

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ABACODE, LLC AND ZEROFOX, INC.,

Petitioners,

vs.

Case No. 19-2741BID

STATE OF FLORIDA, DEPARTMENT OF
EDUCATION,

Respondent,

and

NTT DATA, INC.,

Intervenor.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy in Tallahassee, Florida, on June 25, 2019.

APPEARANCES

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For Intervenor: Frederick John Springer, Esquire
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STATEMENT OF THE ISSUES

Whether, when making a recommendation to award to NTT DATA, Inc., the contract resulting from Invitation to Negotiate 2019-44 Re-Bid, Social Media Monitoring, Respondent, State of Florida Department of Education ("the Department"), acted contrary to one or more governing statutes, rules, policies, or procurement specifications, or any combination thereof; and, if so, whether the intended award was clearly erroneous, arbitrary, capricious, or contrary to competition.

PRELIMINARY STATEMENT

On February 13, 2019, the Department issued Invitation to Negotiate 2019-44 Re-Bid ("the ITN"), seeking proposals for a social media monitoring tool for the state's school systems. Petitioners, Abacode, LLC and ZeroFOX, Inc. (jointly referred to as "Abacode"), and Intervenor NTT Data, Inc. ("NTT") submitted timely replies to the solicitation. At the conclusion of the solicitation process, the Department's negotiation committee issued an approval request memorandum recommending Abacode be awarded the contract.

Shortly thereafter, Richard Corcoran, as Commissioner of Education ("Commissioner Corcoran"), issued a responsive

memorandum, rejecting the committee's recommendation and instead directing the Department to award the contract to NTT.

On April 22, 2019, the Department issued its Agency Award, noticing its intent to award the contract to NTT. On April 24, 2019, Abacode submitted its Notice of Intent to Protest. On May 6, 2019, Abacode submitted its Formal Written Protest, requesting that the Department withdraw the decision prescribed in the Agency Award and award the contract to Abacode.

On May 8, 2019, NTT filed its Notice of Appearance as Intervenor. The Department referred the matter to the Division of Administrative Hearings ("DOAH") on May 21, 2019, and the parties commenced discovery and motion practice.

The final hearing took place as scheduled on June 25, 2019. Three witnesses testified live: Jerry Rasmussen, on behalf of Abacode; Regina Register, whom all three parties had identified as a witness; and Rick Johnson, on behalf of NTT. In addition, the parties presented transcripts of deposition testimony by four witnesses: Rick Johnson; Jerry Rasmussen; Regina Register; and Antoinette Williams. Upon stipulation of all parties, Joint Exhibits 1 through 27 were admitted. Abacode's Exhibits 1 through 10, the Department's Exhibit 1, and NTT's Exhibits 1 through 6 were also admitted.

The two-volume Transcript of the proceeding was filed at DOAH on July 25, 2019. The parties timely filed proposed

recommended orders, which have been considered in preparation of this Recommended Order. All references to the Florida Statutes are to the 2019 version unless otherwise stated.

FINDINGS OF FACT

Background

1. Following the February 2018 gun violence tragedy at Marjory Stoneman Douglas High School in Parkland, Florida, the State of Florida enacted chapter 2018-3, Laws of Florida, to improve public safety. Section 21 of that law created a new section 1001.212, Florida Statutes, which inter alia required the Department to provide, by December 1, 2018, "a centralized integrated data repository and data analytics resources to improve access to timely, complete, and accurate information integrating data from" a variety of specified sources, including social media. Section 50 of that law appropriated \$3 million to the Department to competitively procure the required "centralized integrated data repository and data analytics resources" and to make them available by December 1, 2018.

2. Toward that end, in August 2018, the Department issued an invitation to negotiate under section 287.057, Florida Statutes (the "2018 ITN"). In December 2018, the Department issued a notice of intent to award the contract resulting from the 2018 ITN to Abacode. A competitor, Social Sentinel, protested that intended award.

3. In January 2019, the Department issued a revised decision, indicating its intent to reject all responses to the 2018 ITN. Social Sentinel also protested that decision. The Department referred the protest to DOAH, where Abacode intervened. Following a final hearing, DOAH issued a recommended order rejecting the protest and upholding the Department's decision to reject all responses to the 2018 ITN. See Social Sentinel, Inc. v. Dep't of Educ., Case No. 19-0754BID (Fla. DOAH Apr. 17, 2019).

