

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RA OUTDOORS, LLC, D/B/A ASPIRA,

Petitioner,

vs.

Case No. 20-3376BID

DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondent,

and

US EDIRECT, INC.,

Intervenor.

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings ("DOAH") for final hearing on August 24 and 26 through 28, 2020, by Zoom conference.

APPEARANCES

For Petitioner: Thomas Porter Crapps, Esquire
Kirsten H. Mathis, Esquire
James Zubko Ross, Esquire
Joy Ryan, Esquire
Meenan, P.A.
300 South Duval Street, Suite 410
Tallahassee, Florida 32301

Dawn Stern, Esquire
Richard P. Rector, Esquire
DLA Piper, LLP
500 Eighth Street Northwest
Washington, DC 20004-2131

For Respondent: Kristin Mai Bigham, Esquire
Ronald Woodrow Hoenstine, Esquire
Kathryn E.D. Lewis, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

For Intervenor: Christopher Brian Lunny, Esquire
Marion Drew Parker, Esquire
Radey Law Firm
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301

Richard E. Coates, Esquire
Coates Law Firm, PL
115 East Park Avenue, Suite 1
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

Whether Respondent, Department of Environmental Protection's ("Department") intended decision to award a contract to Intervenor, US eDirect, Inc. ("US eDirect"), for a Parks Business System ("PBS"), pursuant to Invitation to Negotiate 2019002 ("the ITN"), is contrary to the Department's governing statutes, rules, or the ITN specifications, and contrary to competition, clearly erroneous, arbitrary, or capricious.

PRELIMINARY STATEMENT

On March 18, 2019, the Department published the ITN, seeking replies from vendors to provide a PBS with a Central Reservation System ("CRS") and a day-use Point of Sale system ("POS"). Following the submission of replies and the evaluation phase, the Department entered into negotiations with three vendors: Petitioner, RA Outdoors, LLC, d/b/a Aspira ("Aspira"), US eDirect, and Conduent State & Local Solutions, Inc. ("Conduent"). On June 26, 2020, these vendors submitted their best and final offers ("BAFO").

On July 6, 2020, the Department held a public meeting in which the negotiators selected US eDirect for the award; and, on July 6, 2020, the Department posted its notice of intent to award the contract to US eDirect.

Aspira timely filed its notice of intent to protest the award within 72 hours of the posting of the notice of the award. On July 20, 2020, Aspira timely filed its formal written protest and petition for formal administrative hearing with the required protest bond. On July 27, 2020, the Department referred the matter to DOAH to assign an administrative law judge to conduct the final hearing. On July 28, 2020, US eDirect filed its notice of appearance. On August 10, 2020, Aspira filed an unopposed motion to amend the petition, which the undersigned granted on August 18, 2020. On August 24, 2020, the parties filed their Joint Pre-Hearing Stipulation.

The final hearing was held on August 24 and 26 through 28, 2020, with all parties present. Aspira presented the testimony of Gloriann McInnis, Fran Spivey, Jim Brook, Carla Gaskin, Warren Poplin, Warren Sponholtz, Sasha Craft, and Mark Trivette. The Department presented the testimony of Mara Dombrowski. US eDirect did not present any witnesses. Joint Exhibits 1 through 16, 18 through 21, 24 through 31, 33 through 49, 55 through 75, 78 through 90, 92, 94 through 99, 101, 104, 108 through 120, 124 through 130, 135, 136, 142 through 155, 165 through 174, and 182 through 238, were received into evidence upon stipulation of the parties. US eDirect's and the Department's Joint Exhibits 8, 11, and 25 were also received into evidence. The seven-volume final hearing Transcript was filed at DOAH on September 16, 2020.

The parties timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order. The stipulated facts in the parties' Joint Pre-Hearing Stipulation have been incorporated

herein as indicated below. Unless otherwise indicated, references to the Florida Statutes are to the 2020 version.

FINDINGS OF FACT

The Parties

1. The Department is the state agency responsible for managing and preserving Florida's 175 state parks. The Department has been recognized as the nation's only three-time winner of the National Gold Medal Award for Excellence in the management of the state park systems. This achievement makes Florida the only state park system in the nation to win more than one Gold Medal award. The Department is committed to excellence and sustaining its high level of service for its park visitors.

2. Petitioner, RA Outdoors, LLC, d/b/a Aspira, is a limited liability company organized under the laws of the State of Texas. Aspira is registered to do business in the State of Florida.

3. Aspira is the incumbent contractor for the CRS and POS services being requested under the ITN. Aspira has been under contract with the Department to provide a CRS system for the past 19 years and a POS system for the past four years.

4. Intervenor, US eDirect, Inc., is a corporation organized under the laws of the State of New York.

The ITN

5. The process for the ITN began many years ago when the Department was in the process of renewing its contract with Aspira for the final renewal period. Knowing that the end of its contract with Aspira was approaching, the Department sought to gain knowledge of the products and solutions available in the industry for CRS and POS systems.

