

ROBERT F. TOM, SHAREHOLDER
Direct Dial: 901.577.2159
Direct Fax: 901.577.0818
E-Mail Address: rtom@bakerdonelson.com

March 6, 2024

VIA ELECTRONIC MAIL

Edward Armstrong
State Procurement Director
Arkansas Department of Transformation and Shared Services
501 Woodlane, Suite 201
Little Rock, Arkansas 72201
edward.armstrong@arkansas.gov

**Re: Response to Department of Human Services (“DHS”) Protest Response
regarding Anticipation to Award Solicitation No. 710-23-0008: Electronic Benefit
Transfer Services System**

Dear Mr. Armstrong:

This reply addresses the response brief submitted by DHS (“Response”) in connection with Conduent’s Protest of Anticipation to Award Solicitation No. 710-23-0008: Electronic Benefits Transfer Services System (“Protest”). Conduent wishes to address and refute multiple issues raised within the Response. Capitalized terms and acronyms not defined herein shall have the meaning set forth in the Protest.

I. Morse’s Noncompliance with Mandatory RFP Requirements

Although DHS attempts to downplay the missing documentation and nonresponsive portions of Morse’s proposal, the fact remains that multiple portions of Morse’s proposal did not meet the mandatory requirements of the RFP. *See* Protest. It is a universally accepted principle of procurement law that proposals must meet all mandatory requirements of an RFP. *See Statewide Process Serv. of Fla., Inc. v. Dep’t of Transp.*, No. 95-5035BID, 1995 WL 1053244 (Fla. Div. Admin. Hrgs. Dec. 18, 1995) (failure to comply with the key terms of the invitation to bid is fatal to consideration of the bid proposal). *SWR, Inc.*, B-284075; B-284075.2, February 16, 2000 (any proposal that fails to conform to material terms and conditions of an RFP should be considered unacceptable and may not form the basis for an award).

a. *Voluntary Product Accessibility Template*

DHS claims that the use of the word “should”, in Section 1.8 A. 3. of the RFP implies that providing the Voluntary Product Accessibility Template was optional for bidders. That assertion is incorrect and ignores the other mandatory language of the RFP. Even if the term “should” could somehow be interpreted as a mere suggestion in other contexts (a dubious proposition), the standalone sentence at the beginning of Section 1.8 states, “[t]he following items are Proposal Submission Requirements and **must** be submitted in the original Technical Response Packet.” This sentence applies to, and governs, the Voluntary Product Accessibility Template which “should be submitted in the original Technical Proposal Packet” by bidders. DHS’s interpretation would render the word “must” included in the introductory phrase of Section 1.8 non-existent and meaningless, and is in direct contradiction with Section 1.6 A. of the RFP which provides that “[t]he words “must” and “shall” signify a Requirement of this solicitation and that the Contractor’s agreement to and compliance with that item is mandatory” and “[a] Contractor’s proposal will be disqualified if a Contractor takes exceptions to any Requirements named in this RFP.”

b. *Independent Audits*

DHS misleadingly states that “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.” See Response, Page 3. That is not correct. Conduent’s position is that noncompliance with mandatory requirements of the RFP is grounds for rejection of a proposal by the terms of the RFP itself. As discussed in the Protest, independent audits were required by the RFP’s explicit terms. Section 1.8 A. 2. f. of the RFP states: “The Technical Response Packet should be clearly marked ‘Original’ and must include the following: Technical Proposal Response to the Information for Evaluation section included in the Technical Response Packet.” The Technical Response Packet states, “Provide a response to each item/question” and then Section E.13 A. states “Provide copies of independent audit and all certifications required.” Because Morse did not provide “copies of independent audits,” as required, Morse was non-responsive. The logic employed by DHS would mean that a completely irrelevant answer to any question would still be responsive, but this would lead to absurd results. It is one thing to receive an unacceptable grade, but another issue completely to ignore the explicit requirements of the Technical Response Packet through the RFP.

