

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

INFINITY SOFTWARE DEVELOPMENT,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 11-1662BID
)
DEPARTMENT OF EDUCATION,)
)
Respondent,)
)
and)
)
MICROSOFT CORPORATION,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 19 and 20, 2011, in Tallahassee, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent's intended award of a contract to Intervenor pursuant to Invitation to Negotiate No. 2011-18 is contrary to Respondent's governing statutes, Respondent's rules and policies, and the specification of the solicitation.

PRELIMINARY STATEMENT

On December 17, 2010, Respondent, Department of Education (Department), issued an invitation to negotiate, entitled "Revised Standards Tutorial." The invitation to negotiate was numbered ITN 2011-18 and shall be referred to hereinafter as "the ITN." On March 7, 2011, the Department posted its intent to award the contract to Intervenor, Microsoft Corporation (Microsoft). On March 18, 2011, Petitioner, Infinity Software Development, Inc. (Infinity), protested the intended award to Microsoft.

The Department forwarded Infinity's Formal Written Protest and Petition for Formal Administrative Hearing to the Division

of Administrative Hearings on April 1, 2011, for assignment of an Administrative Law Judge to conduct the final hearing. On April 4, 2011, Microsoft filed a Petition for Leave to Intervene, which was granted by Order dated April 6, 2011.

The parties submitted a joint pre-hearing stipulation in which they stipulated to certain facts contained in Section E, pages 5 through 7 of the joint pre-hearing stipulation. Those facts have been incorporated in this Recommended Order to the extent that they are relevant.

At the final hearing, the parties submitted Joint Exhibits 1 through 16, which were admitted in evidence. Petitioner called Regina Johnson and Martha Asbury as its witnesses. Petitioner's Exhibits 1 through 4, 6, 7, 9 through 15, and 17 were admitted in evidence. The Department called Mary Jane Tappen and Ron Lauver as its witnesses. Respondent's Exhibits 7, 9, 11, 12, 14, and 15 were admitted in evidence. Respondent's Exhibits 3 and 4 were proffered. Respondent's Exhibit 6 was not admitted in evidence. Microsoft called David Gallagher as its witness, and Intervenor's Exhibits 1 and 2 were admitted in evidence.

The three-volume Transcript was filed on May 5, 2011. The parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. The parties timely

filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department issued the ITN, Revised Standards Tutorial, on December 17, 2010. The purpose of the ITN was to contract with one or more vendors "to provide assistance with the state's need to support teachers in the implementation, and students in the mastery of the English Language Arts and Mathematics Common Core State Standards (CCSS) and the Next Generation Sunshine State Science and Civics Standards." The Department sought to purchase, among other things, the following:

[T]he development of a new robust web-based system that includes but is not limited to interactive adaptive student practice lessons for each of the Common Core State Standards and Next Generation Sunshine State Science and Social Studies Standards (Science grades 5, 8, Biology 1 and Civics) to address individual student needs and provide a means of individual progress monitoring for students, parents, and teachers; secure mini-interim assessment checks for students; student performance reports for teachers on the mini-interim assessment checks; and programming for parent, student, and teacher log-ins that provide different levels of access to support materials.

2. The ITN required that the system developed would be the property of the Department during and after the contract and stated:

All equipment, software and licenses, programming code and language, documentation and content (both instructional and informative) that is developed as part of this project will be the property of the Department during and after the grant period. All such items must be completely transferred to the Department prior to the end of the contract period, including any licenses to the extent that they have not expired. Any proprietary products owned by the Contractor must provide for a perpetual royalty free and non-exclusive license for use by the Department.

3. Vendors were given the opportunity to ask technical questions about the ITN, and the Department posted the questions and the Department's responses on the vendor bid system on December 29, 2010. One vendor submitted the following question: "Will the DOE require a perpetual license to continued use of any content (assessments or lessons) after the end of the four-year contract if those materials are the vendor's proprietary, pre-existing materials that are provided for use in the Standards Tutorial?" The Department gave the following written response, which was included in Addendum No. 1 to the ITN. "All content and applications developed will be the property of the Department. All content, application code and documentation must be turned over to the Department upon deliverable completion." It is clear from the ITN and the first addendum that the Department required the materials developed pursuant to the contract to be the property of the Department.

