

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MOTOROLA SOLUTIONS, INC.,

Petitioner,

vs.

Case No. 16-2766BID

BAY COUNTY, FLORIDA, BOARD OF  
COUNTY COMMISSIONERS,

Respondent,

and

WILLIAMS COMMUNICATIONS, INC.,

Intervenor.

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FINAL ORDER

Pursuant to notice to all parties, a final hearing was held in this matter before Administrative Law Judge R. Bruce McKibben, pursuant to a contract between the Florida Division of Administrative Hearings ("DOAH") and Bay County, Florida. The final hearing was held on June 23 and 24, 2016, in Panama City, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the decision by Respondent, Bay County, Florida, Board of County Commissioners (the "County" or the "Board"), to approve the bid proposal submitted by Intervenor, Williams Communication, Inc. ("Williams"), should be reversed in favor of granting the proposal by Petitioner, Motorola Solutions, Inc. ("Motorola").

PRELIMINARY STATEMENT

In April 2016, the County posted notice of its intent to award a contract to Williams to provide Bay County with a turnkey project that would provide the county and other jurisdictions and agencies within the county a "P25-standard compliant 800MHz digital linear simulcast trunked radio network." Motorola had also submitted a bid proposal, but its proposal was rejected in favor of Williams' proposal. On May 4,

2016, Motorola timely filed a Consolidated Formal Written Protest Petition, challenging the denial of its bid proposal and the approval of Williams' proposal.

Pursuant to a contract between DOAH and the County, the undersigned Administrative Law Judge was assigned to conduct a final hearing in this matter. The hearing was conducted in accordance with the Bay County Procurement Code, specifically §2-114(11).

At the final hearing, Motorola called three witnesses: Brian Whaley, senior account manager for the Florida panhandle; Dr. Carole Amidon, Berkeley Research Group; and Wendi Sellers, purchasing director for the County. Mr. Whaley was also recalled as a rebuttal witness. Motorola's Exhibits 3, 4, 6 through 15, 18, 22, 24 through 26, 29 through 31 (including 30.1 and 30.2), 33 through 35, 37, 43, 49, 52 and 53 were admitted into evidence. The County called three witnesses: Dr. Rodney Roberts, Brian Whaley, and Dominic Tusa. The Board's Exhibits 2 and 4 through 11 were admitted into evidence. Exhibits 12 through 16 were proffered. Williams did not call any witnesses to testify at final hearing; its Exhibits 17 through 20, 22, 25 through 34, and 39 were admitted into evidence. Joint Exhibits 1 and 2 were also received into evidence.

A transcript of the proceeding was ordered. Although there are no provisions in the County Procurement Code for such, the parties agreed to submit proposed findings of fact and conclusions of law on or before July 12, 2016. Each party timely submitted their post-hearing submission and each was considered in the preparation of this Final Order.

#### FINDINGS OF FACT

(Findings of fact 1 through 24 were stipulated to by the parties and were included in their Prehearing Stipulation.)

1. Motorola is a Delaware corporation with its principal place of business located at 1303 East Algonquin Road, Schaumburg, Illinois.

2. The County is the legislative and governing body of Bay County, Florida, pursuant to Article VIII, Section (1)(e) of the Florida Constitution, and chapter 125, Florida Statutes, and has its principal business address at 840 West 11th Street, Panama City, Florida.

3. The County contracted with Tusa Consulting Services, II, LLC ("Tusa") to support its request for proposal ("RFP") process.

4. On July 31, 2015, the Board issued RFP #15-32, entitled "P25 Public Safety Radio System." Subsequently, the County issued six addenda to the RFP.

5. RFP section 1.2.2.18, entitled "Evaluation Process and Criteria," described the process that the County planned to follow in evaluating responses.

6. Motorola, Williams and one other entity timely submitted proposals for consideration. On October 15, 2015, the County ultimately disqualified one proposer, and considered only Motorola and Williams for award.

7. Tusa employees Nick Tusa and Dean Hart performed the technical evaluation of the proposals.

8. On December 21, 2015, the County announced its intent to award the contract to Williams, indicating total scores of 85.21 for Williams and 84.07 for Motorola.

9. On December 22, 2015, Motorola filed a notice of intent to protest.

10. Upon review of Motorola's protest, the County concluded that the relative weights assigned to evaluation criteria during the scoring process did not match the relative weights indicated in RFP section 1.2.2.18. Applying the correct weights changed the total scores to 84.18 for Motorola and 83.95 for Williams.