6. The Department issued a Request for Information ("RFI") in 2016, 2017, and 2018. The 2016 RFI sought to obtain industry information related to the Department's acquisition of a POS system. The 2017 RFI sought to

obtain industry information about automated park entry technology solutions. The 2018 RFI sought to obtain industry information about park business systems technology. The 2017 and 2018 RFIs expressed the Department's interest in obtaining functionality, including "'[f]ast pass' or quick access lane options for both day use admission as well as for registered campers" and "entry ticket sales in a high-sales environment."

7. The responses to the RFIs indicated there are multiple viable products, which varied significantly in technology, solution, cost model, total cost, integration potential, and requirements. The Department chose to utilize the most flexible comparative procurement process to achieve its goals; specifically, an ITN method of procurement rather than an invitation to bid or request for proposals. The Department chose an ITN because it wanted industry leaders to craft individual and innovative solutions so that the Department could then determine the best value option for the State.

8. Against this backdrop, on March 18, 2019, the Department posted the ITN on the Florida Vendor Bid System ("VBS"), seeking replies from qualified vendors to provide a PBS. The procurement officer designated by the Department for the ITN was Gloriann McInnis. The primary focus ("core services") of the ITN was to procure the CRS and POS business systems. The ITN stated its "[p]urpose and [s]cope" as follows:

The Department of Environmental Protection (hereinafter referred to as the "Department" and/or "DEP") is seeking offers from qualified vendors to provide a Park Business System (PBS), that includes both the implementation and ongoing operation, including maintenance and management, of a comprehensive integrated technology solution for park business needs (Solution). This solution should include, at a minimum, a Central Reservation System (CRS) capable of supporting online, in-person, and call center reservations for multiple locations statewide on a 24/7 basis, and a day-use Point of Sale system (POS) capable of supporting over \$70 million, with

the capacity for growth, in financial transactions on an annual basis.^[1]

9. The Department's goals for the ITN included "solutions which can provide the primary functions of a CRS (for camping and cabin reservations) and a day-use POS system (for park admission sales, annual entrance pass sales, equipment rentals, facility rentals, merchandise sales and other park fees) in an integrated, easy-to-use and highly accessible format."

10. In addition to the core CRS and POS systems, the ITN also indicated that the Department "is open to considering outcomes beyond [the] CRS and POS functionality that would make the system more efficient and effective. If a Respondent has additional services to offer, these options should be documented in the response." The potential additional optional services the Department indicated it was open to considering included, but were not limited to, automated entry solutions, mobile ticket applications, self-service kiosks, technology to support fast-past entrance lanes, online merchandise sales, and online park guide or park guide applications.

11. The ITN provided two pricing components: one price proposal for the core solutions based on a mathematical percentage fee of the estimated annual park system revenue of \$55 million, and a second price proposal for the value-added or optional services.

12. The Price Sheet attached to the ITN (Section 7.00) provided spacing for the vendors to submit their prices for the core solutions only, based on a projected mathematical percentage fee of the estimated revenue of \$55 million. The Price Sheet did not include spacing for value-added services.

¹ The ITN contained attachments that included, among other things, the Requirements Document for the ITN labeled as Attachment G, and the Service Level Agreement and Performance Standards for the ITN labeled as Attachment H. From the time the ITN was posted on VBS, on March 18, 2019, through the Department's intended award decision on July 6, 2020, the Department posted nine Addendums to the ITN on the VBS. No vendors protested the ITN terms, conditions, or specifications, including as amended by the addenda.

13. The Department made clear in the ITN that, with respect to vendor replies as to the core solutions, it "will consider the Respondent's Percentage Fee only, all other pricing requested is 'value added.'" With respect to the value-added services, the Department had no preference as to how a vendor priced its value-added services.

14. The ITN expressly stated: "At the conclusion of negotiations, the Department will request best and final offers (BAFOs) from the remaining respondents and notify them of the selection criteria on which the award will be based."² The ITN further stated: "After receipt of the BAFOs, the Department may conduct a Public Meeting for the negotiation team to discuss the results of negotiations and formulate their recommendations to the Department as to whether and how to award a Contract pursuant to this solicitation." "The negotiation team will not engage in scoring but will arrive at its recommendation by discussion during a public meeting."

Submission and Evaluation of Replies to the ITN

15. After conducting an initial review of vendor submissions addressing the ITN's Minimum Mandatory System Requirements, the Department identified five vendors with the greatest degree of fit with the requirements of the ITN. On June 5, 2019, the Department posted ITN Addendum No. 3, which identified the following top five vendors that would be allowed to submit full replies to the ITN: Aspira, US eDirect, Sovereign Sportsman Solutions, Conduent, and Mission Critical Solutions of Tampa. A full reply was comprised of a business volume, which included a completed Price Sheet, a technical volume, and an operational volume.

16. The Department established an evaluation team, which evaluated the five replies and identified the three highest scored vendors within the competitive range reasonably susceptible to an award with whom the

² That selection criteria was not posted on VBS.

Department would negotiate. The Price Sheet attached to the ITN was used by the evaluation team to evaluate the replies.