4. One of the main goals of the Department in issuing the ITN was to have a product that could be sustained after the contract period. When the ITN was developed, the Department was not aware of the variety of arrangements that might be possible in order to meet all of the Department's goals. However, the Department made the choice to go with ownership of the products developed for the contract and a perpetual, royalty-free non-exclusive license for products that were owned by the contractor and provided pursuant to the contract, but were not developed as a result of the contract. The Department could have worded the ITN so that the vendors would provide a solution for the sustainability component of the contract, but it did not do so. The method chosen by the Department to meet its sustainability needs became a requirement of the ITN. Sustainability was a material aspect of the contract, and, because the Department had specified the method to achieve sustainability in the ITN with no leeway for the vendors to propose a different methodology, the ownership of products developed pursuant to the contract became a material requirement of the ITN. Nothing prevented the Department from negotiating different methods of sustainability during negotiation, but in order to determine whether a vendor was responsive, the Department was bound by the ITN, no matter whether it inadequately reflected what the Department was

seeking. The remedy to the flawed ITN would have been to change the specifications prior to the replies being submitted.

5. The Department argues in its Proposed Recommended Order that the ITN did not call for ownership of the content or the software. This argument is disingenuous in light of the testimony of the Department's representative that the ITN contemplated complete ownership of the products developed pursuant to the contract.

6. Section 7.1 of the ITN required that the vendor include completion dates for deliverables in its Reply and provided a list of deliverables for each year of the contract. The ITN stated that the Deliverable Completion date contained in the ITN was for "informational purposes only." The actual completion dates were to be negotiated.

7. Section 3 of the ITN provides: "Award will be made to the responsible and responsive vendor that the Department determines will provide the best value to the state." Section 3.3. of the ITN defines a responsive bid as "a Reply submitted by a responsive and responsible vendor which conforms in all material respects to the solicitation." The term "Reply" is defined by the ITN as "the complete response of the Respondent^[1/] to the ITN, including properly completed forms and supporting documentation."

8. Section 4.11 of the ITN provides:

As in the best interest of the state, the right is reserved to award based on **all or none** thereof, to a responsive, responsible Respondent. As in the best interest of the state, the right is reserved to reject any and/or all Replies or to waive any minor irregularity in replies received. Conditions which may cause rejection of Replies include, without limitation, evidence of collusion among Respondents, obvious lack of experience or expertise to perform the required work, failure to perform, or meet financial obligations on previous contracts.

9. Section 5.2.2 of the ITN is entitled Mandatory Submittal Documents and requires that the vendors submit, among other things, a transmittal with their replies which contains the following:

- a statement certifying that the person signing the Reply is authorized to represent the Respondent and bind the Respondent relative to all matters contained in the Respondent's Reply
- the company's federal tax identification number
- a statement certifying that the Respondent has read, understands, comply [sic] and agrees to all provision of this ITN
- a statement that the Respondent is authorized to conduct business in Florida in accordance with the provisions of Chapter 607, F.S. In lieu of such statement, the Respondent alternatively must certify that authorization to do business in Florida will be secured prior to the award of the contract

- a statement certifying that the Respondent is registered on the MyFloridaMarketPlace website in accordance with the provisions by the state of Florida. In lieu of such statement, the Respondent must alternatively certify that registration authorization will be completed prior to the award of the contract.

10. Once the replies were submitted, the ITN required that the replies be reviewed to determine if they met the mandatory submittal requirements. If it was determined that a reply met the mandatory submittal requirements, the reply would be evaluated by an evaluation committee.

11. Section 8 of the ITN sets out the evaluation and negotiation process and provides:

8.1 REPLY EVALUATION AND NEGOTIATION PROCESS

Using the evaluation criteria specified below, in accordance with Section 287.057, F.S., the Department shall evaluate and rank responsive Replies and, at the Department's sole discretion, proceed to negotiate with one or more Respondent(s) . . . :

12. Section 8.2 of the ITN provides:

The ITN is designed to assess the most points to the Respondent presenting the best solution for the required services. The Evaluation Committee will consider only those Replies, which are determined to meet the mandatory requirement review (See SECTION 5.2.2) first completed by the Department's Bureau of Contracts, Grants and Procurement Management Services.

