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February 26, 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: Protest of Anticipation to Award Solicitation No. 710-23-0008: Electronic Benefit Transfer Services System (this “Protest”)**

Dear Mr. Armstrong:

We represent Conduent State & Local Solutions, Inc. (“Conduent”). On behalf of Conduent and pursuant to the provisions of Ark. Code Ann. § 19-11-244, *et seq.*, we hereby protest the announcement and intended contract award of Solicitation No. 710-23-0008: Electronic Benefit Transfer Services System (the “Solicitation”) to Morse Data Enterprise Government Services LLC (“Morse”). Pursuant to Ark. Code Ann. § 19-11-244(f), Conduent respectfully requests no contract be awarded in connection with the Solicitation until this protest has been resolved.

Conduent is an industry-leading provider of Information Technology and Business Process Outsourcing solutions to state and local governmental agencies. Conduent does business globally and in all fifty (50) states. Conduent is one of the foremost providers of electronic payments processing services, including services in support of Electronic Benefits Transfer (EBT) for the Supplemental Nutrition Assistance Program.

**I. Background**

On October 4, 2023, the State of Arkansas (“State”) Department of Human Services (“DHS”) issued a final Request for Proposals (“RFP”) for a statewide Electronic Benefit Transfer

Services System contract. As of February 12, 2024, DHS received three proposals, one from each of the following: (1) Conduent, (2) Morse, and (3) Fidelity Information Services LLC (“FIS”). On February 12, 2024, DHS announced its Anticipation to Award the Electronic Benefit Transfer Services System contract, selecting Morse’s proposal for intended award. Among the three proposals received in response to the Solicitation, Conduent received the highest technical score - 562.22 compared to the intended awardee’s technical score of 427.93. However, because Morse submitted a lower cost proposal Morse received the highest Grand Total Score of 727.93, followed by Conduent with a score of 717.89, and last was FIS with a score of 585.21. The following table shows the bid tabulation and scoring matrix for the Solicitation:

### RFP Proposal Tab

Solicitation #/Description: 710-23-0008 Electronic Benefit Transfer Services System

RFP Opening				Weighted Technical Proposal Score	Cost		Grand Total Score <small>*Weighted Technical Proposal Score + Cost Score</small>
Date:	11/30/2023	Read By:	David King		Cost	Cost Score	
Time:	2:00 p.m.	Recorded By:	Karrie Goodnight				
Proposal Submitted By:				Max. Possible: 700	Max. Possible: 300	Max. Possible: 1,000	
Conduent State & Local Solutions, Inc.				562.22	\$ 5,871,904.92	155.67	717.89
Fidelity Information Services LLC				493.95	\$ 10,015,510.40	91.26	585.21
Morse Data Enterprise Government Services LLC				427.93	\$ 3,046,857.88	300	727.93

Highest Ranked Prospective Contractor: Morse Data Enterprise Government Services LLC

The RFP outlined the mandatory requirements for proposals as well as the process of review for DHS to follow. For purposes of the arguments below, the following sections of the RFP are of particular importance to this Protest:

1. *Section 1.6 – ACCEPTANCE OF REQUIREMENTS*
  - 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.
2. *Section 1.8, 3. – RESPONSE DOCUMENTS*

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

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

3. *Section 2.2 – MINIMUM QUALIFICATIONS*

The Contractor **must** meet the following requirements:

- D. Contractor **must** be bondable. For verification purposes, the Prospective Contractor **shall** submit a Letter of Bondability from an admitted Surety Insurer with bid submission. The letter **must** unconditionally offer to guarantee, to the extent of one hundred percent (100%) of the annual contract price, the Prospective Contractor's performance in all respects of the terms and conditions of the RFP and the resultant contract.

4. *Section 3.2 – ORAL PRESENTATION/DEMONSTRATION SCORE*

- A. The 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.
- B. The buyer will create a second set of score sheets by copying the Excel workbook (including the scores entered) and titling each of the score sheets in that workbook as the "Post-Demonstration" score sheets.
- C. After each oral presentation/demonstration is complete, the Evaluation Committee members will have the opportunity to discuss the oral presentation/demonstration and revise their individual scores on the Post-Demonstration Consensus Score Sheet based on the information provided during the oral presentation/demonstration.
- D. The final individual scores of the evaluators on the Post-Determination Consensus Score Sheets will be averaged to determine the final technical score for each proposal.