17. On November 5, 2019, the Department posted its decision on VBS, inviting the top three vendors (Aspira, US eDirect, and Conduent) to participate in negotiations with the Department pursuant to Addendum No. 6 of the ITN. The parties agree that Aspira and US eDirect submitted responsive replies to the ITN and are responsible vendors.

Site Visit, Demonstrations, Negotiations, and Strategy Sessions

18. Following the evaluation of the replies to the ITN, the Department entered into the negotiation phase. The Department designated Fran Spivey as the lead negotiator and non-voting member of the negotiation team. The voting members of the negotiation team were Sasha Craft, a park manager; Warren Sponholtz, a Department IT specialist; Warren Poplin, a Department bureau chief for District 1, Division of Recreation and Parks; Carla Gaskin, a business expert with the Department; and Jim Brook, a Department business and contract supervisor.³

19. Prior to beginning negotiations, the Department invited the three vendors to a pre-negotiation site visit at Wekiwa Springs State Park ("Wekiwa") on November 22, 2019.

20. Speed of entry of visitors into state parks is important. The Department chose Wekiwa because it is one of the busier parks in the state park system. The purpose of the site visit was to allow the vendors to observe "pertinent facilities and processes" and ask questions.

21. The ranger station is the "hub" of where point-of-sale and reservation systems occur. Even though Wekiwa is one of the busier parks, only one ranger staffed the ranger station, which was typical. Points of interest to be observed during the site visit included observing traffic patterns and typical

³ Jim Brook was an alternate until May 21, 2020, and Warren Poplin was a subject matter expert until March 7, 2020, but both attended all the solution demonstrations.

layout, functionality, and visitor interactions and park processes at the ranger station.

22. During their site visit at Wekiwa, the vendors observed multiple campers waiting in line to make payments and the one ranger using two separate computers while working on multiple tasks, including "ringing up people as they came through the admission window, taking their payment, [and] answering the phone." At hearing, Mara Dombrowski, a planning consultant with the Department's Division of Recreation and Parks, who was involved in the development of the ITN, testified that "this one person has to be so efficient in order to keep things moving smoothly and quickly, getting people through the line, keeping the campers happy, checking them in quickly, really to keep the park running smoothly and operating."

23. Following the site visit, the Department hosted meetings with each of the three vendors selected for negotiations so that the vendors could demonstrate the efficiency and operability of their proposed solutions to the ITN.

24. Aspira demonstrated its solution to the Department at meetings held on March 10 and 17, 2020, and May 7, 2020. US eDirect demonstrated its solution to the Department at meetings held on March 11 and 18, 2020, and May 8, 2020.⁴

25. The vendors demonstrated their ability to run transactions to simulate entry into a state park. All devices demonstrated by US eDirect performed without issue. Mr. Poplin attended all the vendors' demonstrations. Mr. Poplin testified that Aspira failed to print a receipt during one of its demonstrations. On the other hand, Mr. Poplin described "US eDirect's printing of a receipt as 'instantaneous.'" Mr. Poplin was so impressed with the speed of US eDirect's printing of a receipt during its demonstration that he retained the receipt.

⁴ The Department also held demonstration sessions with Conduent, which is not a party to these proceedings.

26. Ms. Craft, the park manager at TopSail Hill Preserve State Park, which contains the State's largest campground, also attended the vendors' demonstrations from her perspective as a park manager. As a park manager, Ms. Craft uses the POS and CRS systems on a daily basis. One of Ms. Craft's considerations as she watched the demonstrations was to observe the speed with which she could get visitors into the park.

27. Ms. Craft observed that US eDirect's solution for check-in and POS items was integrated in an all-in-one system. At hearing, Ms. Craft testified that US eDirect's solution would be an improvement over the current system, which requires her to use two separate computers for POS and CRS transactions.

28. Mr. Poplin and Ms. Craft also noted that Aspira's solution required a separate credit card machine. In addition, Ms. Craft noted and testified that under Aspira's solution, in order to process a credit card transaction, she would still have to manually select the type of credit card (i.e., Mastercard or Visa).

29. On May 26, 2020, the Department revised the Price Sheet, Attachment 5, for the three vendors to resubmit their pricing prior to the beginning of negotiations. The Department revised the Price Sheet to include a separate section for value-added services so that vendor pricing for the core services and any value added services could be included in one cohesive document for the negotiation team's ease of reference.

30. Throughout the procurement, the Department conducted internal strategy sessions with its negotiators, subject matter experts, and other personnel to discuss the procurement. The Department recorded these strategy sessions.

31. After the demonstrations and initial strategy session meetings, the negotiation team began negotiations with the three vendors. The Department

conducted separate negotiations with Aspira on June 9, 12, and 18, 2020, and with US eDirect on June 10, 16, and 18, 2020.⁵

32. During the negotiation phase, the negotiation team also conducted strategy sessions to strategize, discuss issues, and analyze the vendors' proposals.

33. During strategy sessions, and as required by the ITN, the negotiation team developed and created the selection criteria to be used in determining "best value."

34. During strategy sessions, the negotiation team also created an internal document titled "Best and Final Offer Guidelines" ("BAFO Guidelines"). Based on the sheer volume of information and time constraints, the negotiation team created the BAFO Guidelines as an internal aide if any individual members of the negotiation team felt they needed a tool to assist them in their individual review of the BAFOs. The BAFO Guidelines set out the selection criteria.