Each member of the Evaluation Committee will be provided a copy of each Technical Reply. Replies will be evaluated on the criteria

established in the section above entitled "Criteria for Evaluation" in order to assure that Replies are uniformly rated. The Evaluation Committee will assign points, utilizing the technical evaluation criteria identified herein and the Procurement Office will complete a technical summary.

Oral presentations (or seeking clarification) will be evaluated by the committee based on the criteria established in SECTION 5.2.1 above. During this stage Respondents will be asked to provide any clarifications needed by the evaluation committee to assist in evaluating their Reply. Information received in this stage will be added to the Respondent's Reply and evaluated as a part of the appropriate section above.

13. Section 8.1 of the ITN provides that the evaluation of the prices would be done through a comparison of the prices submitted in the replies: "The maximum points will be awarded to the lowest acceptable Price Reply. Replies with higher costs will receive the fraction of the maximum points proportional to the ratio of the lowest Price Reply to the higher Price Reply."

14. Section 8.1(E) of the ITN provides:

In submitting a Reply Respondent agrees to be bound to the terms of this ITN, however, the Department reserves the right to negotiate different terms and related price adjustments if the Department determines that it is in the state's best interest to do so.

15. Four vendors, including Infinity and Microsoft, submitted replies to the ITN by the deadline of January 10, 2011.

16. Microsoft's Reply stated:

The information contained in this document [the reply] (a) represents Microsoft's current statement of the features, functions, and capabilities of the products and services described herein, which is subject to change at any time without notice to you, (b) is for your internal evaluation purposes only and should not be interpreted as a binding offer or commitment on the part of Microsoft to provide any product or service described herein; and (c) constitutes Microsoft trade secret information and may not be disclosed to any third party. Any procurement that may result from this information is subject to negotiation and execution of a definitive agreement between [sic] and its chosen authorized Microsoft reseller incorporating applicable Microsoft commercial terms. Microsoft does not guarantee the accuracy of any information presented and assumes no liability arising from your use of the information. MICROSOFT MAKES NO WARRANTIES, EXPRESS OR IMPLIED, IN THIS DOCUMENT.

17. The transmittal letter submitted by Microsoft stated:

"[T]his letter certifies that Microsoft has read and understands the provisions of the ITN." The transmittal letter did not meet the requirements of the ITN that Microsoft certify that it complies and agrees with all provisions of the ITN.

18. The reply submitted by Microsoft did not provide that all materials developed as a result of the contract would become the property of the Department. Microsoft intended to subcontract with Houghton-Mifflin-Harcourt (HMH) to develop the content, which includes the practice lesson plans for the

students. Microsoft stated in its Reply: "The Department of Education will have a perpetual license to use these lessons; HMH will retain copyright and ownership of all lessons provided."

19. Microsoft intentionally did not agree to provide complete ownership of the project deliverables to the Department when it submitted its reply. David Gallagher, Microsoft's representative and the person who submitted the reply on behalf of Microsoft, admitted at the final hearing that he did not have authorization to give the Department ownership of the project deliverables when he submitted Microsoft's reply.

20. Section 5.2.3 of the ITN provided that prices were to be submitted on a form that was provided in the ITN. The price form contains the following language:

We propose to provide the services being solicited within the specifications of ITN 2011-18. All work shall be performed in accordance with this ITN, which has been reviewed and understood. The below prices are all inclusive. There shall be no additional costs charged for work performed under this ITN.

The price form submitted by Microsoft did not contain this language.

21. Taking the evidence as a whole, it is clear that Microsoft did not intend to be bound by its reply and thought

that anything that was contrary to the ITN would be worked out in negotiations.

22. The Department appointed an evaluation team that met on January 18, 2011, to score each reply. Some of the evaluators made note in their evaluations that Microsoft's reply did not meet the requirements of the ITN relating to ownership of the project deliverables.