## II. **Timeliness and Standing**

Arkansas procurement law authorizes a determination on the merits of a protest if such protest is (1) timely made, (2) by an aggrieved party, and (3) on at least one of the enumerated statutory grounds. *See* Ark. Code Ann. § 19-11-244. A protest is timely if submitted in writing within fourteen calendar days after the award or notice of anticipation to award. Ark. Code Ann. § 19-11-244(a)(3). The Notice of Anticipation to Award to Morse was announced on February 12, 2024; thus, this protest is timely made as of today, February 26, 2024. Conduent may protest the award of this contract as an "actual bidder" and "aggrieved" party. Arkansas Code Ann. § 19-11-244(a)(2). Although "aggrieved party" is not defined in the statute, the Arkansas Supreme Court has determined an aggrieved party to be one who suffers adverse financial consequences. *See Forrest Constr., Inc., v. Milam*, 345 Ark. 1, 7, 43 S.W.3d 140, 144 (Ark. 2001). Conduent is an aggrieved party because Conduent's proposal was not accepted, and thus lost the contract award to a competing participant that did not follow the mandatory requirements of the RFP. Additionally, DHS did not follow the required review process in accordance with the terms of the RFP. Finally, one of the five statutory grounds which a protest may be based upon concerns adherence to the rules of a specific solicitation. *See* Ark. Code Ann. § 19-11-244(a)(4)(A)(iii). As will be described further in the following section, this protest should be sustained because of both DHS's and Morse's failure to comply with the mandatory requirements contained within the RFP.

### III. Basis for Protest and Argument

This protest is made on the grounds that “the procurement agency failed to adhere to the rules of the procurement as stated in the solicitation, and the failure to adhere to the rules of procurement materially affected the contract award.” Ark. Code Ann. § 19-11-244(a)(4)(A)(iii).

1. *The Intended Awardee, Morse Data Enterprise Government Services LLC, Was Non-Responsive for Failure to Submit Mandatory Documentation Required by the RFP.*

Morse did not comply with the rules and requirements explicitly stated in the RFP. Section 1.8 A. 3. c. of the RFP requires that a Voluntary Product Accessibility Template (“VPAT”) be submitted with the original Technical Proposal Packet and Section 2.2 D. states that “[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.” Morse’s proposal did not include either form of the aforementioned documentation.

The RFP requirements with which Morse failed to comply were mandatory and disqualifying. Section 1.6 A. of the RFP states:

- 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. Contractor’s proposal will be disqualified if a Contractor takes exceptions to any Requirements named in this RFP.

Thus, by the terms of the RFP itself, Morse’s proposal must be disqualified as non-responsive for lack of compliance with mandatory RFP requirements. In addition, the RFP’s definitions of the terms “shall” and “must” are consistent with the interpretation of those terms given by Arkansas courts. The Arkansas Supreme Court “has consistently held that the word ‘shall’ in a statute, means the legislature intended mandatory compliance with the statute unless such an interpretation would lead to an absurdity.” *Hathcock v. Arkansas Dept. of Human Services*, 69 S.W.3d 6, 8 (Ark. 2002); *see also Tollet v. Wilson*, 608 S.W.3d 602, 606 (Ark. 2020)) (“The word ‘shall’ means mandatory compliance unless it would lead to an absurd result.”); *Barber v. State*, No. CR-22-778, 2024 WL 696796, at \*8 (Ark. Ct. App. Dec. 21, 2024) (“The word shall means mandatory.”). Additionally, both missing documents are important sources of information for DHS to evaluate Morse’s ability to perform the services in the manner required by the RFP. On the other hand, Conduent proved its ability to perform all aspects of the future contract within its proposal.

Morse also failed to submit, pursuant to Section E.13 A. of the Information For Evaluation within the Revised Technical Response Packet<sup>1</sup>, “copies of independent audit and all certifications required.” The failure to submit this documentation is further evidenced by the fact that Morse received a zero for this section. Section 3.1 of the RFP describes a Quality Rating of zero as “unacceptable” and “the proposal clearly does not meet the requirement.” Although Morse’s

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<sup>1</sup> Attached as Exhibit A.

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.

The missing audit document described above was also grounds for automatic rejection of Morse's proposal. According to Section 1.8 A. 2. f. of the RFP, a Technical Response Packet "**must** include" a "Technical Proposal response to the Information For Evaluation section included in the Technical Response Packet." Furthermore, the Information For Evaluation section says "[p]rovide a response to each item/question in this section." As mentioned above, Section E.13 A. of the Information For Evaluation document states "[p]rovide copies of independent audit." Again, Morse did not provide copies of any audits. This failure should have resulted in rejection of Morse's proposal because Section 3.1 of the RFP states that "Technical Proposal Packets that do not meet submission Requirements shall be rejected and shall not be evaluated." The missing audits are yet another example of Morse's non-responsiveness; a reason Morse's proposal should have been rejected and not evaluated in any capacity; and reason for this Protest to be sustained.