11. Upon recommendation of Tusa, the County rounded the total scores to 84 and deemed the proposals a tie.

12. County staff proposed to reject all proposals and re-advertise the RFP.

13. On January 5, 2016, the Board of County Commissioners considered the staff recommendation. By a 3-2 vote, the Commission accepted Tusa's recommendation to round the scores and to commence contract negotiations with Williams.

14. Motorola filed another written challenge to the County's January 5 action, which it characterized as an award of the contract to Williams.

15. On January 19, 2016, the Board of County Commissioners again considered the RFP process. County staff again recommended rejecting all proposals and re-advertising the procurement. After a motion to continue negotiations with Williams failed by a vote of 3-2, the Commission passed a motion to hire an outside attorney with experience and expertise in the area of procurement law to advise the County.

16. On March 15, 2016, the Commission voted to continue negotiations with Williams.

17. On March 17, 2016, Motorola filed an intent to protest the Commissioners' vote of March 15, 2016.

18. On March 21, 2016, the County responded to Motorola's various pending protests, concluding that the protests were premature because the County had not yet made an award decision.

19. On March 31, 2016, Motorola filed an Amended and Supplemental Formal Written Protest Petition.

20. On April 19, 2016, the Board of County Commissioners voted to authorize County staff to post a Notice of Award to Williams and to accept protests to the decision prior to entering into any contract with Williams.

21. On April 21, 2016, Motorola filed another intent to protest the notice of award.

22. On May 4, 2016, Motorola filed its Consolidated Formal Protest Petition.

23. On May 10, 2016, the County procurement director, Wendi Sellers, issued the County's written decision denying Motorola's protest.

24. The P25 Public Safety Radio System in the RFP was intended to be a turnkey system that met or exceeded all requirements.

25. The RFP contained a number of important and necessary elements, including but not limited to: 1) Portable units must have a one quarter (1/4) wavelength antenna; 2) Portable and mobile radio devices must meet minimum electrical specifications; 3) Portable and mobile radio units must include separate volume and channel select knobs; 4) Microwave link segments must have a 40 dB flat fade margin and be designed with a microwave loop that excludes any single point of failure; and 5) The proposed network must be able to migrate to P25 Phase II in the future without adding new hardware.

26. The County had some concerns about Motorola's response relating to some of the required items. Clearly, the portable radio units did not have 1/4 wavelength antennas; the radios Motorola proposed had 1/2 wavelength antennas which are much longer and bulkier, and less easy to use. Motorola indicated that it could address that problem "during negotiations" with the County, but its response to the RFP was definitely deficient.

27. There is some question whether Motorola's proposed radios met the minimum electrical specifications for portable radios. While the datasheet for the radios included by Motorola in its bid proposal was out of date, Motorola maintains that the radios it specifically meant to include would meet the standards.

28. The hand-held radios proposed by Motorola did not come equipped with individual knobs for volume control and channel selection. Instead, the radio proposed by Motorola contained a knob for volume and a switch for channel selection. Again, Motorola said it would address the discrepancy with the County during negotiations, if necessary.

29. Motorola's proposal for meeting the 40 dB flat fade margin was suspect. The applicant suggested that if there was a "fix" needed, it would do so without cost to the County. As to the loop/ring design without a single point of failure, again



Motorola's proposal appeared somewhat deficient. One of the proposed sites on the system, in Mexico Beach, spurs off from the rest of the system, leaving only one link to and from the site. That could result in a single point of failure.

30. It appears that Motorola would need to add hardware in order to do the complete upgrade to Phase II, and no costs were included in its proposal to cover that need. This resulted in a cost estimate lower than Williams, but the lower cost was not justified.

31. Tusa assigned two experienced employees to evaluate the technical portions of the bid proposals. They assigned points to literally hundreds of line items on their scoresheets, totaled scores for each section, and weighted the section scores in accordance with section 1.2.2.18 of the RFP. The section scores were then totaled and multiplied by .70 (i.e., 70 percent) to obtain a final technical score for consideration. That figure was added to the final cost score figure and combined for an "Overall Project Score" for each proposal.

32. Tusa incorrectly weighted some of the scores, resulting in a complaint from Motorola. Those errors were corrected and revised Overall Project Scores were assigned.

