



ARKANSAS
DEPARTMENT OF
**HUMAN
SERVICES**

Office of Procurement

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March 4, 2024

Mr. Edward Armstrong, Director
Office of State Procurement
Arkansas Department of Transformation and Shared Services
501 Woodlane, Suite 201
Little Rock, AR 72201

RE: Protest by Conduent State & Local solutions, Inc. (“Conduent”)
RFP No. 710-23-0008: Electronic Benefit Transfer Services System

Dear Director Armstrong:

The Arkansas Department of Human Services (“DHS”) posted an Anticipation to Award the Electronic Benefit Transfer Systems (“EBT”) contract under Request for Proposal (“RFP”) No. 710-23-0008 on February 12, 2024. The named awardee was Morse Data Enterprise Government Services LLC (“Morse”). On February 26, 2024, Conduent emailed its Protest of Anticipation to Award Solicitation No. 710-23-0008: Electronic Benefit Transfer Services System (“Protest”) to Director Edward Armstrong of the Office of State Procurement (“OSP”). On February 26, 2024, Director Armstrong, via e-mail, notified DHS Chief Procurement Officer (“CPO”), Sarah Cunningham, and DHS Chief Counsel, Jim Brader, of Conduent’s Protest and DHS’s ability to make its recommendations to OSP Director Armstrong pursuant to Ark. Code Ann. § 19-11-226(b)(1). As such, DHS has elected to submit the following response. For the reasons cited below, OSP should not sustain the Protest and DHS should be allowed to proceed with its award of the contract.

Timeliness and Standing

DHS does not dispute that Conduent’s Protest was timely submitted or that it has standing to Protest the Anticipation to Award. The Protest was timely received by the OSP on February 26, 2024, which was within fourteen (14) calendar days after the notice of Anticipation to Award was published on the DHS website. DHS also does not dispute that Conduent has standing to submit a protest under Ark. Code Ann. § 19-11-244(a)(2)(A) as an “actual bidder, offeror, or contractor who is aggrieved in connection with the award of a contract.” However, within this response DHS contests the grounds upon which Conduent bases its Protest such that DHS did not improperly or unlawfully award the contract. (See OSP Rule R1:19-11-244.1). Further, DHS contends that

Conduent has failed to substantiate facts upon each of the grounds asserted in its Protest as required under Ark. Code Ann. § 19-11-244(a)(4)(B).

I. Intended Awardee Complied with all Mandatory RFP Requirements.

a. *Morse submitted a Letter of Bondability as required under RFP Section 2.2.D.*

DHS agrees with Conduent that the submission of a Letter of Bondability was clearly a mandatory requirement of the RFP as a listed “Minimum Qualification” under RFP Section 2.2.D. Conduent alleges that Morse’s proposal must be disqualified as non-responsive for failing to submit a Letter of Bondability from an admitted Surety Insurer with the bid submission as required by Section 2.2.D. of the RFP. Conduent’s claim is misguided. Morse provided a Letter of Bondability (*See Attachment*) satisfying the RFP requirements in its unredacted copy of its proposal submitted to DHS. Pursuant to RFP Section 1.17, DHS alerts bidders to the practice of releasing redacted proposal copies in response to Freedom of Information Act (FOIA) requests from the public. However, it appears that Morse removed its Letter of Bondability included in its unredacted proposal either doing so inadvertently or as its apparent method of redaction. Thus, what resulted was Morse’s redacted packet was released to Conduent in response to its FOIA request without Morse’s Letter of Bondability. Such an omission is akin to a technical mistake rather than outright lack of compliance with mandatory RFP requirements that warranted disqualification of Morse’s complete proposal for consideration.