Protests of Arkansas contract awards will be sustained where it is shown that the intended awardee failed to follow the mandatory requirements of an RFP. For example, on December 15, 2020, the State Procurement Director sustained the Protest of Award in RFP No. 710-20-0041: Solicitation for Design, Development, Implementation, Maintenance, and Operations of a new Comprehensive Child Welfare Information System<sup>2</sup> ("CWISS Protest Determination"), because the winning proposal did not satisfy the mandatory requirements of the price proposal submission.<sup>3</sup> The CWISS Protest Determination discussed a lack of documentation within the winning proposal. In the CWISS situation, the winning bidder did not submit a required attachment with its Official Bid Price Sheet, which could have been grounds for immediate rejection. (Exhibit B at 4). Rather, DHS sought clarification from the winning bidder even though any clarification cannot amend or "change the terms" of a submitted proposal. (Ark. Code Ann. § 19-11-230(f)(2); Exhibit B at 4). In the determination, the State Procurement Director stated, "Where a failure to meet a mandatory requirement is clear and unambiguous, what further clarification is needed?" (Exhibit B at 4).

The missing information in Morse's proposal concerned accessibility, bondability requirements, and audit reports, which relate directly to the ability of a bidder to perform the services according to the terms of the RFP. The missing documents are clearly and unambiguously mandatory provisions of RFP Sections 1.8 A. 3. c. and 2.2 D, respectively, and the Technical Response Packet. Even if DHS has sought a clarification from Morse for the missing documentation, the words of the State Procurement Director remain on point: "[w]here a failure to meet a mandatory requirement is clear and unambiguous, what further clarification is needed?" (Exhibit B at 4).

If DHS has communicated with Morse for the information, the process has not been made public, and thus does not further the underlying policies of State procurement law including "increased public confidence in the procedures followed in public procurement," "fair and equitable treatment of all persons who deal with the procurement system of this state," and

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<sup>2</sup> Attached as Exhibit B.

<sup>3</sup> Importantly, according to Arkansas procurement law, the failure to "conform to the essential requirements" of a solicitation is grounds for rejection of that proposal. TSS OSP Rule R6: 19-11-230(1).

providing “safeguards for the maintenance of a procurement system of quality and integrity.” Ark. Code Ann. § 19-11-202.

2. *DHS Failed to Follow the Express Requirements of the RFP Process.*

Section 3.2 A. of the RFP provides for oral presentation by “the two (2) Prospective Contractors with the top technical scores after the completion of the technical proposal evaluation.” Furthermore, Sections 3.2 C. and D. of the RFP provide for score adjustments based on the RFP required oral presentations. As the bid tabulation above shows, the proposals of Conduent and FIS received the two highest Technical Scores, 562.22 and 493.95 respectively, compared to 427.93 of Morse, but Conduent was not given an opportunity to orally present and demonstrate its proposal.

According to the terms of the RFP, Conduent and FIS should have each received an opportunity to orally present their proposals based on their technical scores. The failure of DHS to allow oral presentations by the two offerors with the highest technical scores was a clear violation of the express terms of the RFP. Indeed, because Morse had the lowest technical scores among all three offerors, Morse’s proposal should not even have been considered for the award. Section 3.2 of the RFP sets forth a detailed “Post-Demonstration” process for discussion of oral presentations by the Evaluation Committee, revision of scores, and then tabulation of final scores for those offerors who made oral presentations. Because Morse was ineligible for oral presentations, Morse’s scores could not have been included in that process, and awarding to Morse was a violation of the terms of the RFP.

Protests of Arkansas contract awards will be sustained where it is shown that the agency has failed to follow the requirements of an RFP. For example, on April 5, 2023, the State Procurement Director sustained the Protest of Award in Solicitation No. S000000162: Food Distribution Services<sup>4</sup> (“FDS Protest Determination”), because the competitive sealed bidding requirements, as mandated in the solicitation, were not met when reviewing the department received proposals.

