



April 8, 2024

Mr. Robert F. Tom
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RE: Protest by Conduent State & Local Solutions, Inc. ("Conduent")
RFP No. 710-23-0008: Electronic Benefit Transfer Services System

Dear Mr. Tom,

The Office of State Procurement has reviewed your client, Conduent's, protest of the Department of Human Services's (DHS) anticipated award of Request for Proposal No. 710-23-0008 for an Electronic Benefit Transfer Services System (the "EBT RFP" or the "solicitation"). Conduent protests on the ground that "the procurement agency fail[s] to adhere to the rules of the procurement as stated in the solicitation, and the failure to adhere to the rules of the procurement materially affect[s] the contract award."¹

In support of its protest, Conduent identifies several specific requirements of the EBT RFP, explains why it believes those requirements were mandatory, alleges how DHS failed to adhere to them, and argues it has been aggrieved by this failure. For reasons detailed more fully below, the relief request in the protest is denied.

I. Reasoning²

Conduent first claims it has been aggrieved because DHS improperly announced its intent to award the EBT contract to Morse, a competing participant, but Morse did not satisfy the EBT RFP's mandatory requirements. It claims that if Morse had been disqualified it would have been awarded the contract because it had the second highest score. Second, Conduent argues that DHS failed to adhere to the solicitation because it did not schedule oral presentations with two prospective contractors.

¹ Ark. Code Ann. § 19-11-244(a)(4)(A)(iii).

² Conduent meets the standing and timeliness requirements to file a protest. It has standing as an "actual bidder, offeror, or contractor who is aggrieved in connection with the award of a contract." Ark. Code Ann. § 19-11-244(a)(2)(A). And its protest was made within fourteen (14) days. Ark. Code Ann. § 19-11-244(a)(3).

A. Morse Failed to Satisfy the EBT RFP’s Mandatory Requirements

Conduent’s claims that Morse failed to satisfy mandatory requirements of the solicitation rest on the argument that the solicitation’s use of the terms “shall” and “must” introduce a mandatory requirement. Section 1.6 of the EBT RFP, entitled ACCEPTANCE OF REQUIREMENTS, provides:

- A. The words “**must**” and “**shall**” signify a Requirement of this solicitation and that the Contractor’s agreement to and compliance with that item is mandatory.
- B. A Contractor’s proposal will be disqualified if a Contractor takes exceptions to any Requirements named in this RFP.
- C. Contractor may request exceptions to NON-mandatory items. Any such request **must** be declared on, or as an attachment to, the appropriate section’s Agreement and Compliance Form. Contractor **must** clearly explain the requested exception and should reference the specific solicitation item number to which the exception applies.³

This language establishes that, for purposes of the EBT RFP, the words “must” and “shall” signify mandatory requirements. Such usage is consistent with how the word “shall” is understood in the context of Arkansas Procurement Law.⁴ Based on this, Conduent argues that DHS failed to follow the EBT RFP by not rejecting proposals that did not meet mandatory requirements in Sections 1.8; 2.2; and 3.2 of the solicitation. Each of these arguments is addressed below.

1. Section 1.8: Voluntary Product Accessibility Template

First, Conduent argues that DHS should have rejected Morse’s proposal because it did not satisfy the requirement of Section 1.8 A. 3. c. of the solicitation, which requires that a Voluntary Product Accessibility Template (“VPAT”) be submitted with the original Technical Proposal Packet.⁵ Section 1.8 A. 3. c. of the EBT RFP states:

1.8 RESPONSE DOCUMENTS

A. Original Technical Proposal Packet

The following items are Proposal Submission Requirements and **must** be submitted in the original Technical Response Packet.

...

- 3. The following items **should** be submitted in the original *Technical Proposal Packet*.

...

³ EBT RFP Section 1.6 A.-C.

⁴ See Ark. Code Ann. § 19-11-203(28) (“‘Shall’ means the imperative”).

⁵ Protest, 4.

- c. *Voluntary Product Accessibility Template (VPAT)*, if applicable. (See *Technology Access*.)

...

Morse did not submit a VPAT with its proposal. DHS contends that Morse's failure to supply a VPAT is not a disqualifying failure to satisfy a mandatory requirement of the EBT RFP because Section 1.8 A. 3. c. states a VPAT "*should* be submitted in the original Technical Proposal Packet." In contrast to the mandate preceding the Letter of Bondability requirement, the reference to a VPAT in the EBT RFP is immediately preceded by the statement that it "should" be submitted with the original Technical Proposal Packet.

DHS argues that the term "should" means something less than a clear mandate, and I agree. Unlike "must" and "shall" the term "should" is not given a special definition in the EBT RFP. I must assume that the use of different language to define different obligations was deliberate. Consequently, the word "should" is read as having its plain, ordinary meaning, as Arkansas courts do when construing contract terms⁶ and statutes.⁷ "Should" is used to express a sense of duty or expectation.⁸ However, the obligation is not mandatory and unlike "shall" and "must" is permissive or advisory. If DHS had meant it to be mandatory, it would have used "shall" or "must" instead of "should." Also, the requirement is followed by the phrase "if applicable," denoting that in some instances the VPT may not be required at all.

Additionally, if the two provisions—the first providing "must" and the second "should"—conflict, the general, specific canon must be applied.⁹ This canon provides that when there is conflict between a general provision and a specific provision, the specific provision prevails. In other words, if a statute contains both a broad, general rule and a narrower, specific rule addressing a particular situation, the specific rule takes precedence over the general one.