Morse’s unredacted proposal complies with all minimum qualifications outlined in Section 2.2.D. DHS contends that in the interest of conserving public funds in awarding public contracts (*See OSP Rule R7:19-11-230*) and in the spirit of fostering effective competition (*See Ark. Code Ann. § 19-11-202*) DHS did not err in accepting Morse’s proposal (*See Attachment*). Conduent’s claim that Morse’s proposal must be disqualified as non-responsive for failure to provide a Letter of Bondability is misguided and its Protest should not be sustained.

b. *Submission of a Voluntary Product Accessibility Template was not a requirement of the RFP*

Conduent further avers that Morse failed to submit a required Voluntary Product Accessibility Template (“VPAT”) in accordance with RFP Section 1.8.A.3.c., which states “[t]he following items *should* be submitted in the original Technical Proposal Packet. Voluntary Accessibility Template (VPAT), if applicable. (*See Technology Access*).” (emphasis added). Provision of a VPAT is not clearly set forth as a requirement or rule under the RFP because the section uses “should” instead of the defined terms “must” or “shall,” which are the express signals for requirements. (*See RFP Section 1.6.A and Section 1.7.F,G*). One may argue the use of the term “should” as a past tense of “shall” here in this instance. For clarity and fairness to bidders, if this was the intention and the case here, DHS needed to have included “should” in RFP Section 1.6.A and Section 1.7.F, respectively, as a defined term clearly representing a requirement.

Further, one must look to RFP Section 1.26, “Technology Access” to determine whether a requirement was clearly set forth therein. RFP Section 1.26 states in relevant part that “the Contractor expressly represents and warrants to the State of Arkansas through the procurement process by submission of a VPAT. . .that the technology provided to the State for purchase is capable, either by virtue of features included within the technology” that the technology purchased in whole or in part with state funds provides access to “individuals who are blind or visually impaired with access” to such technology. Pursuant to Ark. Code Ann. § 25-26-204(c) “the minimum specifications under subsection (b) of this section do not prohibit the purchase or use of an information technology product that does not meet these standards if the information manipulated or presented by the product is inherently visual in nature so that its meaning cannot be conveyed nonvisually.” Here, DHS required the contractors to “design an electronic benefits transfer (EBT) System for DHS that will deliver benefits on a *single card*.” (See RFP Section 2.1.) (emphasis added). The use of a card for benefits is not inherently visual; whereas, arguably the use of an automated teller machine (“ATM”) or point of sale (“POS”) system could be regarded as such. If the EBT product overall was determined to not meet the standards as set forth under Ark. Code Ann. § 25-26-201, et. seq., then DHS would be required to “provide written documentation supporting the selection of [such], including any required reasonable accommodations.” (See RFP Section 1.26.C.).

For purposes of the Protest at hand, the VPAT was not a requirement under this RFP and its omission is not dispositive to have mandated that DHS disqualify Morse’s proposal.

c. Morse’s proposal response relating to the Independent Audit and Certifications met requirements and was scored appropriately.

Conduent also alleges that Morse’s proposal should have been rejected because it failed to submit “copies of independent audit and all certifications required” in its Technical Response Packet in reference to Section E.13.A. of the Information for Evaluation. (See Protest, pg. 4). Conduent contends that DHS should have rejected Morse’s proposal under Section 3.1 of the RFP because “Technical Proposal Packets that do not meet submission Requirements shall be rejected and shall not be evaluated.” (See Protest, page 5). In essence, Conduent contends that the requirement to submit a Technical Response Packet in accordance with 1.8.A.2.f. of the RFP is only satisfied if every item is deemed “acceptable” as answered. That is incorrect. All prospective contractors must provide an answer to all required items in the Information for Evaluation. However, the DHS Office of Procurement’s role in reviewing the prospective contractors’ Technical Response Packet is limited to verification that submission requirements have been met in determining whether to reject a proposed packet under Section 3.1 of the RFP. The acceptability of submissions during the evaluation of responsive answers is reserved for evaluators during the review and scoring process. In this case, Morse provided a response to E.13.A. of the Information for Evaluation, as acknowledged by Conduent in its Protest. “Although Morse’s proposal includes a discussion about their audit procedures and processes with an independent auditor, including a note about their last audit, Morse did not include any copies of such audit.” (See Protest, page 4.)