The FDS Protest Determination concerned non-compliance with competitive sealed bidding requirements contained in the solicitation. In that case, the solicitation terms dictated the time in which bids were to be opened. As a result of technical issues with the submission format, the winning bid was first opened over an hour after the scheduled opening time. Exhibit C, at 2. The issue was that competitive sealed bidding State law clearly requires “[p]ublic contemporaneous opening of bids at a predesignated time and place.” Ark. Code Ann. § 19-11-229(a)(2); Exhibit C, at 2. The protest was sustained on the basis that the review process did not follow the solicitation’s mandatory requirements, which were to be conducted in accordance with the State laws about competitive sealed bidding.<sup>5</sup> Exhibit C, at 3.

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<sup>4</sup> Attached as Exhibit C.

<sup>5</sup> See *McGoldrick Construction Services Corporation*, B-409252.2, March 2, 20214. Federal Government Accountability Office sustained a bid protest on grounds that the agency did not evaluate the proposal in question in the manner prescribed in the solicitation for certain requirements.

Although the mandatory requirements in the FDS Protest Determination and the RFP at issue are different, the effect is the same. In the FDS Protest Determination, the terms of the proposal did not change because of the RFP violation, but nevertheless the protest was sustained, as should be the case here. The expectation of willing participants in the bidding process is that the rules will be followed and enforced. It is imperative that this expectation continue to be met in order to incentivize maximum participation in the bidding process and further the State's interest with any future solicitations.<sup>6</sup>

#### **IV. Conclusion**

For the foregoing reasons, Conduent respectfully asks that this Protest be sustained as Conduent is an aggrieved party, making a timely protest, on the required statutory grounds. It is in the best interest of the State to ensure that the aforementioned 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  
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<sup>6</sup> See Ark. Code Ann. § 19-11-202 for policy considerations.

**Notice to anticipated awardee named in Anticipation to Award pursuant to Ark. Code Ann. § 19-11-244(a)(2)(B):**

**Morse Data Enterprise Government Services LLC**

Joyce Ballack  
13785 Research Blvd, Suite 125  
Austin, TX 78750  
Email: [joyce.ballack@itsmorse.com](mailto:joyce.ballack@itsmorse.com)



Exhibit A

[Revised Technical Response Packet]

**TECHNICAL RESPONSE PACKET**  
**REVISED**  
**710-23-0008**

## RESPONSE SIGNATURE PAGE

Type or Print the following information.

PROSPECTIVE CONTRACTOR'S INFORMATION			
Company:	_____		
Address:	_____		
City:	_____	State: _____	Zip Code: _____
Business Designation:	<input type="checkbox"/> Individual <input type="checkbox"/> Sole Proprietorship <input type="checkbox"/> Public Service Corp <input type="checkbox"/> Partnership <input type="checkbox"/> Corporation <input type="checkbox"/> Nonprofit		
Minority and Women Owned Designation*:	<input type="checkbox"/> Not Applicable <input type="checkbox"/> American Indian <input type="checkbox"/> Service-Disabled Veteran <input type="checkbox"/> African American <input type="checkbox"/> Hispanic American <input type="checkbox"/> Women-Owned <input type="checkbox"/> Asian American <input type="checkbox"/> Pacific Islander American		
	AR Certification #: _____ * See <i>Minority and Women-Owned Business Policy</i>		
PROSPECTIVE CONTRACTOR CONTACT INFORMATION			
<i>Provide contact information to be used for solicitation related matters.</i>			
Contact Person:	_____	Title: _____	_____
Phone:	_____	Alternate Phone: _____	_____
Email:	_____		
CONFIRMATION OF REDACTED COPY			
<input type="checkbox"/> YES, a redacted copy of submission documents is enclosed. <input type="checkbox"/> NO, a redacted copy of submission documents is <u>not</u> enclosed. I understand a full copy of non-redacted submission documents will be released if requested.  <i>Note: If a redacted copy of the submission documents is not provided with Prospective Contractor's response packet, and neither box is checked, a copy of the non-redacted documents, with the exception of financial data (other than pricing), will be released in response to any request made under the Arkansas Freedom of Information Act (FOIA). See Solicitation Terms and Conditions for additional information.</i>			
ILLEGAL IMMIGRANT CONFIRMATION			
By signing and submitting a response to this <i>Solicitation</i> , a Prospective Contractor agrees and certifies that they do not employ or contract with illegal immigrants and shall not employ or contract with illegal immigrants during the term of a contract awarded as a result of this solicitation.			
ISRAEL BOYCOTT RESTRICTION CONFIRMATION			
By checking the box below, a Prospective Contractor agrees and certifies that they do not boycott Israel and shall not boycott Israel during the term of a contract awarded as a result of this solicitation.			
<input type="checkbox"/> Prospective Contractor does not and shall not boycott Israel.			