Furthermore, DHS argues that the independent audits were not mandatory because it would only become mandatory “upon request.” RFP Section 2.37 A. Although this is a correct statement of the language used in the specific section of the RFP, the argument fails when considered with the Technical Response Packet. As stated above, the Technical Response Packet by its own terms requests the independent audits in Section E. 13 A., which states “Provide copies of independent audit and all certifications required.” This statement from DHS must be considered a request for such documentation, meaning that the independent audits became a mandatory requirement of any proposal submission. Thus, Morse’s proposal failed to comply with the mandatory requirements of the RFP.

II. DHS Failure to Conduct Oral Presentations

Bidders are entitled to rely on the evaluation process set forth in solicitation documents. *See Helicopter Transport Servs. LLC*, B-400295, B-400295.2, Sept. 29, 2008, 2008 CPD ¶ 180 at 5 (sustaining bid protest because agency's evaluation process was "inconsistent with [the] announced evaluation scheme"); *AT&T Mobility LLC*, B-420494 May 10, 2022 (sustaining bid protest because agency conducted evaluation process "contrary to the terms of solicitation"); *Gen. Rev. Corp.*, B-414220.2, et al., Mar. 27, 2017, 2017 CPD ¶ 106 ("Once the solicitation is issued and offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria in making its award decision, or inform all other offerors of any significant changes made in the evaluation scheme."). In this case, DHS failed to conduct an important evaluation step set forth in the RFP without amending the RFP or notifying the bidders.

Specifically, the RFP provided that "[t]he two (2) Prospective Contractors with the top technical scores after the completion of the technical proposal evaluation will be contacted to schedule an oral presentation/demonstration." In spite of the clear language in the RFP, DHS skipped this step and now, in its Response brief, attempts to construe the word "will" as a simple wish or possible intention instead of the required process that it is. *See* Response, Page 4. This idea contradicts Arkansas law and well accepted principles of procurement law. Under Arkansas law, "[w]hen parties express their intentions in a written instrument in clear and unambiguous language," a court must "construe the writing in accordance with the plain meaning of the language employed, considering the sense and meaning of the parties' words as they are taken and understood in their plain and ordinary meaning." *Northeast Public Water Authority v. City of Mountain Home*, 552 S.W.3d 437, 442 (Ark. Ct. App. 2018); *see also SWR, Inc.*, B-284075; B-284075.2, February 16, 2000 (granting bid protest because the agency "relaxed" the RFP specifications and its requirements during the solicitation process); *Sonetronics, Inc.*, B-289459.2, March 18, 2002. (sustaining a bid protest because the Agency did not follow the RFP required evaluation method based on at least three "completed" contracts. The awardee submitted only a single completed contract thus the Agency did not and could not follow the evaluation process laid out in the RFQ).

The plain meaning of Section 3.2 of the RFP indicates that an oral presentation would be conducted by DHS with "the two (2) Prospective Contractors with the top technical scores after completion of the technical proposal evaluation." DHS's failure to conduct oral presentations was a violation of the terms of the RFP, past the point of a relaxation of the terms that has sustained federal protests. DHS attempts to construe language in a manner inconsistent with common usage in order to relieve itself of its duties stated in the RFP.

III. Conclusion

For the foregoing reasons, and the reasons contained in the Protest, Conduent respectfully asks that its Protest be sustained. It is in the best interest of the State to ensure that any errors and omissions are accounted for and public trust in future procurement is maintained.

Sincerely,

Baker, Donelson, Bearman,
Caldwell & Berkowitz PC



Robert F. Tom

cc:

Karrie Goodnight
Solicitations
Arkansas Department of Human Services
Donaghey Plaza, P.O. Box 1437
Little Rock, Arkansas 72203
DHS.op.solicitations@dhs.arkansas.gov

Sarah Cunningham
Chief Procurement Officer
Arkansas Department of Human Services
Donaghey Plaza, P.O. Box 1437
Little Rock, Arkansas 72203
sarah.cunningham@dhs.arkansas.gov

Paris Nielsen
Contract Review and Reporting
Arkansas Department of Transformation and Shared Services
501 Woodlane, Suite 201
Little Rock, Arkansas 72201
paris.nielsen@arkansas.gov

Morse Data Enterprise Government Services LLC

Joyce Ballack
Morse Data Enterprise Government Services LLC
13785 Research Blvd, Suite 125
Austin, TX 78750
joyce.ballack@itsmorse.com