Further, Conduent did not identify which audits or certifications were required and that which Morse was lacking as outlined in RFP section 2.37. Morse did provide a response so RFP section

2.37, which correlates to Information for Evaluation Section E.13.A. As the language contained within this section, an independent audit must be submitted to DHS “upon request” and DHS further alerts prospective contractors in RFP Section 2.37 B of the auditing requirements of the subsequent program. There are no clear immediate requirements other than the language contained in RFP Sections 2.37.A. and 2.27.B in relevant part:

A. The Contractor shall submit copies of its annual audits of its data processing, operations, disaster recovery, and security functions upon request by DHS.

B. The Contractor shall provide, to DHS who will later forward to FNS, an annual written certification stating that the Contractor and its subcontractors comply with applicable banking regulatory requirements and EBT specific requirements. These certifications shall be subject to independent verification and validation.

The listed documents in E.13.A. are not mandatory minimum qualifications and failure to provide separate documents in addition to its response to RFP Section 2.37 as provided in its proposal (*See Morse Response page 138*) did not warrant disqualification under Section 2.2 of the RFP. Further, as acknowledged by Conduent, evaluators scored Morse’s response properly for the lack of separate documentation and the score was weighed accordingly. As such, DHS' acceptance of and evaluation of Morse’s proposal was proper, and thus, Conduent’s Protest should not be sustained.

II. DHS Followed the Express Requirements of the RFP Process

Conduent alleges that DHS failed to follow the express requirements of the RFP. Specifically, Conduent contends that Section 3.2.A of the RFP *requires* DHS to schedule oral presentations from the two prospective contractors with the highest technical scores. However, throughout the RFP, “requirements” are distinguished by using the terms “shall” or “must” as defined in Sections 1.6.A and 1.7.G of the RFP. The term used in Section 3.2.A is “will,” therefore it is not a requirement as defined by the RFP. The word “will” has several connotations as outlined in the Merriam Webster Dictionary. The most applicable definition here is its use as a verb defined as “intend, purpose” (*See “will,” www.merriam-webster.com*). DHS sets forth in RFP Section 3.2 that “the two prospective contractors with the top technical proposal scores after the completion of the technical proposal evaluation will be contacted to schedule an oral presentation/demonstration.” Here, the use of the word “will” expresses intent, not a mandatory requirement.

DHS did not violate an express requirement of the RFP in determining that oral presentations/demonstrations were not necessary and did not violate any express process requirements. RFP Section 3.5.B states that by the submission of a Technical Response Packet, the Contractor understands that “subjective judgements **shall** be made during the evaluation and scoring of the Technical Proposals.” After all technical proposals were evaluated and scored, the

Evaluation Committee, in its discretion, determined that oral presentations/demonstrations were not necessary as all required information was successfully received through the Technical Response Packets. By submitting a Technical Proposal Packet, Conduent explicitly agreed to accept DHS's use of subjective judgment in the evaluation and scoring of the technical proposals. The limitation of the number of vendors providing oral demonstrations was intended to ensure that the State's commitment of resources to the evaluation process was not overextended. In a case where technical proposals from a large number of bidders were evaluated, scheduling demonstrations with only the two highest scoring bidders would have provided a focused resource expenditure. In this case, in which further differentiation between a small pool of bidders was determined to be unnecessary, the most advantageous course for the State was to prioritize competition. Also, nothing in state procurement law requires oral presentations or demonstrations as an evaluation tool. DHS contends that in the interest of conserving public funds in awarding public contracts (*See* OSP Rule R7:19-11-230) and in the spirit of fostering effective competition (*See* Ark. Code Ann. § 19-11-202) DHS did not err in allowing all three (3) prospective contractors to move forward to the scoring of cost proposals.