35. Although the BAFO Guidelines contained a scoring matrix, weights, and subparts for the various criteria, negotiators were not required to score the BAFOs. The BAFO Guidelines that were utilized by certain individual negotiators were not collected or shared with any other negotiators.⁶

36. During the strategy sessions, including sessions held on June 16 and 17, 2020, the negotiation team decided to modify the Department's May 26, 2020, Price Sheet, Attachment 5, to attach to the Department's request for best and final offer ("RBAFO"). The Price Sheet f attached to the RBAFO was different from the Price Sheet attached to the posted ITN.

37. During negotiations on June 18, 2020, Aspira asked the Department, "[I]s there a preferred path that you can say, you know, that DEP would like

⁵ The Department also conducted negotiation sessions with Conduent in June 2020.

⁶ The weights and subparts were created by the negotiation team in two strategy sessions. The Department did not provide the vendors with the BAFO Guidelines and the BAFO Guidelines were not posted on VBS.

to have either it's everything--that one base fee is all-inclusive for everything that says it's included in the base fee or you'd like to have that additional hypothetical, if you want to do a kiosk, it's going to be an additional X dollars a month. Is there a proposed path?" The negotiation team stopped negotiation with Aspira and held a sidebar strategy session to discuss how to answer Aspira's question.

38. The negotiation team understood that Aspira proposed to charge the Department the same flat-fee percentage price structure for the core solutions and any value-added services. The negotiation team realized that the revised Price Sheet did not provide spacing for Aspira to list its proposed percentage fee for value-added services. The negotiation team decided to modify the revised Price Sheet prior to BAFO submissions to allow Aspira to present its price for value-added services as a percentage of the transactions processed through individual value-added optional items.

39. After the sidebar strategy session, negotiations resumed between the Department and Aspira. The negotiation team informed Aspira that the Price Sheet would be revised to allow for percentage based pricing for value-added services prior to the BAFO submissions. In response, Aspira asked again, "is there a preference that you can tell us that DEP would like as far as methodology?" In response, Mr. Brook responded, "we're fine with your methodology, we just want to confirm that is your methodology, that is your proposal. We understand that proposal to be, for a lack of a better way to describe it, a flat fee across all methods of revenue collection. And that's great, that's fine, yeah." The negotiation team, however, gave no indication of its preference nor instructions on how Aspira should price its proposed value-added services.

40. During negotiations on June 18, 2020, Mr. Sponholts also explained to U.S. eDirect changes to the layout of the Price Sheet regarding value-added services, stating:

So, some of the discussions we had, we were getting questions about, you know, how many of these are you going to need? How important is this? When are you going to need these? And, you know, usually our answers end up being, we're not really sure, it may be in a couple years. And we're gonna need at least some of them.

So, I know it was hard for respondents to come up with some good pricing to be able to respond to that and make sure--like was alluded to the other day, make sure the backpack was filled correctly. So we've kind of changed the way we're asking for some of the pricing for additional and value-add items.

And moving to more of a monthly service per-unit style approach, more of a--as a service approach. So, it allows us to consume and doesn't have to make any of the respondents kind of go out on a limb and to gamble on how much they think we need. So we've kind of listed everything here as--into a per unit or a per-package pricing model on monthly fee. And then we would just pay for those items on a monthly basis.

So, just want to make sure you understood the reason for that. The only exception for that is at the bottom. There are a couple of things that don't lend themselves to a service model, and that the--
Keep going down.

MS. SPIVEY: Annual pass.

MR SPONHOLTZ: Yeah, So, like the annual passes and the text messaging for mass communication, I know we've been going back and forth talking to you guys specifically about whether that's included in the base percentage or whether that's something outside of the base percentage. It's--but we'll leave the options in this sheet whether you can include it in your base fee or you can describe or you can present a more a la carte model. But the text messaging and the annual passes, they don't really

lend themselves to a per-month model, they lend themselves to a per-month model, they lend themselves to more of a consumption model. So we want to leave that open for you guys to describe. That's it.

Joint Ex. 63, pp. 1851-52.

41. Contrary to Aspira's assertion, Mr. Sponholtz's comments to US eDirect during this negotiation session do not reflect a preference and direction to US eDirect that it should price its value-added solutions through an "a la carte" pricing model rather than a percentage-fee-based pricing model. As a review of the above comments and Mr. Sponholtz's testimony at hearing reflect, Mr. Sponholtz merely explained to both Aspira and US eDirect the Department's goal of moving more towards a service model approach (purchasing equipment as it is needed) and away from an ownership of equipment model approach because the Department did not want to own a lot of equipment it may not ever need. At hearing, Mr. Sponholtz explained that his comments made to both Aspira and US eDirect gave each vendor "flexibility to be able to price things so--to kind of move with our--move with our scale."