Therefore, although Section 1.8 provides that "the following" items "must" be submitted, the specific subsection containing the VPAT requirement states that "the following items *should* be submitted..." Because this clause is more specific and immediately precedes the VPAT requirement, I think "should" and not "must" is the applicable term. Therefore, DHS was not required to disqualify Morse for not including a VPAT.

⁶ *First Nat. Bank of Crossett v. Griffin*, 310 Ark. 164, 169, 832 S.W.2d 816, 819 (1992).

⁷ *Ark. for Healthy Eyes v. Thurston*, 2020 Ark. 270, at 7, 606 S.W.3d 582, 586.

⁸ "Should." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/should>. Accessed 18 Mar. 2024.

⁹ *Hackie v. Bryant*, 2022 Ark. 212, 654 S.W.3d 814 (citing Antonin Scalia & Bryan Garner, *Reading the Law: The Interpretation of Legal Texts* 180 (1st ed. 2012)).

2. Section 2.2: Letter of Bondability

Conduent next argues that Morse's proposal should have been rejected because Morse failed to submit a Letter of Bondability, which is a mandatory requirement of the solicitation. Section 2.2 D. of the EBT RFP states, "[t]he Contractor **must** meet the following requirements," including the requirement that "the Contractor **must** be bondable," and that "[f]or verification purposes, the Prospective Contractor **shall** submit a Letter of Bondability from an admitted Surety Insurer with bid submission." Based on the use of the terms "must" and "shall," and Section 1.6 regarding their use, Conduent correctly asserts that a Letter of Bondability is a mandatory requirement.

Nevertheless, Conduent's argument ultimately fails because Morse submitted a Letter of Bondability with its unredacted copy of its proposal. In its response to the protest, DHS states, "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." Therefore, when DHS provided Morse's redacted packet to Conduent in response to its Freedom of Information Act request, DHS failed to include a copy of Morse's Letter of Bondability.

Supplying only one copy of a required document is, at worst, a minor irregularity or technical violation; it is not material failure to satisfy a mandatory RFP requirement. Indeed, the bondability requirement screens out offerors whose performance cannot be bonded from those that are "responsible."¹⁰ The State can still use the Letter of Bondability provided with the unredacted proposal to verify that the offeror is a bondable and responsible offeror. This minor oversight did not alter the RFP such that it frustrates the purpose of the requirement or prevents fair comparison of the competing proposals of responsible offerors.

In addition, I may waive technicalities in proposals or minor irregularities in a procurement "which do not affect the material substance of the Request for Proposals when it is in the State's best interest to do so."¹¹ Although it would be inappropriate under this standard to waive an offeror's complete failure to supply a Letter of Bondability, I will waive this minor irregularity since a copy of the Letter of Bondability was submitted and it serves the intended purpose of the RFP requirement—to establish that the offeror is bondable. It is in the best interest of the State not to disqualify proposals for minor irregularities where, as here, the purpose of the requirement is served and the offeror does not derive any unfair competitive advantage.¹²

¹⁰ A "responsible bidder or offeror" is "a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability that will assure good faith performance." Ark. Code Ann. § 19-11-204(11).

¹¹ See OSP Rule R7:19-11-230.

¹² See *id.* at R7:19-11-230(a).

3. Section 3.2: Independent Audit and Certifications

Conduent also argues that Morse's proposal should have been rejected because it failed to submit copies of "an independent audit and all certifications required" in its Technical Response Packet. Although Conduent correctly recognizes that all prospective contractors must respond to the Information for Evaluation section in the Technical Response Packet,¹³ Morse's failure to include a copy of an audit was not fatal to its proposal.

Here, Morse's proposal included a discussion about their audit procedures and processes with an independent audit. Although it did not include copies of the independent audit, the solicitation did not require one. The Independent Audit and Certification Section of the EBT RFP provides that a contractor shall submit copies of its annual audits "upon request by DHS." Therefore, unless requested by DHS, copies were not required with the proposal to fulfill the mandatory minimum qualifications, and DHS did not have to disqualify Morse's proposal for failing to include one.

B. DHS Failed to Follow an Express Requirement of the Solicitation

Finally, Conduent alleges that DHS failed to follow the express requirements of the solicitation because it did not entertain oral presentations from two prospective contractors. The EBT RFP provides, "two (2) Prospective Contractors with the top technical proposal scores after the completion of the technical proposal evaluation will be contacted to schedule an oral presentation."¹⁴

Again, the EBT RFP defines "must" and "shall" as mandatory terms. It does not include "will" as a word which has that meaning. Furthermore, Merriam Webster Dictionary defines "will" as "intend, purpose," which like "should" does not denote any mandatory obligation.¹⁵ Accordingly, I find that DHS did not violate any express requirement of the RFP in failing to schedule oral presentations with two prospective contractors.

III. CONCLUSION

Conduent's protest is denied for the forgoing reasons. DHS may proceed with the procurement consistent with Arkansas Procurement Law including, but not limited to, Ark. Code Ann. § 19-11-262. This determination is final and conclusive.¹⁶

¹³ EBT RFP 1.8. A. 2. F.

¹⁴ EBT RFP Section 3.2

¹⁵ "Will." Merriam-Webster.com Dictionary, Merriam-Webster, [Will Definition & Meaning - Merriam-Webster](#). Accessed 24 Mar. 2024.

¹⁶ See Ark. Code Ann. § 19-11-262.

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Respectfully,

A handwritten signature in black ink that reads "Jessica Patterson". The signature is written in a cursive, flowing style.

Jessica Patterson
State Procurement Director

cc: by Email Only:

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