In addition to the above, DHS' federal regulatory entity is the United States Department of Agriculture ("USDA") Food and Nutrition Services ("FNS"), which has issued the following guidance: "[c]ontracts must be awarded to the lowest responsive and responsible bidder, or to the responsible firm whose proposal is most advantageous to the program with price as the primary factor." (*See* Memorandum for the USDA-FNS, *Guidance on Competitive Procurement Standards for Program Operators*, SP 12-2016; CACFP 05-2016; SFSP 09-2016, November 13, 2015). This guidance is still current and offers explanation to language as contained within 7 CFR Part 3016.36 regarding "competition." Also, the same regulation states "any response to a publicized request for proposals shall be honored to the maximum extent possible." (*See Id.* at subpart (d)(3)(i)). FNS will provide technical assistance or advice on other aspects of the RFP or contract that may impede competition. (*See* USDA-FNS, *WIC Informational Memorandum: Updated Guidance on Thresholds and Procedures for WIC MIS/EBT Implementation Advance Planning and Procurement Documents Requiring FNS Approval*, February 6, 2024). Allowing all three (3) prospective contractors to move forward to cost scoring fell in line with the federal regulatory guidelines of allowing for increased competition. DHS did not open cost proposals until technical scoring was completed, at which time, the evaluators determined that demonstrations or oral presentations were not needed to allow for any re-scoring of the technical proposals. Following this subjective judgement, cost proposals were then opened.

Additionally, Conduent alleges "that because Morse had the lowest technical scores among all the three offerors, Morse's proposal should not even had been considered for the award." (*See* Protest, page 6). In support of its claim, Conduent cites Section 3.2 of the RFP and the "Post-Demonstration" process permitting oral presentations for the two prospective contractors with the highest technical scores. However, in focusing on Section 3.2 of the RFP, Conduent completely ignores the subjective judgements portion of Section 3.5.B of the RFP as referenced above. Also, the calculations set forth in the RFP for determining the cost score were at thirty percent (30%), in line with state procurement law requirements set forth in Ark. Code Ann. § 19-11-230(d)(2). While the fact that Morse received the lowest technical score is undisputed, the RFP clearly states that

Cost Score would be considered and weighed in determining the Grand Total Score for each contractor and factored in the award process. Morse received the highest Cost Score and satisfied all the RFP requirements. In evaluation of the Grand Total Score, Morse was deemed to be the most advantageous responsive, responsible bidder to the State of Arkansas in accordance with Ark. Code Ann. § 19-11-230(a)(4) which states, “An award made to the responsible offeror whose proposal is determined in writing to be the most advantageous considering price and evaluation factors set forth in the request for proposals.”

Here, the differences in pricing between the vendors as inserted into the formula set forth under RFP Section 3.3 resulted in the Cost Score being a determinative factor in the highest Grand Total Score. DHS conserving resources along with following federal regulatory guidance in keeping all three vendors after the scoring of the technical proposals ensured competition and a primary focus on price. Conduent has failed to state facts to substantiate that DHS failed to follow the requirements of the RFP regarding oral presentations/demonstrations; therefore, its Protest cannot be sustained.

III. Conclusion

Conduent’s Protest should be denied in its entirety for the reasons and arguments set forth above and more specifically due to Conduent failing to state facts that substantiate each ground upon which its Protest is based because (a) Morse submitted all required elements set forth under the RFP and (b) DHS adhered to the requirements of the RFP. Thus, DHS should be allowed to move forward with the awardee to finalize the contract.

Sincerely,

Sarah Cunningham

Sarah Cunningham, J.D.
DHS, Chief Procurement Officer

Attachment as stated

cc: by Email Only:

Kristi Putnam, DHS Secretary
Jim Brader, DHS Chief Counsel
Mary Franklin, DHS Division of County Operations Director
Joyce Ballack, Morse Vice President
Jon Loveless, Conduent Program Manager
Robert F. Tom, Counsel for Conduent