42. As testified to by Mr. Sponholtz at hearing, his comments "fit[] in with the modification that the negotiation team [made] to the value-added prices on the final Price Sheet with the three columns of compensation." As further explained by Mr. Sponholtz at hearing:

A: Right. So after speaking with all the respondents, we want to make sure the price sheet was set up such that it would work for the different pricing models. So we expected--we expected some different pricing models and we just wanted to provide some organization via the pricing sheet so that we could be able to, you know, review those pricing models, so that's why we put that in there. We also told them, though, that if they had aspects of their pricing model that did not match that format, then to go ahead and just add rows and

columns and describe their pricing--pricing methodology and we would consider it.

T., Vol. IV, p. 568.

43. The second revised Price Sheet (Attachment 5; Joint Exhibit 24, pages 294 through 297) made clear to the vendors, "[i]f your pricing method for any service does not align with the models provided below, please insert rows and/or columns to the appropriate tables and describe your proposed pricing model in detail." Again, the Department did not dictate how the vendors should price value-added services; rather, the ITN and instructions allowed the vendors flexibility to choose how to configure and price any value-added services.

The BAFOs and the Negotiation Team's Recommendation

44. On June 19, 2020, the Department sent the three vendors an RBAFO, and the Procurement Officer emailed the three vendors: (1) the selection criteria on which the award would be based; (2) the second revised Price Sheet (Attachment 5); (3) the Department's Standard Contract to be signed and returned by the vendor selected for the ITN services; (4) Supplement Scope of Work Sample; and (5) Contract Certifications. BAFO's were due to the Department by June 26, 2020, at 4:00 p.m. Both Aspira and US eDirect timely filed BAFOs.⁷

45. The selection criteria for reviewing the vendors' BAFOs, as provided to the three vendors, provide as follows:

F. SELECTION CRITERIA

The Department shall make its determination of which solution provides the best value to the state based on the selection criteria below:

1. Respondent's articulation, innovation, and demonstrated ability of the proposed approach to meet the Department's technical requirements as

⁷ Attachment 5 of the RBAFO was not posted on the VBS.

demonstrated by the BAFO, system demonstrations, and negotiation sessions.

2. Respondent's articulation, innovation, and demonstrated ability of the proposed approach to meet the Department's operational requirements for CRS as demonstrated by the BAFO, system demonstrations, and negotiation sessions.

3. Respondent's articulation, innovation, and demonstrated ability of the proposed approach to meet the Department's operational requirements for POS as demonstrated by the BAFO, system demonstrations, and negotiation sessions.

4. Respondent's articulation, innovation, and demonstrated ability of the proposed approach to meet the operational requirements for administrative and reporting web application as demonstrated by the BAFO, system demonstrations, and negotiation sessions.

5. Proposed staff experience (including proposed subcontractors) and respondent's responsibility as demonstrated by the entire response, system demonstrations, and negotiation sessions.

6. Optional solutions: Respondent's articulation, innovation, and demonstrated ability of the proposed for the optional solutions as well as the approach availability and pricing as demonstrated by the BAFO, system demonstrations, and negotiation sessions.

7. Acceptance of standard contract terms and conditions including SLAs and financial consequences as demonstrated by the BAFO.

8. Respondent's pricing as submitted in the BAFO.

Joint Ex. 227, p. 7273.

46. US eDirect's BAFO proposed a flat-fee percentage of 4.75% for its core solution during the initial term of the contract and 4.5% for its core solution

for the renewal term of the contract. For value-added solutions, US eDirect proposed its proprietary Yodel System, which is comprised of a Yodel App for the public, Yodel Ranger App for park staff, and a Yodel camera and barrier gate.

47. The Yodel system is a completely automated solution which reads license plates to grant park entry. US eDirect proposed a flat-fee transaction of \$0.15-\$0.40 depending on the equipment the Department chose to employ. This flat-fee would be paid by park visitors as a convenience fee for use of the technology. Additionally, US eDirect proposed other value-added solutions via an "a la carte model," by which the Department could pick and choose to employ other value-added solutions for an additional monthly charge.

48. Aspira's BAFO proposed a flat-fee percentage of 4.95% for its core solution during the initial term of the contract and 4.7% for its core solution for the renewal term of the contract. Similar to US eDirect's proposal, Aspira's BAFO proposed a list of value-added solutions from which the Department could choose.

49. However, Aspira proposed a price model for its value-added solutions based on the same flat-fee percentages as its core solutions (4.95% for the initial term and 4.7% for the renewal term).

50. In addition, Aspira purposefully chose to leave its BAFO section for value-added solutions vague by not listing specific hardware. As Aspira explained to the Department during a negotiation session on June 18, 2020, Aspira wanted "flexibility going forward as to those vendors who introduce new hardware and their features and functions, to be able to substitute that hardware at that kind of standard fee percentage versus us having to do more complicated things or having you do capital expenditures...." Aspira also declined to specify the quantity of value-added solutions it would provide. Instead, Aspira vaguely indicated it would "'work together' [with the Department] to identify appropriate locations" for implementing value-added

solutions which are "both financially viable and provide[s] an increase in customer service."

51. On July 6, 2020, the negotiation team held a public meeting (Intent to Award Meeting) to discuss which vendor the team believed presented the best value to the State. Each negotiator commented on which vendor he or she believed provides the best value to the state based on the selection criteria.