4. While the protest of the 2018 ITN was pending at DOAH, on February 13, 2019, Governor Ron DeSantis issued Executive Order 19-45, deeming it unacceptable that the Department had been delayed in its efforts to provide the resources required by section 1001.212(6), Florida Statutes. The Governor ordered the Department to do so by August 1, 2019. The August 1, 2019, deadline was codified later via chapter 2019-22, Laws of Florida.

5. Consistent with Executive Order 19-45, on February 13, 2019, Commissioner Corcoran, determined that it was necessary to proceed with a competitive procurement of the required resources notwithstanding the pending protest. Commissioner Corcoran's decision was authorized by section 120.57(3)(c), Florida Statutes, which provides:

(c) Upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.

6. The first part of section 120.57(3)(c) creates what is commonly referred to as the "automatic stay." The second part of section 120.57(3)(c) authorizes an exception, that is, the circumstances under which an agency may override the automatic stay and proceed with the contracting process.

7. Despite the pending protest, Commissioner Corcoran issued a memorandum authorizing the re-advertisement of the solicitation based on an immediate and serious danger to the public health, safety, and welfare. As directed by Commissioner Corcoran, on February 13, 2019, the Department issued a new Invitation to Negotiate, the ITN at issue in this proceeding.

The ITN

8. The ITN solicited replies for a digital tool to help school districts monitor threats of violence, signs of bullying, thoughts of suicide, and other issues affecting students' well-being. The ITN requested a solution capable of monitoring major social media sites in multiple languages and at specific

locations--a practice commonly known as "geofencing"--along with notifications to contacts to be defined by participating school districts. The ITN requested in-person and web-based system training, along with ongoing telephone and email support, and requested that vendors submit resumes for key personnel along with details including prior relevant experience concerning the scope of work. The ITN contemplates services effective for an initial term of three years, with the option for three one-year renewals thereafter.

9. In terms of vendor selection, the ITN stated that replies would be evaluated and ranked on a scale of 1 to 100--70 points for the technical score and 30 points for price--using the criteria prescribed therein. The ITN is clear that evaluation scores indicate only perceived benefits of the reply, and explicitly reserved the right to negotiate with all responsive and responsible vendors in order to ascertain the best solution. Moreover, the ITN reserved the right to seek supplementation, clarification, or revision of vendor replies. The ITN further provides that, after the conclusion of negotiations, the Department would award the contract "to the responsible and responsive vendor(s) that provide the best value to the state, based on the criteria of the ITN."

The Responses

10. The Department received six replies to the ITN, including those from both Abacode and NTT. Comparing the proposals at issue here, both NTT and Abacode compete as service providers, each offering a unique technology solution. NTT's solution is based on the Brandwatch platform, while Abacode offers the ZeroFOX platform.

11. Although Abacode and ZeroFOX are represented jointly in this action, only the singular Abacode responded to the Department's solicitation. In the event that Abacode received the contract award, it had planned to enter into a subcontract with ZeroFOX.

12. Abacode's security center operates out of Tampa, Florida, and is a local based company. Abacode employs approximately 45 people and offers services as a managed security services provider ("MSSP"). This role effectively licenses Abacode to sell the ZeroFOX tool and provide services related thereto, such as configuration management, maintenance, monitoring, support, and training. Although Abacode has previously deployed the ZeroFOX tool, Abacode has not previously implemented the ZeroFOX tool in an education context, and has not previously implemented the ZeroFOX tool on behalf of a government entity.

13. In contrast, NTT is a global information technology company, the fifth largest in the world, and employs more than 250,000 people, with 55 subsidiary companies. One of these subsidiaries, NTT Security, employs approximately 1,200 people and competes with Abacode in the MSSP market. It is based in the United Kingdom. In 2018, an independent analyst firm ranked NTT Security 10th among MSSPs, while ranking Abacode at 71st. Unlike Abacode's experience with the ZeroFOX tool, NTT has previously implemented the Brandwatch tool on behalf of public education customers.

