registration requirement constituted a material deviation from the terms of the RFP. Everbridge obtained no competitive advantage over ECN or any other vendor through noncompliance with the registration requirement.

49. ECN asserts that the Everbridge proposal was nonresponsive to the RFP because the Everbridge proposal included the following language:

Legal Disclosure
Everbridge's RFP response is provided for informational purposes and is not meant to form a binding contract for the provision of our critical communications suite. Upon request, Everbridge will engage in contract negotiations to execute a service agreement tailored to appropriately capture each party's applicable rights and obligations.

50. ECN asserts that the cited language rendered the Everbridge proposal as conditional. The RFP provided that submission of a conditional proposal could result in a proposal being deemed nonresponsive. The evidence fails to establish that Everbridge submitted a conditional proposal in response to the RFP.

51. Section 20 of the RFP (titled "Agreement Document") provided as follows:

The Division's "Contract" document is attached hereto and made a part hereof. The terms and conditions contained therein will become an integral part of the contract resulting from this RFP. In submitting a proposal, the proposer agrees to be legally bound by these terms and conditions.

52. One of the three submitted proposals rejected by DEM prior to evaluation was considered to be a conditional proposal, in part because the vendor struck through portions of the RFP in its response. Unlike that vendor, Everbridge unequivocally acknowledged, on page 127 of its response, the DEM's "instructions regarding the terms and conditions that will ultimately form the service agreement between the state and its selected vendor."

53. Everbridge asserts that the ECN proposal failed to comply with the requirement that the Technical Proposal include "financial statements created in accordance with Generally Accepted Accounting Principles for the last three years," and that the failure renders the ECN proposal nonresponsive. The evidence supports the assertion.

54. The phrase "Generally Accepted Accounting Principles" (GAAP) refers to a set of financial reporting standards and procedures adopted by the Financial Accounting Standards Board

(FASB), a private organization, and adopted throughout the accounting profession.

55. Financial statements prepared in accordance with GAAP include what are commonly identified as "notes" that disclose extensive and relevant information supporting the financial analysis reported in the statements.

56. The financial statements submitted by ECN did not meet the requirements of the RFP. Although ECN asserted at the hearing that the financial statements it submitted were prepared in accordance with GAAP, the financial statements submitted by ECN were incomplete because they failed to contain the requisite notes.

57. The RFP required that the financial information provided by each vendor "demonstrate that it is financially stable and has the resources necessary to perform the services outlined in this RFP on a statewide basis."

58. The notes to ECN's financial statements should properly have disclosed that the ECN statements contained financial information related to ECN subsidiaries, in addition to that of ECN. The absence of notes impeded determination of the reporting entity's financial stability and resources.

59. The Everbridge proposal fully complied with the requirement to submit financial statements prepared in accordance with GAAP and included the notes.

60. ECN's failure to submit financial statements meeting the RFP requirement is a material deviation from the terms of the solicitation that may not be waived because it provided a competitive advantage over other proposers who complied with the requirement.

61. Everbridge also asserts that the ECN proposal is nonresponsive because three of the six evaluators determined that, for various reasons, ECN's technical plan failed to meet the minimum requirements set forth in the Scope of Work.

62. The RFP specifically provided that a failure to meet each of the minimum requirements would result in a proposal not being further reviewed or scored. Nonetheless, the ECN proposal was reviewed and scored.

CONCLUSIONS OF LAW

63. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.57(1) and 120.57(3), Fla. Stat. (2015).^{1/}

64. Section 120.57(3)(f) provides, in relevant part, as follows:

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).

65. The evidence fails to establish that the proposed award of the contract to Everbridge is contrary to DEM's governing statutes, rules or policies.

66. As to whether the proposed award complies with the specifications set forth in the solicitation, the proposal submitted by Everbridge substantially complied with the specifications of the RFP. Everbridge's failure to comply with the foreign corporation registration requirement was not a material deviation from the specifications.

67. A deviation from the specifications is material, "if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. Dept. of Gen. Servs., 493 So. 2d 50 (Fla. 1st DCA 1986); Robinson Elec. Co., Inc. v. Dade Cnty., 417 So. 2d 1032 (Fla. 3d DCA 1982).

68. At the hearing, DEM was unable to offer any rationale for having even included the requirement in the RFP. DEM made no effort to ascertain compliance with the requirement by any vendor. Everbridge gained no competitive advantage over other vendors by the deviation. It is not possible to conclude that a deviation is material when DEM made no effort to determine compliance by any vendor prior to posting the notice of intended award.

69. On the other hand, ECN's failure to submit appropriate financial statements gave ECN a substantial competitive advantage over other vendors. The failure to provide the notes that are routinely provided as part of financial statements prepared in accordance with GAAP obstructed an accurate analysis of ECN's financial stability and resources, and was a material deviation from the requirements of the RFP sufficient to warrant disqualification of the ECN proposal as nonresponsive.

70. The evidence fails to establish that the proposed award of the contract to Everbridge is clearly erroneous, contrary to competition, arbitrary, or capricious.

71. A decision is clearly erroneous when it is based on substantial error in proceedings. An agency's decision or intended decision will be found to be "clearly erroneous" if it is without rational support and, consequently, the Administrative Law Judge has a "definite and firm conviction that a mistake has been committed." See U.S. v. U.S. Gypsum Co., 68 S. Ct. 525 (1948). The evidence fails to establish that there has been an error in the proceedings or that the award of the contract at issue in this case to Everbridge would be a mistake.

72. As to whether the RFP process was "contrary to competition," the phrase is best understood by its plain and obvious meaning--i.e., against or in opposition to competition. The purpose of the competitive bidding process is to secure fair competition on equal terms to all bidders by affording an opportunity for an exact comparison of bids. See Harry Pepper and Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2d DCA 1977). The evidence fails to establish that the RFP process employed by DEM in this case was contrary to competition.

73. The evidence further fails to establish that the process was arbitrary or capricious. "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, or despotic." Agrico Chemical Co. vs. State Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Emergency Management enter a final order dismissing the First Amended Formal Written Protest and Petition for Formal Administrative Hearing filed by Emergency Communications Network, LLC, and awarding the contract to Everbridge, Inc.

DONE AND ENTERED this 28th day of January, 2016, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of January, 2016.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2015), unless otherwise indicated.

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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.