**An official authorized to bind the Prospective Contractor to a resultant contract shall sign below.**

The signature below signifies agreement that any exception that conflicts with a Requirement of this *Solicitation* may cause the Prospective Contractor's response to be rejected.

Authorized Signature: \_\_\_\_\_ Title: \_\_\_\_\_

Printed/Typed Name: \_\_\_\_\_ Date: \_\_\_\_\_

## PROPOSED SUBCONTRACTORS FORM

• Do not include additional information relating to subcontractors on this form or as an attachment to this form.

**PROSPECTIVE CONTRACTOR PROPOSES TO USE THE FOLLOWING SUBCONTRACTOR(S)  
TO PROVIDE SERVICES.**

*Type or Print the following information*

Subcontractor's Company Name	Street Address	City, State, ZIP

**PROSPECTIVE CONTRACTOR DOES NOT PROPOSE TO USE  
SUBCONTRACTORS TO PERFORM SERVICES.**

## VENDOR AGREEMENT AND COMPLIANCE

- Any requested exceptions to items in this section which are NON-mandatory must be declared below or as an attachment to this page. Vendor must clearly explain the requested exception, and should label the request to reference the specific solicitation item number to which the exception applies.
- Exceptions to Requirements shall cause the vendor's proposal to be disqualified.

By signature below, vendor agrees to and shall fully comply with all Requirements as shown in this section of the bid solicitation.

Authorized Signature: \_\_\_\_\_

*Use Ink Only.*

Printed/Typed Name: \_\_\_\_\_ Date: \_\_\_\_\_

## INFORMATION FOR EVALUATION

- Provide a response to each item/question in this section. Prospective Contractor may expand the space under each item/question to provide a complete response. Attachment V Client History Form and Attachment I Standard IT Requirements may be considered by evaluators in relevant categories in evaluation.
- Do not include additional information if not pertinent to the itemized request.

	Maximum RAW Score Available
<b>E.1 General Requirements</b>	
A. Provide Prospective Contractor's company history including the number of years and experience in developing, implementing, and managing financial systems such as EBT, Electronic Funds Transfer (EFT), financial network services, and transaction processing.	5 points
B. Describe the Prospective Contractor's experience as it pertains to the developing, implementing, and managing financial systems such as EBTs, EFTs, financial network services and transaction processing including utilization of pre-existing commercial networks, ATMs, and POS terminals.	5 points
C. Describe the Prospective Contractor's experience concerning USDA Federal regulations pertaining to the EBT System.	5 points
D. Describe the Prospective Contractor's existing commercial networks, ATMs, and POS terminals.	5 points
E. Provide a short concise synopsis outlining transaction processing, retailer management, and customer service including all services, supplies and functions for the EBT System as outlined in this RFP.	5 points
<b>E.2 Design Phase</b>	
A. Provide a current listing of FNS approved retailer and Third-Party Processors that will be utilized with DHS.	5 points
B. Describe the design of Prospective Contractor's system including a description of the operating environment, procedures, and workflow.	5 points
<b>E.3 Transition In Requirements</b>	
A. Describe the processes to be used for the migration of the client and retailer database from the current Contractor's EBT/EFT system to the new system.	5 points
B. Describe the Prospective Contractor's contingency plan for problems and issues that may occur during migration.	5 points
C. Provide a schedule of high-level milestones for the transition in phase.	5 points
D. Provide the Prospective Contractor's bank account structure.	5 points
<b>E.4 EBT System Functionality</b>	
A. Describe the Prospective Contractor's contingency plan for circumventing communication outages of longer than five (5) minutes.	5 points
B. Describe the Prospective Contractor's process of eliminating unauthorized access.	5 points
C. Describe the plan to ensure that all transmitted data will be accurately and completely received to prevent incomplete and/or duplicate data?	5 points
D. Describe the Prospective Contractor's card inventory control system.	5 points
E. Describe the capability to process and accept out of state card transactions.	5 points