14. Regarding the tools themselves, Mr. Rasmussen testified that ZeroFOX and Brandwatch do not "go to market" in the same manner. In its reply, Abacode indicated that Forrester, an analyst firm focused on the technology market, had named ZeroFOX an industry leader in the market for "digital risk protection." Abacode effectively views digital risk protection as a "super set" of social media monitoring--i.e., the area includes social media monitoring, but also includes a great deal more.

15. Regarding NTT's solution, the Brandwatch tool competes not in the digital risk protection market, but in the "social listening" market, where it is characterized by Forrester as a "strong performer."

16. In terms of implementation, Mr. Rasmussen testified that Abacode could "hit the switch," at which point the ZeroFOX tool would begin immediately monitoring social media for threats for all 67 school districts in Florida, if needed, upon being given the flat file of all the schools and their addresses. Abacode can immediately monitor social media in all languages.

17. NTT's use of Brandwatch also provides an immediately-capable "out of the box" solution for social media monitoring. However, while the Brandwatch tool is capable of immediately taking any data load provided by Florida's school districts, NTT's proposed project schedule also reflects the time required to implement the tool for district-level use. NTT's proposal required six and one-half to seven months to fully implement its monitoring program for all 67 districts. This includes determining which school districts will participate; identifying points of contact within each school district; determining which parties will receive alerts from the tool; and determining which locations will be monitored via geofencing.

Evaluation, Negotiation, and Award

18. After receipt and opening of the replies, the Department's procurement office conducted a preliminary review to determine their responsiveness. Other than a single reply, which was later deemed nonresponsive, the Department's procurement office determined that, pursuant to the provisions

of the ITN, any irregularities or deviations contained in the remaining replies were minor and would be waived.

19. The members of the Evaluation Committee and the Negotiation Committee are selected by the Department based upon experience, expertise, and background so that the members have the qualifications to understand what is needed by the state under the ITN and who are qualified to determine the vendor who can offer the best method and provide the best value to the state needed to meet the needs of the particular agency.

20. To begin the evaluation stage of the procurement, the Department selected an Evaluation Committee consisting of five persons. Committee members were instructed to use the criteria prescribed in the ITN document to assign individual scores to each technical reply. After scoring, score sheets were returned to the Department's procurement agent, Regina Register, who added the technical evaluation scores with price evaluation scores to obtain final evaluation scores.

21. In terms of results, the Department awarded Abacode the highest total score, awarding 66.4 technical points and 18.2 cost points for a total evaluation score of 84.6. The Department awarded NTT the second highest total score, awarding 59.4 technical points and 24.9 cost points for a total evaluation score of 84.3. At the conclusion of the evaluation process, the Department's procurement office provided evaluation

materials and summaries to the relevant management-level approver, Andre Smith, to determine the parties with which the Department would enter negotiations.

22. The Department selected a Negotiation Committee of three persons and opted to negotiate with all five responsive bidders, including both Abacode and NTT. The Department's Negotiation Committee conducted separate meetings with both Abacode and NTT on March 25, 2019.

23. During the negotiation meeting with NTT, the Department's Negotiation Committee inquired as to how NTT intended to address staffing and user-level support for the project per the requirements of the ITN. Although NTT had not explicitly addressed the issue in its initial proposal, NTT responded by clarifying its staffing intentions, naming specific individuals intended to participate in the project along with possible areas for expansion. Additionally, NTT detailed its more specific intentions in the submission of its best and final offer.

24. During the negotiation meeting with NTT, NTT's team inquired as to whether the Department's Negotiation Committee had any concerns regarding the proposed phase-in project schedule. Antoinette Williams, who served as the Department's Negotiation Committee chairperson, responded that, while time

was of the essence, the implementation schedule provided in NTT's reply would suit the Department's needs.

25. At the conclusion of negotiations, the Department's procurement agent contacted both NTT and Abacode in order to: (1) correct or clarify any remaining questions and (2) solicit each vendor's best and final offer. Abacode submitted a best and final offer of \$4,875,320 for the six-year term. NTT submitted a best and final offer of \$3,587,859.00 for the six-year term, along with an optional discount of \$100,000 in exchange for a more relaxed project schedule.