23. The evaluation committee awarded the maximum number of points for price to Microsoft. The two top-scoring vendors, Infinity and Microsoft, were invited into negotiations. The Department submitted questions to both Infinity and Microsoft before the negotiations, and both vendors submitted written responses to those questions. The Department submitted the following question to Microsoft:

Your proposal states "HMH will retain copyright and ownership of all lessons provided" (pp.3-25, 3-33). How does this meet the ITN requirement that "All equipment, software and licenses, programming code and language documentation and content (both instructional and informative) that is developed as part of this project will be the property of the Department during and after the grant period. All such items must be completely transferred to the Department prior to the end of the contract period, including any licenses to the extent they have not expired. Any proprietary products owned by the Contractor must provide for a perpetual royalty free and non-exclusive license for use by the Department." (p. 6)?

24. Microsoft responded to the question of ownership, in part, as follows:

Developments. Upon payment in full, we assign you joint ownership in all rights in any custom computer code or materials (other than products, fixes or pre-existing work) developed by us (or in collaboration with you) and provided to you in the course of performance of this contract ("developments"). "Joint ownership" means each party has the right to independently exercise any and all rights of ownership now known or hereafter created or recognized, including without limitation the rights to use, reproduce, modify and distribute the developments for any purpose whatsoever, without the need for further authorization to exercise any such rights or any obligation of accounting or payment of royalties, except you agree you will exercise your rights for your internal business operations only, and you will not resell or distribute the developments to any un-affiliated third party. These use restrictions shall survive termination or expiration of this contract. Each party shall be the sole owner of any modifications that it makes based upon the developments.

* * *

Educational-Digital Content & Assessments. We will grant a perpetual, royalty-free and non-exclusive license (except as set forth below) for all of the content and lesson instruction and assessments created as part of this project to the State of Florida. As such, we will retain copyright and ownership of this created material, while the State of Florida may leverage the material on an exclusive basis in the State of Florida anywhere within its offices, school facilities, and education programs, including use extended to staff, administration, teachers, students and

parents. Much of the content, particularly in the Reading, Language Arts/Literature and Civics disciplines is integrated into the lessons from third-party sources. The ownership of material permissioned from outside our team is unavailable to be granted or transferred to the State of Florida. However as part of the sustainability plan for the Student Standards Tutorial, we will ensure that mechanisms are in place to allow for permission renewals as required by contract with third-party content owners for a period encompassing four years from the final delivery of the contract period.

Although Microsoft was given an opportunity to clarify its position on ownership of the product deliverables developed for the contract, Microsoft's response was still not responsive to the requirements of the ITN.

25. The Department appointed a negotiation team that met separately with Infinity and Microsoft on February 3, 2011. During the negotiation session, a Microsoft representative stated that it would be "impossible" for Microsoft to provide complete ownership of equipment and software, that there was no way that Microsoft could put in its best and final offer that the Department would have complete ownership, and that Microsoft did not want to be non-responsive but it did not know how to fix the problem.

26. After the negotiation session with Microsoft, Regina Johnson (Ms. Johnson) and Mary Jane Tappen, who were members of the negotiation team, engaged in email communications regarding

whether the Department could change the language of the ITN to allow the Department to accept the licensing proposal offered by Microsoft. Ms. Johnson noted that if the ITN language were not changed, Microsoft could be rejected for non-compliance.

27. On February 7, 2011, after the negotiation sessions, Ms. Johnson sent an email to Infinity notifying Infinity that the Department would accept a license or co-ownership proposal, reflecting a change in the ITN specifications.

28. Following negotiations, each vendor was given the opportunity to submit a Best and Final Offer (BAFO) by February 11, 2011. Both vendors submitted BAFOs.

29. On February 16, 2011, the negotiators held an Intent to Award meeting. Following discussion, two negotiators voted for Microsoft, and one voted for Infinity.

30. On March 1, 2011, Chancellor Frances Haithcock sent an Intent to Award memorandum to Commissioner Eric Smith (Commissioner Smith), explaining why Microsoft provides the best value to the state. Commissioner Smith signed that memorandum on March 4, 2011.

31. On March 7, 2011, the Department posted the Intent to Award to Microsoft.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. See §§ 120.569 and 120.57, Fla. Stat. (2010).^{2/}

33. Section 120.57(3)(f) provides that the burden of proof rests with the party protesting the agency's intended decision, and further provides:

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.