F. How does the Prospective Contractor's system facilitate tracking and retaining individual benefits?	5 points
G. Describe the Prospective Contractor's solution process in steps from receiving our input file through the posting of a benefit and issuance of a card including any error report handling.	5 points
H. Describe how the Prospective Contractor will provide online access to FNS.	5 points
<b>E.5 EBT Card Requirements</b>	
A. Describe the distribution process for EBT cards and packets for both mailing and over the counter cards.	5 points
B. Describe in detail the Prospective Contractor's capabilities to design and/or manufacture EBT cards. Identify any third party or subcontractor (if applicable) involvement in the process.	5 points
C. Describe the Prospective Contractor's process for replacing lost, damaged, or stolen cards for both mailing and over the counter cards.	5 points
D. Describe the proposed EBT card design and requirements including security features that meet or exceed FNS standards and QOR.	5 points
E. Describe the Prospective Contractor's approach to issuing new and replacement cards for both mailing and over the counter cards.	5 points
F. Describe the Prospective Contractor's approach to mass reissuance of EBT cards.	5 points
G. Describe enhanced security measures and features to minimize stolen card information.	5 points
<b>E.6 Customer Service Requirements</b>	
A. Describe the Prospective Contractor's customer service call center including staff, availability, support from IVRS and help desk, and performance standards including statistics.	5 points
B. Provide the physical location(s) and describe all technical and support services, i.e., customer service call center, retailer help desk, state support help desk, and card production facility	5 points
C. Describe how the data processing technical support help desk will monitor the system and transmission line?	5 points
D. Describe in detail how cardholders access ATMs and POS terminals to obtain cash.	5 points
E. Describe the Prospective Contractor's plan to ensure that all data and information housed by the various data centers are fully protected against unauthorized access?	5 points
F. Describe employee support the Prospective Contractor will provide Call Center employees once the system is activated.	5 points
G. Explain what the Prospective Contractor would do to gather transaction history if the agency requested.	5 points
H. Describe the Prospective Contractor's interactive voice response system (IVRS) and features.	5 points
I. Describe how cardholder complaints and disputes are resolved and the timeframes associated with the process.	5 points
J. Describe the process for educating cardholders on accessing the cardholder portal and how cardholders will navigate through the portal.	5 points
K. Explain how cardholders are notified of changes or adjustments that affect them.	5 points
L. Describe the standard procedures employed to verify the identity of the cardholder using the help desk, web portal, and mobile applications.	5 points

M. Describe enhanced security procedures, options, or features available to verify the identity of cardholders using the help desk, web portal, and mobile applications.	5 points
<b>E.7 Training</b>	
A. Describe in detail the following training information for staff, cardholders, & retailers:	
1. Training options such as hands-on, initial, on-going, etc.	5 points
2. Training materials and resources	5 points
3. Training programs	5 points
B. Describe how much training will be provided, the number of trainers and whether training will be provided by the Prospective Contractor or subcontractor(s).	5 points
<b>E.8 POS Terminals</b>	
A. Describe the method used to block access to TANF benefits at POS terminals.	5 points
B. Provide an overview of POS transaction types and functions.	5 points
C. Describe the plan for supplying POS equipment to the exempt locations maintained by USDA requesting vendor supplied Terminals	5 points
D. Describe the process to capture both on and offline transactions including online EBT, System initiated, online processing interactions, offline processing manual vouchers, online transactions processing related to cardholder, retailer and financial institution accounts, initiated at access terminals.	5 points
<b>E.9 Financial Transaction/Transmission Requirements, Financial Adjustment Processing</b>	
A. Describe in detail how the proposed system will support financial transaction processing including the following:	
1. identify networks included in the EBT system	5 points
2. online and off-line financial transactions	5 points
3. retailer & financial institution account processing	5 points
4. ATM Network and provide the total number of Network ATM locations	5 points
B. How does the proposed system support reporting of benefit access?	5 points
C. Describe when cardholders would be notified of adjustments to their EBT accounts.	5 points
D. How does the proposed system support and maintain written adjustment letters sent to participants.	5 points
<b>E.10 Maintenance &amp; Change Request Processes &amp; Procedures</b>	
A. Provide the Prospective Contractor's plan for processing change order requests.	5 points
B. Provide the Prospective Contractor's contingency plan for unprocessed change order requests.	5 points
C. Describe the EBT systems integration process for TPPs	5 points
D. Describe the process and procedures for scheduled and unscheduled system downtime.	5 points
<b>E.11 Problem Management, Contract Monitoring &amp; Problem Resolution</b>	
A. Describe the Prospective Contractor's specific strategy for problem management controls.	5 points
B. Provide an overview explaining how the Prospective Contractor will monitor the contract and the steps for problem resolution.	5 points