33. Upon completion of its error corrections, Tusa found the Overall Project Scores to be "mathematically identical," i.e., 84.175 for Motorola and 83.950 for Williams, a difference

of about two tenths of a point. Never before had Tusa seen scores so close in an RFP situation. The scores were close enough that the County considered rejecting all the bids and starting over with the RFP process. However, so much time and work had gone into the project that another resolution was sought. So, instead of rejecting both bids, Tusa recommended rounding the scores to the nearest whole number, resulting in a tie score of 84. Inasmuch as Williams' technical score was higher than Motorola's, and the Motorola cost projection was suspect due to possible omissions of costs, the County decided to negotiate with Williams. Motorola timely filed a protest to challenge that decision.

34. Motorola had numerous concerns about the scoring process used by Tusa and the County during the proposal evaluation conducted by Tusa.

35. First, Motorola objected to the rounding of scores. However, both Tusa and the County justified the concept as a means of effectuating a faster and final resolution, which was preferable to starting over. The rationale for rounding the scores was explained credibly by Tusa and accepted as reasonable by the County.

36. Motorola complained that while the RFP did not specifically allow an applicant to get more points by showing it "exceeded" the criteria, Williams received scores higher than

the maximum for some sections. However, it is evident from Motorola's own submission that it also designated areas of its proposal as exceeding the requirements. In fact, Motorola had prior experience in bids evaluated by Tusa as to the ability to exceed a criterion. Motorola did not receive as many "exceeds" as Williams during the review, but that was based on the quality of the proposals, not favoritism to one applicant versus the other.

37. Motorola pointed out some scoring errors made by Tusa in the evaluation of the proposals. For example, points were awarded by one evaluator for a section that did not even exist, i.e., section 3.2.5. The other evaluator did not make that mistake. When the mistake was pointed out, the evaluator inexplicably corrected it by giving both applicants a score of 1 on that non-existent section. On section 6.1, which should result in a score of 0 or 1, Tusa awarded Williams a 2. Both of the errors were corrected when pointed out, but show some level of sloppiness by Tusa in its evaluation. However, neither of the errors was significant enough to warrant rejection of the final decision. There were, for example, other errors made by the evaluators that benefitted Motorola instead of Williams.

38. A primary complaint by Motorola had to do with how the cost portions of the proposals were weighted. RFP section 1.2.2.18 provides, in pertinent part:

The County plans to use a two-step process when evaluating Proposals. Technical and Pricing Proposals shall be evaluated separately using a weighted point system. Out of a maximum 100% Overall Project Score, 70% shall be allocated to Technical Proposal evaluation scores with 30% being allocated to system cost over the life of the system (initial cost + one year warranty plus additional 14 years of maintenance and operational costs (15 year warranty support)).

\* \* \*

Proposals that are determined responsive and complete will be evaluated by an Evaluation Committee comprised of three (3) Tusa Consulting Services personnel. The Proposal scoring the highest will be submitted to the County with recommendations to begin negotiations with the corresponding Vendor.

Technical Proposals will be graded in the following areas, listed in relative order of importance, with respect to the requirements as outlined in this RFP:

1. Performance, coverage, capability, and versatility (30%).
2. Reliability, redundancy, and warranty (20%).
3. Proposer qualifications, history of product support, RFP deviations (20%).
4. Quality of maintenance, response time, availability of service parts (10%).
5. Interoperability, and proposed timeframe for project completion (5%).
6. Proposed Training (5%).
7. System installation, and implementation planning (5%).
8. Organization, scope, and detail of proposal (5%).

The scored results of this Technical Evaluation will be multiplied by 0.70, thereby yielding a weighted technical

project-total score. The results of this portion of the Evaluation shall be submitted to the Bay County Purchasing Department. The cost Proposals will comprise of 30% of the total Proposal score.

\* \* \*

The Total Cost will be calculated by comparing the relative cost differences between responsive Cost Proposals and evaluating the Proposal costs by simple percentage on the total cost of procurement and annual operation. The combination will be determined at the sole discretion of the County.

The Proposer Submittal receiving the highest Overall Project Score shall be considered for the Contract Award, by the Evaluation Committee, subject to Bay County's Total Cost Analysis set forth below. Further, the County retains the right to reject all bids for any and all reasons, in the exercise of its sole discretion. In the case of a tied Overall Project Score, the Consultant shall recommend the Proposal Submittal having the highest Technical Proposal evaluation score.

39. Motorola contends that Tusa improperly assigned the cost scores under this section. Tusa took both applicants' cost projections (\$17,569,299 by Motorola; \$20,335,354 by Williams), totaled them, and divided each projection by the total. This resulted in a figure of 46.35 for Motorola, 53.65 for Williams. Those numbers were divided by .30 (i.e., 30 percent) for a final cost score of 16.10 for Motorola and 13.91 for Williams. Those scores were added to their technical scores for their Overall

Project Scores (which were ultimately deemed mathematically identical).