26. NTT's price effectively halves that of its response in the previous 2018 ITN.

27. Upon receipt of each vendor's best and final offers, the Department scheduled its Intent to Award meeting for April 4, 2019. During the meeting, members of the Department's Negotiation Committee were instructed to discuss the merits of the various proposals received and, at the conclusion of the meeting, to cast written ballots for the vendor which members felt provided the best value for the state.

28. In their discussion of the merits, the Negotiation Committee did not rank or score competing offers, and did not undertake any formal written trade-off analysis between technical offerings and proposed prices. However, at the conclusion of the discussion, the Negotiation Committee members

cast their votes, resulting in a unanimous decision to recommend award to Abacode. Ms. Williams drafted a memorandum to Commissioner Corcoran recommending that the contract be awarded to Abacode.

29. Regarding the Negotiation Committee's role in the process, Ms. Williams, who has previously participated in Department procurements, testified that she explicitly recognized the role as reviewing proposals, meeting with vendors, and ultimately, making a recommendation for Commissioner Corcoran's consideration and review. Although Ms. Williams cast her vote for Abacode, she testified that she did so specifically because Abacode's proposal offered more than the criteria prescribed in the ITN document--a point which Abacode has not only conceded, but advertised.

30. Indeed, Ms. Williams concluded that NTT would have been her second choice, noting (1) that NTT was fully capable of performing the work and (2) that NTT's price proposal was substantially lower than that of Abacode. Moreover, although privy to the technical and pricing materials submitted by each vendor, it is important to note that the Department's Negotiation Committee was not briefed on the specific amount of funds available for the project.

31. Although the committee members might have seen the appropriation language contained in chapter 2018-3, an annual

total of \$3 million for the procurement or development of multiple tools, neither the ITN nor the procurement office instructed the Negotiation Committee as to the total amount to be spent on this particular portion of the larger project.

32. During the pendency of the ITN process, the Department completed its procurement of the remaining tools prescribed by law--that is, the centralized integrated data repository--at an annual cost of \$2.6 million. Given the \$3 million initially appropriated for the project, this cost was substantial, and significantly reduced the funds available for the social media monitoring portion of the project.

33. On April 15, 2019, Commissioner Corcoran decided to award the contract to NTT. The Commissioner memorialized his decision:

I have reviewed the recommendation of the Negotiation Committee that I appointed to conduct negotiations in relation to the invitation to negotiate for a social media monitoring tool. I have also reviewed the proposals offered in response to the invitation to negotiate and consulted with the Department's staff in relation to these proposals. Notwithstanding the recommendation of the Negotiation Committee, upon consideration of all the selection criteria listed in the invitation to negotiate, I have concluded that NTT Data provides the best value for the state.

NTT Data provides social media monitoring services in the education sector and other industries. NTT Data is capable of meeting the compressed timetable for implementation

and, from a practical standpoint, offers services that compare very favorably to those of the vendor recommended by the Committee. I must consider, however, that social media monitoring is one component of an effort to create a centralized data repository to enhance the efforts to keep Florida schools safe. NTT Data's best and final price is \$1,287,461.00 lower than the vendor recommended by the Committee and that savings can be more effectively applied in other areas to enhance student safety.

Based upon the foregoing, please proceed with awarding the contract to provide a social media monitoring tool as identified in ITN 2019-44 to NTT Data.

34. Accordingly, on April 22, 2019, the Department issued its notice of intent to award to NTT. Both Abacode and Social Sentinel protested the April 22, 2019, intended award decision resulting from the ITN. The protestors filed their formal protest petitions on May 6, 2019. The next day, Commissioner Corcoran again determined to continue with the contracting process under section 120.57(3)(c), notwithstanding the pendency of the protests. Commissioner Corcoran memorialized his decision in a memorandum of that same date (the "May 7 Memo"). The May 7 Memo did not include language advising interested parties of a right to challenge the decision or how to challenge the decision.