C. Describe the precautions the Prospective Contractor will take to ensure an EBT SNAP benefit account is not closed when a SNAP case closes.	5 points
D. Explain the steps the Prospective Contractor will take to ensure that open accounts remain open during account close outs.	5 points
E. Describe how the proposed system will recognize and reject requests for duplicate account assignments based on matching SSN, date of birth, and name. Include the process of how DHS will be notified.	5 points
<b>E.12 System Performance, System Security Plan, Fraud Prevention Analysis</b>	
A. Describe how the Prospective Contractor will provide card security.	5 points
B. Describe how the Prospective Contractor will monitor ATM accessibility.	5 points
C. Describe the Prospective Contractor's Security Plan for the EBT System.	5 points
D. Describe the proposed system's data security controls and indicate whether they meet or exceed FNS thresholds.	5 points
E. Describe how effective the Prospective Contractor's Fraud Prevention Plan has been with other EBT Systems.	5 points
F. Provide the Prospective Contractor's procedures for incident management.	5 points
G. Describe available options for federally and state required blocking of EBT transactions for prohibited card use and terminals.	5 points
<b>E.13 Independent Audit/Certification</b>	
A. Provide copies of independent audit and all certifications required.	5 points
<b>E.14 Project Management</b>	
A. Provide the Prospective Contractor's staffing plan that includes the following: <ul style="list-style-type: none"> <li>• An organizational chart</li> <li>• List of key personnel by position, title, and function including a description of all resource requirements, roles, and responsibilities</li> <li>• Resumes of key personnel</li> </ul>	5 points
B. Provide a list of Project Management task that encompass all duties for managing staff. The list should include key personnel roles and responsibilities.	5 points
<b>E.15 Reporting</b>	
A. Describe the proposed system's reporting capabilities and features for the following: <ul style="list-style-type: none"> <li>• Financial</li> <li>• Batch Processing</li> <li>• Card</li> <li>• Billing Security</li> <li>• Program Management</li> <li>• System Performance</li> </ul>	5 points
B. Describe the Prospective Contractor's process to incorporate an ad hoc report into a systematic report.	5 points
<b>E.16 Transition Out Requirements</b>	
A. Describe the Prospective Contractor's complete transition out plan.	5 points
<b>E.17 Value Added Services</b>	
A. Describe benefits available to the cardholder (such as free ATM transactions) and cardholder convenience functionality included in the Prospective Contractor's proposal.	5 points

<p>B. Describe the enhanced security options, features, or protocols providing additional security and assisting with fraud mitigation included in the Prospective Contractor's Proposal.</p>	<p>5 points</p>
<p>C. Describe proposed data warehouse reporting and ad hoc reporting functionality included in the Prospective Contractor's Proposal.</p>	<p>5 points</p>
<p>D. Describe how the Prospective Contractor would transition from all mailing to a hybrid model of card issuance for both mailing and over-the-counter card issuance including cost factors, resources, and the process.</p>	<p>5 points</p>
<p>E. Describe any value-added services included in the Prospective Contractor's Proposal. Please detail how the set of services selected will provide a high impact on the State's program objectives. Prospective Contractors are encouraged to reference Tab 5 Value Added Services Priorities of the Cost Proposal Template for agency identified services and their associated priority levels.</p> <p>Only value-added services included in the Proposal shall be described. Prospective Contractors shall not include any potential future services for which offered pricing on Tab 7 Service Rate Card of Attachment T Cost Proposal Template but are not offering as a value-added service in their Proposal.</p>	<p>5 points</p>
<p>F. Describe any value-added card features included in the Prospective Contractor's Proposal. Please detail how the card features selected will provide a high impact on the State's program objectives. Prospective Contractors are encouraged to reference Tab 6 Value Added Card Features Priorities of the Cost Proposal Template for agency identified card features and their associated priority levels.</p> <p>Only value-added card features included in the Proposal shall be described. Prospective Contractors shall not include any potential future card features for which they offered pricing on Tab 8 Card Features Rate Card of Attachment T Cost Proposal Template but are offering as a value-added card feature within their Proposal.</p>	<p>5 points</p>

Exhibit B

[Protest Determination of Award in RFP No. 710-20-0041: Solicitation for the Design, Development, Implementation, Maintenance, and Operation of a new comprehensive Child Welfare Information System]



Department of Transformation and Shared Services

Governor Asa Hutchinson

Secretary Amy Fecher

Director Edward Armstrong

December 15, 2020

Mitchell Williams  
Mr. Derrick W. Smith  
425 West Capitol Avenue, Suite 1800  
Little Rock, Arkansas 72201-3525

RE: Protest of Award in RFP No. 710-20-0041: Solicitation for the Design, Development, Implementation, Maintenance, and Operation of a new Comprehensive Child Welfare Information System

Dear Mr. Smith:

Thank you for your letter of protest (the "Protest"), dated November 23, 2020, which you timely submitted on behalf of eSystems, Inc. ("eSystems") regarding the state's anticipated award of a contract to RedMane Technology, LLC ("RedMane") for the design, development, implementation, maintenance, and operation of a new Comprehensive Child Welfare System ("CWISS") in connection with request for proposals 710-20-0041 (the "RFP") that the Department of Human Services, Office of Procurement ("DHS") conducted.