34. Infinity contends in its Proposed Recommended Order that Microsoft was not responsive to the ITN for the following reasons:

- 1) The Microsoft Reply was not responsive because the reply did not include the mandatory submittal documents required by Section 5.2.2 of the ITN;
- 2) The Microsoft Reply was not responsive because the reply was not "binding" as required by Section 8.1(E) of the ITN; and
- 3) The Microsoft Reply was not responsive because it did not provide DOE with complete ownership of the non-proprietary contract deliverables as required by Section 3.1 of the ITN and the ITN Addendum.

Infinity has the burden to establish that Microsoft's reply was non-responsive for these reasons and that the Department's decision to determine that Microsoft was responsive was clearly erroneous, contrary to competition, arbitrary, or capricious.

35. An agency action will be found to be "clearly erroneous" if the agency's interpretation conflicts with the plain and ordinary intent of the law. See Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004). In such a case, "judicial deference need not be given" to the agency's interpretation. Id. An agency action will be found to be "clearly erroneous" if it is without rational support, and, consequently, the trier-of-fact has a "definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

36. An act is "contrary to competition" if it unreasonably interferes with the objectives of competitive bidding, which are:

[T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the county at the lowest possible expense; and to afford equal advantage to all desiring to do business with the

county, by affording an opportunity for an exact comparison of bids.

Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931).

37. The Administrative Law Judge in SYSLOGIC Technology Services, Inc. v. South Florida Water Management District, Case No. 01-4385BID (Fla. DOAH Jan. 18, 2002; SFWMD Mar. 6, 2002), stated:

Thus, from Section 287.001 can be derived an articulable standard of review. Actions that are contrary to competition include those which:

- (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. (emphasis added).

38. "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. Liberty Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006).

39. Chapter 287, Florida Statutes, deals with the procurement of commodities and services by state agencies. The Department utilized an invitation to negotiate as the method for

procurement of the contract at issue. Section 287.057(1) (c) describes how a procurement by invitation to negotiate is conducted and provides:

(c) Invitation to negotiate.--The invitation to negotiate is a solicitation used by an agency which is intended to determine the best method for achieving a specific goal or solving a particular problem and identifies one or more responsive vendors with which the agency may negotiate in order to receive the best value.

1. Before issuing an invitation to negotiate, the head of an agency must determine and specify in writing the reasons that procurement by an invitation to bid or a request for proposal is not practicable.

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.

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.

5. The contract file for a vendor selected through an invitation to negotiate must contain a short plain statement that explains the basis for the selection of the vendor and that sets forth the vendor's deliverables and price, pursuant to the contract, along with an explanation of how these deliverables and price provide the best value to the state. (emphasis added).

40. Section 287.012(25) defines a responsive submission to a solicitation as follows: "Responsive bid," "responsive proposal," or "responsive reply" means a bid, or proposal, or reply submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation. A responsive vendor is defined by section 287.012(26) as "a vendor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation." Section 287.012(24) defines a responsible vendor as "a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance." The statutory definition of a responsive vendor does not change whether the procurement method is an invitation to bid, a request for proposals, or an invitation to negotiate.

41. The evidence clearly demonstrates that Microsoft's reply deviated from the ITN. However, every deviation from the ITN does not make a reply non-responsive to the ITN. The Department reserved the right to waive minor irregularities. The court in Robinson Electrical Co. v. Dade County, 417 So. 2d

1032, 1034 (Fla. 3d DCA 1982), discussed the criteria for determining whether a variance is a material deviation or a minor irregularity and stated:

Although a bid containing a material variance is unacceptable, Glatstein v. City of Miami, 399 So. 2d 1005 (Fla. 3d DCA), rev. denied, 407 So. 2d 1102 (Fla. 1981), not every deviation from the invitation is material.

In determining whether a specific noncompliance constitutes a substantial and hence non-waivable irregularity, the courts have applied two criteria-first, whether the effect of a waiver would be to deprive the [government agency] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

In application of the general principles above discussed, sometimes it is said that a bid may be rejected or disregarded if there is a material variance between the bid and the advertisement. A minor variance, however, will not invalidate the bid. In this context a variance is material if it gives the bidder a substantial advantage over the other bidders, and thereby restricts or stifles competition. 10 McQuillan, Municipal Corporations § 29.65 (3d Ed. Rev. 1981) (footnotes omitted); see Harry Pepper & Associates, Inc. v. City of Cape Coral, (Fla. 3d DCA 1982).