40. Motorola contends that at least one of the parties' cost proposals should have had a score of 30 under the terms of RFP section 1.2.2.18, but that contention is not persuasive. Tusa credibly explained how the cost score calculation worked. An expert witness, Dr. Roberts, supported the Tusa method, although he agreed it was but one way of approaching the issue. Another expert, Dr. Amidon, constructed a totally different method which, though reasonable, was not sufficiently proven to be more reasonable than the method Tusa used.

41. Motorola also took exception to the fact that only two evaluators reviewed the projects even though the RFP notes that a "committee comprised of three" would review the proposals. At the beginning, there were three Tusa employees involved, but one of them had to recuse himself due to a relationship with one of the vendors. While he remained involved in a clerical capacity, he did not evaluate the proposals directly. His removal from the evaluation process and resulting two-man evaluation was completely understandable.

42. All in all, the review process and the final decision were consistent with the spirit of the RFP, even if mistakes were made. The County's decision to negotiate with Williams was justified.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over this proceeding in accordance with a contract between DOAH and the Bay County, Florida Board of County Commissioners. Pursuant to that contract, provisions of the Bay County Procurement Code were to be followed when conducting the final hearing. Specifically, section (11)d. of that code states:

To the maximum extent practicable, the hearing shall be informal. The [ALJ] shall conduct a de novo hearing consistent with minimum procedural due process. All parties shall have the opportunity to respond, to present evidence and argument on all issues and to conduct cross-examination and submit rebuttal evidence. The standard of proof shall be the preponderance of the evidence standard. The protesters shall have the burden of proof. The [ALJ's] decision shall be based on competent substantial evidence. Judicial rules of evidence and procedure shall not apply to the hearing. There shall be a court reporter present at the hearing.

44. The prescribed Code section was followed to the extent possible. Each party was allowed the opportunities enumerated in the rule, and the process was made as informal as possible. No party objected to the procedures adopted by the undersigned for consideration of this matter.

45. Both the County and Williams made persuasive arguments in their proposed conclusions of law that 1) Motorola's shortcomings in its proposal militate against Motorola having

standing in this proceeding; and 2) the final decision in this matter should be based on an abuse of discretion or arbitrary and capricious standard. However, in light of the "informal" nature of this proceeding as set forth in the Bay County Procurement Code, those arguments are rejected.

46. Instead, the traditional preponderance of evidence standard under a de novo review is more appropriate. It must still be noted that 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 . . . 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).

47. Motorola did prove, by a preponderance of evidence, that the County (through Tusa) made mistakes in the review of the RFP responses by the two applicants. The scoresheets had errors. Only two evaluators were used. Those errors were de minimis.

48. Further, Motorola's objections to the assignment of additional points for exceeding a criterion are rejected. Motorola knew or should have known that such points could be awarded. Its own proposal strongly suggests knowledge of that fact. Its arguments in that regard are waived. See Consultech



of Jacksonville, Inc. v. Dep't of Health, 876 So. 2d 731,  
734 (Fla. 1st DCA 2004).

49. Motorola did not prove that its project - as presented in its proposal - should have been approved instead of Williams' proposal.

50. Bay County Procurement Code §2-114(11) states in pertinent part:

e. [The ALJ] shall issue a written decision setting forth findings of fact and conclusions of law.

1. If the [ALJ] upholds the decision, the county may resume the procurement process . . . .

f. The [ALJ] shall send a copy of the written decision to the parties and counsel of record and shall inform the parties that any person aggrieved by any action or decision of the [ALJ] may seek appropriate judicial review.

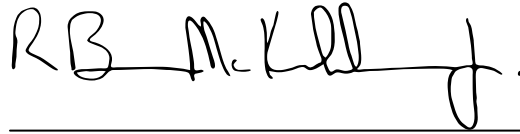
51. Bay County Procurement Code §2-114(12) states:

The decision of the [ALJ] shall be final and may not be appealed to the Bay County Board of County Commissioners.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the challenge by Motorola Solutions, Inc., as to the decision of the Bay County, Florida, Board of County Commissioners, in RFP #15-32 is DENIED.

DONE AND ORDERED this 25th day of July, 2016, in  
Tallahassee, Leon County, Florida.



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R. BRUCE MCKIBBEN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of July, 2016.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Bay County Procurement Code §2-114(11)f. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.