35. On June 11, 2019, the Department and NTT finalized and executed the agreement for the tool. On June 13, 2019, Social Sentinel voluntarily dismissed its protest petition. When

Abacode failed to dismiss its petition, on June 19, 2019, NTT, as Intervenor, filed a Motion for Summary Recommended Order or, in the Alternative, Motion to Relinquish Jurisdiction ("Motion"). NTT's Motion argued that, because the Department completed the contracting process, DOAH lacks jurisdiction over the matter, and the matter is moot. Abacode filed written opposition to the Motion, and on June 24, 2019, the undersigned denied the Motion following a telephonic hearing. NTT's Motion was renewed and rejected at final hearing.

Abacode's Arguments^{1/}

36. Abacode advances a variety of arguments in support of its protest. Abacode argues it was improper to award the contract to NTT because: Abacode's proposal offers the best value to the state; Commissioner Corcoran should not have rejected the unanimous recommendation of the Negotiation Committee; and NTT is not a responsive vendor.^{2/}

37. NTT did not address Abacode's arguments in its proposed recommended order but rather renewed its earlier arguments that the matter is moot because the contract was already awarded and DOAH is unable to provide Abacode with any relief.

Best Value

38. Abacode's argument centers around the contention that its proposal would, despite the extra cost, provide a better

value to the state than that of NTT. Both the ITN and chapter 287, Florida Statutes, specify that the Department, through the ITN process, is tasked with the determining which vendor provides the best value to the state based on the selection criteria of the ITN. Accordingly, a failure to select the vendor which provides the best value to the state based on the prescribed criteria, if proven, would necessarily contravene both solicitation specifications and governing statutes, and would warrant reversal in consideration of the appropriate standards of review.

39. Abacode raises numerous features of its proposal which it argues produce a better value for the state. Abacode argues: NTT does not offer immediate state-wide implementation; NTT sets its annual "mention" of a threat limit at 100,000,000, while Abacode's is without limit; NTT only provides alerts via email, while Abacode also offers a smartphone "app" for users; and NTT only supports analytics for a limited number of languages, while Abacode can monitor any language by simply defining a keyword list.

40. Assuming these claims are factually accurate, the general argument is effectively summarized as follows: "[T]he price proposed by Abacode, in terms of services proposed, is more responsive, offers more for the dollar, and is more proficient and effective than the proposal by NTT and clearly

offers the best method for accomplishing the intent of the ITN, and Chapter 1001, Fla. Stat."

41. Chapter 287 defines "best value" as "the highest overall value to the state based on factors that include, but are not limited to, price, quality, design and workmanship." § 287.012(4), Fla. Stat. Although this determination must necessarily turn on a discretionary conclusion--a balancing test considering the prescribed factors--Florida courts are clear that an agency has broad discretion in this regard, and the agency's decision, when based on an honest exercise of this discretion, will not be overturned by a court, even if reasonable persons might disagree. To that end, taken at face value, Commissioner Corcoran's decision memorandum articulates reasonable permissible motives for the Department's decision.

42. Although reasonable persons may disagree whether, when it comes to the safety of the public school system, it is desirable to focus on cost-savings rather than maximum capabilities, the Department's decision to select a viable solution based on lesser cost is well within the discretion provided law.

Rejection of the Negotiation Committee's Recommendation

43. Abacode argues that Commissioner Corcoran's decision to substitute his judgment for that of the unanimous recommendation of Abacode by the Negotiation Committee was

contrary to the Department's governing statutes, rules, policies, or solicitation specifications, and that the decision was thereby clearly erroneous, contrary to competition, arbitrary, or capricious.

44. Abacode has not articulated which provisions of statute, rule, or policy were contravened by Commissioner Corcoran's decision. Ms. Register testified that, per the Department's existing policies and procedures, Commissioner Corcoran is free to substitute his judgment for that of the Negotiation Committee in selecting the contract awardee. Although uncommon, the practice is not precluded by law or rule, and state agencies, state courts, and federal courts have regularly recognized agency heads' authority to substitute their will where cost is the deciding factor. See, e.g. Deloitte & Touche, LLP v. State, Dep't. of HRS, 675 So. 2d 932 (Fla. 1st DCA 1996) (affirming, per curiam, DOH's substitution of its agency head's judgment in a request for proposals).