42. The leitmotif of both Microsoft's and the Department's arguments is that, because the procurement is by an invitation

to negotiate, if there is a variance in the vendors' replies and the ITN, it is of no moment because there will be negotiations before a contract is awarded. This argument is without merit. A procurement made by an invitation to negotiate is a competitive procurement. Section 287.057 requires that the Department determine that a reply is responsive prior to entering into negotiations with the vendor. In the instant case, Microsoft was not responsive to the ITN prior to the negotiation. The Department recognized that Microsoft was not responsive when it posed the question to Microsoft prior to the negotiations to explain how the licensing method for the content that Microsoft submitted in its reply was not contrary to the requirement of ownership set forth in the ITN. Instead of rejecting Microsoft's reply for being non-responsive, the Department essentially changed the requirements of the ITN to make Microsoft responsive, which is contrary to competition.

43. It is clear that Microsoft was not submitting a binding reply and that it did not agree to comply or be bound by the terms of the ITN. It intentionally omitted the certification in its transmittal letter that it complies and agrees with the terms of the ITN. It placed disclaimers in both its technical and price replies that the reply was for "evaluation purposes only and should not be interpreted as a binding offer or commitment on the part of Microsoft to provide

any product or service described herein." It omitted language in its price reply that all work was to be performed in accordance with the ITN, that the prices submitted were all inclusive, and that there would be no additional charges for the work performed under the ITN. Although Microsoft argues that Microsoft knew that it was bound by the terms of the ITN, this argument is without merit based on the testimony of the representative of Microsoft who submitted Microsoft's reply that he did not have authorization to give ownership of the content developed to the Department. Again, during negotiations, Microsoft made it clear that it was impossible for Microsoft to give complete ownership to the Department.

44. Determining that a vendor who will not agree to be bound by the terms and conditions of the ITN is responsive defeats the purpose of the requirement that the reply must be responsive in order to be qualified to negotiate and goes to the heart of the competitive nature of a procurement by invitation to negotiate.

45. Additionally, the vendors were evaluated on the prices that they submitted in their replies. The lowest price submitted garnered the most points. If a vendor does not submit binding prices, then the evaluation becomes meaningless because a true comparison of the prices submitted by all vendors cannot be made if prices are only estimates. No testimony was provided

that the other vendors were allowed to submit prices that were not binding or that were only estimates.

46. Microsoft argues that the Department could negotiate with a qualified vendor if the vendor's reply was not responsive to the ITN. The term "qualified vendor" is not defined in the ITN, and section 287.057 provides that the vendor must be responsive, not qualified. Thus, to negotiate with a vendor who was not responsive but was qualified is contrary to the statute governing the Department's use of an invitation to negotiate.

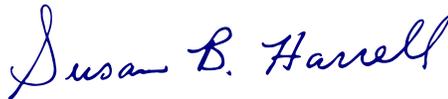
47. The Department's decision to determine Microsoft's reply responsive to the ITN and proceed to negotiations was contrary to the ITN and contrary to section 287.057. The determination that Microsoft's reply was responsive is clearly erroneous and contrary to competition. Thus, to award a contract to a vendor who should not have been determined responsive to the ITN is clearly erroneous and contrary to competition. To award the contract to Microsoft would be contrary to the ITN and to section 287.057.

48. Because the award to Microsoft is contrary to section 287.057 and the ITN, the Department is left with the decision to either reject all replies and issue a new ITN which clearly reflects what the Department wants or to enter into negotiations with Infinity.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that the intended decision to award a contract to Microsoft pursuant to ITN 2011-18 is contrary to section 287.057 and the ITN.

DONE AND ENTERED this 7th day of June, 2011, in Tallahassee, Leon County, Florida.



SUSAN B. HARRELL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of June, 2011.

ENDNOTES

^{1/} Respondent is defined by the ITN to mean "a potential Contractor acting on its own behalf and on behalf of those individuals, partnerships, firms, or corporations comprising the Respondent's team."

^{2/} Unless otherwise indicated, all references to the Florida Statutes are to the 2010 version.

COPIES FURNISHED:

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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.