52. Mr. Sponholtz stated, from his IT perspective, that he liked US eDirect because its solution had a very clean and intuitive design. He also felt US eDirect had a very high rate of configurability, which was "super important" because of the diverse makeup of the parks throughout the State. Mr. Sponholtz further stated that US eDirect had a proven endpoint management software solution in place available to manage all those endpoints throughout the State. He characterized US eDirect as a "market leader in that sense." Mr. Sponholtz further stated that US eDirect "also performed very well during the demonstration," with "[n]o issues popp[ing] up during the demonstrations."

53. Mr. Poplin felt US eDirect provided "really good innovativeness." He explained his rationale from the perspective of the Department's "field operations and the ease of use for our park-level staff and ease of site and use for our visitors as well." Mr. Poplin went on to state that one of the things he had been "pushing hard on for each one of the respondents was the speed of transactions." He thought it was very important to be "able to move our guests into the parks" because "we have several of our busy parks that bottleneck." According to Mr. Poplin, US eDirect demonstrated the faster solution.

54. Ms. Craft, from her perspective as a park manager at Topsail Hill, stated that her "selection came down to the system that I felt was innovative and user friendly." For her, ease of use and speed of transactions for the field

staff was important, and US eDirect's "fully innovative system would be perfect for our field operations."

55. Both Ms. Gaskin and Mr. Brook viewed Aspira as the top solution during the preliminary vote. From Ms. Gaskin's perspective, the "main deciding factor" between US eDirect and Aspira was Aspira's "ability to leverage customers that they already have--from a marketing perspective." However, Ms. Gaskin acknowledged she is not "in the field" and "not an IT person," so she would "respect the opinions of those two who would actually be using the system." Mr. Brook also felt Aspira "offered proven customer reservation system and expertise" through its marketing channel ReserveAmerica.com.

56. Thereafter, the negotiation team engaged in a discussion amongst themselves to try and reach a consensus on the vendor who presented the best value, and a second vote was taken. Mr. Sponholtz, Mr. Poplin, Ms. Craft, and Ms. Gaskin voted for US eDirect as the best value to the State. At hearing, Ms. Gaskin testified that she changed her vote after hearing Mr. Poplin's and Ms. Craft's comments related to the functionality and ease of use of US eDirect's system for field staff, which she decided was more important than marketing. Only Mr. Brook voted again for Aspira in the second vote. After the second vote, Mr. Brook said he believed consensus is important, that he and the program will move forward enthusiastically with US eDirect, and the negotiation team unanimously recommended the award to US eDirect.⁸

⁸ Aspira failed to prove the allegations in its Amended Petition that "[u]tilizing any website but Reserve-America will result in the loss of 40% of the State's revenue." Indeed, the belief regarding any potential loss of revenue by leaving the ReserveAmerica.com platform is speculative. In any event, Mr. Brook and Ms. Gaskin raised the issue of the revenue generated by Aspira's website and marketing during the award recommendation public meeting; the issue was discussed, and, as detailed herein, it was ultimately determined at the public meeting that other factors were more important in determining best value.

57. At no time during the public meeting were scores discussed with the group. The negotiators did not mention scores or scoring during the public meeting.

58. After the public meeting, the Department posted its Notice of Intent to Award the contract to US eDirect on the VBS.

Aspira's Protest

59. Aspira raises numerous issues, none of which warrant rescission of the Department's intended award to US eDirect.

Comparison of Pricing

60. Aspira's primary contention is that the negotiation team "failed to properly price the 'core services'" and conduct an "apples-to-apples" comparison of Aspira's and US eDirect's pricing models for the value-added solutions set forth in their BAFOs.

61. The persuasive evidence adduced at hearing demonstrates that the negotiation team properly conducted a mathematical formulaic "apples-to-apples" comparison of the flat-fee percentage prices for the core services, and that the price offered by US eDirect for the core services was lower than the price offered by Aspira.

62. As to the optional value-added services, each vendor was given the freedom to present its best value-added solutions and best price model for the value-added services. Contrary to Aspira's assertions, the extensive negotiations were handled properly and in a collaborative and non-biased manner with no competitive advantage given to US eDirect. The negotiation team properly considered the prices offered by Aspira and US eDirect for value-added services as part of their individual best value determinations, but price was not a determinative factor and was, therefore, given nominal weight. The negotiation team did not do an "apples-to-apples" comparison of the value-added services because each vendor's pricing model was different and, in any event, such an analysis was not required in determining best value.

63. The pricing of value-added services was not the focus of the selection criteria or ITN. The ITN and selection criteria centered on the core services for a POS and CRS system; not the pricing for value-added services. The Department does not even know what value-added services it may purchase in the future. On the other hand, the Department is required to pay the core price upon execution of the contract.

64. Under the facts of this case, it was well within the negotiators' discretion to accord nominal weight to the pricing of value-added services contained in the BAFOs and more weight to the core solution price, superior functionality, ease of use, and innovativeness of the core solutions offered by US eDirect. In sum, the persuasive and credible evidence adduced at the hearing demonstrates that the negotiation team's consideration of pricing was not contrary to the Department's governing statutes, rules, or the ITN specifications, contrary to competition, clearly erroneous, arbitrary, or capricious.