45. As for solicitation specifications, the ITN dictates only that the Department, after negotiations are conducted, will make an award to the responsible and responsive vendor that provides the best value to the state. Although Abacode has levied numerous claims regarding both the evaluation scores and ultimate recommendation provided by the Department's Evaluation and Negotiation committees, at no point does the ITN promise or

imply a contract award based on these factors alone. Indeed, the ITN states that the Department will make an award, and the Commissioner, in his role as the state's chief educational officer and the lawful executive director of the Department, bears reasonable discretion and authority to make contract decisions on the Department's behalf. §§ 20.15(2), 1001.10(1), Fla. Stat.

NTT's Status as a Responsive Vendor

46. Section 287.012(27) defines a "responsive bidder" as a vendor that submitted a reply that conforms in all material respects to the solicitation. Abacode argues that NTT is not a responsive vendor for four reasons: NTT's proposal disregards the deadline prescribed by law; NTT's proposal fails to include the resumes of key management individuals; NTT relies on a tool provided by a company in another country; and NTT's proposal cites past performance unrelated to the ITN and references that cannot be verified.

47. Section 1001.212 requires the Department to provide a centralized integrated data repository and data analytics resources by August 1, 2019. Although NTT's proposal incorporates a phase-in schedule which extends past August 1, 2019, testimony at hearing indicated that Brandwatch platform is ready for immediate deployment and use. NTT's proposal simply factors in additional project time and resources to integrate

district-level data and preferences into the tool. The law requires that the social media monitoring tool be available--not that all districts immediately use it. Thus, this NTT's proposal is responsive in this regard.

48. The ITN states that vendors should provide names and resumes of key personnel on the vendor's team. NTT's proposal identified the project lead but listed "TBD" (to be determined) under certain support positions. However, the omission was waived by the procurement department as immaterial. NTT provided clarification in both the negotiation meeting and in its best and final offer. NTT explained that it had several bid proposals for work pending and it would assign key personnel once it was advised of which, if any, contracts it was awarded. Accordingly, NTT's proposal was sufficiently responsive in this regard.

49. ITN Addendum #2 states that contract services shall not be performed outside of the USA. Although Brandwatch's headquarters is located in the United Kingdom, NTT's client executive, Rick Johnson, testified that all training and services will be supplied out of NTT's offices in Texas or Florida, which meets the requirements of the ITN.

50. The ITN requests details regarding vendors' relevant experience concerning the scope of work described therein. Abacode contends that its ZeroFOX platform is built for what the

ITN required, i.e. a security related tool for monitoring social media.

51. According to Abacode, NTT's platform, Brandwatch, is a social sentiment or marketing tool. Brandwatch listens to social media to see how people feel about a product or how people feel about a brand.

52. Abacode's response to the ITN included reference to similar use cases, i.e. social media monitoring for threats of harm. Abacode provided references showing that ZeroFOX was a leader not only in social media monitoring for threats of violence, but provided references where the social medial monitoring activity had been provided on behalf of education institutions.

53. NTT's proposal provided noneducational references which dealt with social media monitoring for threats of violence. NTT has relevant experience in monitoring in the educational setting but due to the nondisclosure provisions of the contracts with those education institutions, they could not be used as verifiable references.

54. Although ZeroFOX's platform offered by Abacode may be superior to that of Brandwatch as offered by NTT, Brandwatch's platform, as considered by the evaluation and negotiation committees, adequately meets the needs of Respondent as

specified by the ITN and therefore, NTT's proposal was responsive in this regard.

CONCLUSIONS OF LAW

55. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes.

56. Abacode has standing to bring this procurement protest and NTT has standing to participate as an intervenor because their substantial interests are at stake.

57. Pursuant to section 120.57(3)(f), the burden of proof rests with Abacode as the party opposing the proposed agency action. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Abacode must sustain its burden of proof by a preponderance of the evidence. See Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

58. Section 120.57(3)(f) provides in part as follows:

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.

59. The phrase "de novo proceeding," as used in section 120.57(3)(f), describes a form of intra-agency review. "The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." State Contracting, 709 So. 2d at 609.