BAFO Guidelines

65. Aspira also contends that the creation and use of the BAFO Guidelines by the negotiators violated the ITN's specification that "[t]he negotiation team will not engage in scoring but will arrive at its recommendation by discussion during a public meeting."

66. The persuasive evidence adduced at hearing demonstrates that the negotiation team's best value determination was properly made by a discussion at the public meeting and not based on the use or scoring of the BAFO Guidelines.

67. The negotiators understood that the BAFO Guidelines were merely a "tool" to aide them in their individual deliberations, and not a requirement of scoring the vendors. The negotiators who scored the vendors pursuant to the BAFO Guidelines did not share their individual scores with other negotiators or anyone else, and the scores were not turned into the procurement officer to tally.

68. Instead, the negotiation team met in a public meeting and had a discussion as to whom they each believed represented best value--a discussion that did not include scores or scoring. After an initial vote, the negotiation team further discussed who they believed presented the best value. Notably, based on this discussion, Ms. Gaskin was persuaded to change her vote from Aspira to US eDirect. A second vote was taken and the negotiation team voted four to one in favor of US eDirect. After that, Mr. Brook was persuaded to change his vote and the recommendation of award was unanimous. In sum, the persuasive and credible evidence adduced at the hearing demonstrates that the negotiators' creation and use of the BAFO Guidelines was not contrary to the Department's governing statutes, rules, or, the ITN specifications, contrary to competition, clearly erroneous, arbitrary, or capricious.

Speed of Entry

69. In its Amended Petition, Aspira further alleged that the negotiation team improperly considered speed of park entry as a factor in the award because the ITN does not address "speed of entry." However, the ITN is replete with language showing the Department's desire to increase the speed of entry for park visitors.

70. For example, the ITN stated: (1) the Department is seeking a PBS with proposed solutions that "offer convenience to park visitors, staff, and management, and capabilities with DEP systems for mobile devices and personal computer dashboard, reporting, and management." (2) "To support the Division's mission, it is imperative that the Department have access to tools that are intuitive and efficient to use to ensure visitor satisfaction and stimulate customer-based marketing." (3) "Park Admission transactions are the primary focus of the POS. The POS must be a robust system to allow for fast and efficient park entry." (4) POS and CRS "[s]ystem must provide efficient and intuitive functionality to allow park staff to process transactions in a high-volume environment." (5) "All POS transactions and screen

navigations will complete in under .2 seconds as measured at the POS location."

71. In addition, Aspira understood through negotiations that speed of entry into the state parks was very important. During negotiations with Aspira, Mr. Brook told Aspira's representative that, "... and just to reiterate that we have an understanding that speed is of the essence in Florida state parks ... speed is of the essence, speed of entry. So our goal is to make that even faster...." In response, Mr. Trivette, Aspira's chief executive officer, stated, "You guys have made it crystal clear, and frankly, if you look at the majority of the new technologies that we positioned in the ITN, they're pretty much all around speed, ease of entry, being consumer friendly and helping get people in the parks faster, which ultimately is a better consumer experience and drives additional revenue."

72. The persuasive and credible evidence adduced at hearing demonstrates that the negotiation team's consideration of speed of entry into the park was not contrary to the Department's governing statutes, rules, or the ITN specifications, contrary to competition, clearly erroneous, arbitrary, or capricious.

73. In sum, the persuasive and credible evidence adduced at hearing demonstrates that the Department appropriately determined that the proposed award to US eDirect will provide the best value to the State based on the selection criteria. The Department's intended award to US eDirect is not contrary to the Department's statutes, rules, or the ITN specifications, clearly erroneous, contrary to competition, arbitrary, or capricious.

CONCLUSIONS OF LAW

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

75. Aspira has standing to bring this procurement protest and US eDirect has standing to participate as an intervenor.

76. Pursuant to section 120.57(3)(f), Aspira bears the burden of proving, by a preponderance of the evidence, that the Department's intended award of a contract to US eDirect for a PBS system pursuant to the ITN is contrary to the Department's governing statutes, rules, or the ITN specifications, and contrary to competition, clearly erroneous, arbitrary, or capricious. *AT&T Corp. v. State, Dep't of Mgmt. Servs.*, 201 So. 3d 852, 855 (Fla. 1st DCA 2016).

77. 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.

78. 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 & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1981). 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).

79. 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).

80. 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 (Fla. DOAH Jan. 2, 2014; Fla. AHCA Feb. 3, 2014); *Phil's Expert Tree Serv., Inc. v. Broward Cty. Sch. Bd.*, Case No. 06-4499BID (Fla. DOAH Mar. 19, 2007; BCSB June 11, 2007).

81. 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. Behav. Health Corp.*, 927 So. 2d 34, 38-9 (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 Envtl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Nevertheless,

[T]he 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.

82. Under section 287.057, Florida Statutes, 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.*, 201 So. 3d at 852, 855.