60. A bid protest proceeding is not simply a record review of the information that was before the agency. Rather, a new evidentiary record based upon the facts established at DOAH is developed. J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127, 1132-33 (Fla. 1st DCA 2013).

61. After determining the relevant facts based on the evidence presented at hearing, the agency's intended action will be upheld unless it is contrary to the governing statutes, the agency's rules, or the bid specifications. The agency's intended action must also remain undisturbed unless it is clearly erroneous, contrary to competition, arbitrary, or capricious.

62. The Florida Supreme Court explained the clearly erroneous standard as follows:

A finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing

the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. Such a mistake will be found to have occurred where findings are not supported by substantial evidence, are contrary to the clear weight of the evidence, or are based on an erroneous view of the law. Similarly, it has been held that a finding is clearly erroneous where it bears no rational relationship to the supporting evidentiary data, where it is based on a mistake as to the effect of the evidence, or where, although there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces the court that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.

Dorsey v. State, 868 So. 2d 1192, 1209 n.16 (Fla. 2003).

63. The contrary to competition standard precludes actions which, at a minimum: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. Care Access PSN, LLC v. Ag. for Health Care Admin., Case No. 13-4113BID, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *54 (Fla. DOAH Jan. 2, 2014); Phil's Expert Tree Serv., Inc. v.

Broward Cty. Sch. Bd., Case No. 06-4499BID, 2007 Fla. Div. Admin. Hear. LEXIS 161, at *23 (Fla. DOAH Mar. 19, 2007).

64. An action is "arbitrary if it is not supported by logic or the necessary facts," and "capricious if it is adopted without thought or reason or is irrational." Hadi v. Lib. Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. J.D., 114 So. 3d at 1130. Thus, under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." Adam Smith Enters., Inc. v. Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Nevertheless,

the reviewing court must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of each of these factors to its final decision.

Id.

65. Under section 287.057, an agency seeking to procure contractual services may elect to use either an invitation to bid ("ITB"); a request for proposal ("RFP"); or, as here, an

ITN. § 287.057(1), Fla. Stat.; AT&T Corp. v. State, Dep't of Mgmt. Servs., 201 So. 3d 852, 855 (Fla. 1st DCA 2016). The ITN process is the most flexible procurement process and contemplates that not all vendors will necessarily provide the same solution to the same problem. As recognized by the First District in AT&T Corp.:

The ITN process was created as a distinctly more flexible process than the RFP or ITB process and gives an agency the means "to determine the best method for achieving a specific goal or solving a particular problem" and to identify "one or more responsive vendors with which the agency may negotiate in order to achieve the best value."

AT&T Corp., 201 So. 3d at 855 (quoting § 287.057(1)(c), Fla. Stat. (2014)).^{3/}

66. Relevant to ITNs, section 287.057(1)(c) provides, in pertinent part:

2. The invitation to negotiate must describe the questions being explored, the facts being sought, and the specific goals or problems that are the subject of the solicitation.

3. The criteria that will be used for determining the acceptability of the reply and guiding the selection of the vendors with which the agency will negotiate must be specified. The evaluation criteria must include consideration of prior relevant experience of the vendor.

4. The agency shall evaluate replies against all evaluation criteria set forth in the invitation to negotiate in order to

establish a competitive range of replies reasonably susceptible of award. The agency may select one or more vendors within the competitive range with which to commence negotiations. After negotiations are conducted, the agency shall award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state, based on the selection criteria.

67. "Best Value" means "the highest overall value to the state based on factors that include, but are not limited to, price, quality, design, and workmanship." § 287.012(4), Fla. Stat.

68. Negotiations are an inherent component of the flexible ITN process. However, the Department cannot make "material changes" to the ITN during negotiations. AT&T Corp., 201 So. 3d at 858. It has long been recognized that "[a]lthough a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. State Dep't of Gen. Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986); AT&T Corp., 201 So. 3d at 858 (concluding that revisions to statement of work that evolved during negotiation phase did not restrict competition--and recognizing that AT&T elected not to modify its initial reply).

69. Turning to the merits of the instant case, as detailed above, the Department's proposed action, in awarding the contract to NTT and not to Abacode, is not contrary to the ITN specifications, clearly erroneous, contrary to competition, arbitrary, or capricious. Any irregularities in NTT's proposal as alleged by Abacode were minor and not material deviations.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Education enter a final order dismissing the protest of Abacode, LLC and ZeroFOX, Inc.