83. 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. *AT&T Corp.*, 201 So. 3d at 855; *PayIt, LLC v. Dep't of Fin. Servs.*, Case No. 20-0742BID (Fla. DOAH Aug. 6, 2020; Fla. DFS Sept. 29, 2020)(rejecting protestor's challenge to weight given to agency's consideration of pricing and reasonableness of best value determination). As recognized by the court in *AT&T*:

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.

84. 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.

85. "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.

86. Turning to the merits of the instant case, Aspira failed to prove by a preponderance of the evidence that the Department's proposed action in awarding the contract to US eDirect is contrary to statute, rule, the ITN specifications, clearly erroneous, contrary to competition, arbitrary, or capricious. Contrary to Aspira's assertions, the greater weight of the evidence supports that the extensive negotiations in this procurement were handled properly and in a collaborative and non-biased manner with no competitive advantage given to any vendor. The negotiation team, consisting of individuals with varied backgrounds, properly developed selection criteria

during the negotiation phase and applied those selection criteria in discussions at a public meeting in reaching a best value determination.

87. The Department gave each vendor the freedom to present its best value-added solutions and best price model for the value-added solutions. The persuasive and credible evidence adduced at hearing demonstrates that the negotiation team understood and considered the prices offered by US eDirect and Aspira for value-added solutions, but ultimately determined at a public meeting that the core services offered by US eDirect offered the best value to the State. The failure to consider the pricing of value-added solutions as a primary factor in this procurement is certainly understandable given the goals and purposes of the ITN, which were the "core services," and the fact that the Department does not even know what value-added services it may purchase in the future. The negotiation team chose US eDirect not only based on its lowest price for its core solutions, but also because of its superior, functional, ease of use, and innovative core solutions, consistent with the goals and purposes of the ITN. The proposed award and the reasons for the award are logical, justified under the facts, consistent with the ITN, and Florida law. The undersigned considered all of Aspira's alleged grounds for rescission, and they are all rejected as without merit.⁹

⁹ In its Amended Petition, Aspira alleged additional grounds for rescission of the intended award to US eDirect, all of which are without merit. Aspira asserted that the Department's creation of the selection criteria after negotiations violates section 287.057(1)(c)1.-5. Section 287.057(1)(c) sets forth a two-step process and distinguishes "evaluation criteria" from "selection criteria." Although sections 287.057(1)(c) 3. and 4. require evaluation criteria to be specified in the ITN, no such requirement exists for the selection criteria. *Cooperative Servs. of Fla., Inc. v. Dep't of Mgmt. Servs.*, Case No. 13-0963BID (DOAH Jan. 15, 2014; Fla. DMS Feb. 28, 2014). In the instant case, the ITN clearly provided that vendors would be notified of the selection criteria after negotiations were complete. Consistent with the ITN, the negotiation team developed the selection criteria by which the vendors would provide the "best value to the State" after negotiations. The Department did not violate section 287.0571(c) by creating the selection criteria after the completion of negotiations.

Aspira also alleged that US eDirect's proposal, which provides for convenience fees paid by park visitors, violates section 258.014 and Florida Administrative Rule 62D-2.014. At hearing, Aspira abandoned its claim that that the convenience fees are illegal, and instead asserted that the ITN did not disclose that vendors have the ability to charge convenience fees. The convenience fees in US eDirect's BAFO relate to its value-added solution for the

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection enter a final order dismissing the protest of Petitioner, RA Outdoors, LLC, d/b/a Aspira.

DONE AND ENTERED this 15th day of October, 2020, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of October, 2020.

Yodel system. As previously discussed, pursuant to the ITN, Aspira was free to propose whatever pricing method it desired for value-added services. At hearing, Mr. Trivette admitted that Aspira could have bid its proposal other ways, but it chose not to do so.

At hearing, Aspira dropped the allegations within sections "H" and "I" of its Amended Petition.

COPIES FURNISHED:

Kristin Mai Bigham, Esquire
Ronald Woodrow Hoenstine, Esquire
Kathryn E.D. Lewis, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399
(eServed)

Thomas Porter Crapps, Esquire
James Zubko Ross, Esquire
Joy Ryan, Esquire
Meenan P.A.
300 South Duval Street, Suite 410
Tallahassee, Florida 32301
(eServed)

Kirsten H. Mathis, Esquire
Meenan P.A.
300 South Duval Street, Suite 410
Tallahassee, Florida 32301

Richard E. Coates, Esquire
Coates Law Firm, PL
115 East Park Avenue, Suite 1
Tallahassee, Florida 32301
(eServed)

Marion Drew Parker, Esquire
Christopher Brian Lunny, Esquire
Radey Law Firm
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301
(eServed)

Dawn Stern, Esquire
Richard P. Rector, Esquire
DLA Piper, LLP
500 Eighth Street Northwest
Washington, DC 20004-2131

Lea Crandall, Agency Clerk
Department of Environmental Protection
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000
(eServed)

Justin G. Wolfe, General Counsel
Department of Environmental Protection
Legal Department, Suite 1051-J
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000
(eServed)

Noah Valenstein, Secretary
Department of Environmental Protection
Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000
(eServed)

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.