DONE AND ENTERED this 26th day of August, 2019, in Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of August, 2019.

ENDNOTES

^{1/} NTT argues that because the Department entered into the Social Media Monitoring Tool contract on June 11, 2019, with NTT, and that Abacode did not challenge the decision to continue the solicitation process pursuant to section 120.57(3), Florida Statutes, the issues are not moot and DOAH no longer has jurisdiction.

The May 7, 2019, memorandum was never published in the Florida Administrative Register, nor was Abacode directly notified by the Department that it intended to enter into a contract with NTT regardless of the pendency of the bid protest. Abacode accidentally found out about the internal memorandum during the resolution meeting of the parties after the bid protest was filed when same was casually mentioned at the meeting. Counsel for Abacode specifically requested after learning of the existence of such memorandum, that he be furnished with a copy of same. A copy of this memorandum was furnished to counsel via email dated May 15, 2019.

When transmitting the memorandum to counsel for Abacode, the Department did not advise counsel that it intended to, as soon as possible, enter into the subject contract with NTT. Arguably, the provisions of Section 120.57(3)(c) would allow the Department to enter into such contract. However, the Department failed to provide any point of entry to challenge this decision.

Abacode explained that it had hoped that the Department would not enter into such contract pending the bid protest, which proceedings were on an expedited track. However, Abacode elected not to seek action in circuit court or the appellate courts to maintain that the declaration or a danger to public health, safety, or welfare was not founded. Such a challenge would consume resources, would result in likely failure, and Abacode did not want to argue that the subject contract was not in the interests of the public health, safety, and welfare of the students of Florida.

Section 120.57(3)(c), and other provisions of section 120.57, do not explain what happens if an agency elects to enter into a contract with a vendor pending a protest. However, it is clear from a reasonable reading of section 120.57 that once a timely protest has been filed, that protest proceeds to its rightful conclusion regardless of whether or not the agency has entered into a contract with another vendor during the pendency of the bid protest.

As explained on the record at final hearing, the cases cited by NTT did not address a proceeding pursuant to section 120.57(3)(c), and were found not to be applicable and were rejected by the undersigned. However, due to the determination that NTT was properly awarded the contract in this case, there is no need to further explain the rejection of NTT's argument regarding jurisdiction in this Recommended Order.

^{2/} Initially, Abacode also argued that NTT was not a responsible vendor. Florida law defines "responsible vendor" as "a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability to that will assure good faith performance." § 287.012(25), Fla. Stat. As with the responsiveness designation, NTT's failure to meet the "responsible" threshold would contravene chapter 287 and the ITN specifications, and would merit reversal.

Because Abacode alleged that NTT is not a responsible vendor, Abacode had the burden of proving that it does not suffer from the same problem; that is, Abacode must prove that it is a responsible vendor. See Intercontinental Properties, Inc. v. Dep't of Health & Rehab. Servs., 606 So. 2d 380, 384 (Fla. 3d DCA 1992) ("a party protesting an award . . . must be prepared to show not only that the [awarded] bid was deficient, but must also show that the protestor's own bid does not suffer from the same deficiency"); see also § 120.57(3)(f), Fla. Stat. ("burden of proof shall rest with the party protesting").

NTT sought financial information in discovery from Abacode to prepare its defense to the responsibility issue. Abacode failed to timely produce the requested information prior to the deposition of its corporate representative.

After considering NTT's Second Motion in Limine and hearing oral argument on this motion at final hearing, the undersigned permitted Abacode to offer evidence and argument that NTT was not "responsible" but precluding either side from presenting information regarding "responsibility" (particularly financial responsibility) that was not included in response to the ITN or that was not provided in discovery by Abacode prior to the deposition of its corporate representative on June 20, 2019. Because of this ruling, neither side presented evidence as to their responsibility as a vendor and Abacode did not raise the responsibility of NTT in its proposed recommended order.

^{3/} There are no substantive differences between the 2014 and 2019 versions of section 287.057.

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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.