To summarize the Protest, eSystems essentially contends that it was aggrieved because DHS did not adhere to the rules of the procurement, as stated in the RFP, and Arkansas Procurement Law. More precisely, eSystems asserts: (i) the procurement process violated a constitutional, statutory or regulatory provision; and (ii) DHS failed to adhere to the rules of the procurement as stated in the solicitation, and that the failure materially affected the contract award to the detriment of eSystems.<sup>1</sup>

One of the "rules of the procurement"<sup>2</sup> was that all offerors were mandated to include "all pricing on the Official Price Bid Sheet and Attachment F only."<sup>3</sup> Another was that, "Attachment F must be completed in Excel pursuant to instructions in the file."<sup>4</sup> This Attachment E was an Excel worksheet that, after entry of identified cost elements, calculated the proposal price for purposes of evaluation. The original version of the RFP's Attachment E did not contain a cell dedicated specifically to capturing hosting costs. DHS subsequently amended the RFP and replaced the prior Attachment E with one that had a cell for including the hosting costs. As DHS explained, "This replacement was made to, among other things, address an error in calculating the ongoing costs associated with a vendor's proposed system. In short, the original posted template failed to add hosting costs to the ongoing cost

<sup>1</sup> See Protest, Page 4, and Ark. Code Ann. § 19-11-244(a)(4)(A).

<sup>2</sup> The term "rules of the procurement" comes from Ark. Code Ann. § 19-11-244(a)(4)(A)(iii), which identifies one of the statutorily permissible grounds of a protest. This term is not given a special definition in Arkansas Procurement Law, so I allow the words to have their ordinary, everyday meaning. A principal meaning of the word "rule" is "a prescribed guide for conduct or action." See Rule | Definition [www.merriam-webster.com/dictionary/rule](http://www.merriam-webster.com/dictionary/rule). In the context of an RFP, I understand provisions of an RFP that are prescribed guides for conduct or action to be "rules of the procurement."

<sup>3</sup> RFP § 1.14 A.

<sup>4</sup> RFP § 1.14 H.

total, whereas the corrected template fixed this calculation mistake.<sup>5</sup>

The Protest established that DHS did not, in fact, uniformly require all offerors to submit the completed Attachment E as mandated in the amended RFP.<sup>6</sup> RedMane did not submit the mandatory Attachment E as required by the amended RFP. Instead, it submitted a superseded version of Attachment E. Consequently, the elements of the cost proposal attachment that RedMane submitted differed significantly from the Attachment E that DHS explicitly required all prospective contractors to submit under the RFP's terms. The difference was significant because the mandatory Attachment E required all of the responsive offerors to identify and include a cost element (hosting costs) in their Total M&O & Ongoing Costs that was not asked for in the Attachment E that RedMane submitted. Consequently, any vendors who complied with the amended RFP's requirement to submit the official Attachment E were prompted to include hosting costs that they would not have been required to include in their cost proposal if they had also been permitted to submit a cost proposal using the same superseded Attachment E that DHS allowed RedMane to use.

The Protest also established that:

1. DHS sent RedMane an email that it characterized as "clarification," in which DHS informed RedMane that: (a) RedMane did not submit the required Attachment E; (b) RedMane's failure to submit the required Attachment E resulted in an apparent pricing "error" of over two millions dollars; and (c) RedMane's proposal would be "disqualified" unless RedMane clarified that it would "honor" the price that DHS asserted was an error;<sup>7</sup> and
2. eSystems would have been the highest ranked responsible offeror if DHS had strictly applied the mandatory requirements of the RFP and rejected RedMane's non-conforming price proposal instead of presenting RedMane with the option of "clarifying" that it would "honor" the price that DHS asserted was an error caused by RedMane's failure to submit the required Attachment E.<sup>8</sup>

In light of these facts and others set forth in my reasoning below, which also considers applicable law and the provisions of the RFP, I have determined that the Protest should be sustained, in part.

#### REASONING

Arkansas Procurement Law has several underlying purposes, including "increased public confidence in the procedures followed in public procurement, the "fair and equitable treatment of all persons who deal with the procurement system of this state," "increased economy in state procurement activities by fostering effective competition," and providing "safeguards for the maintenance of a procurement system of quality and integrity."<sup>9</sup> I apply Arkansas Procurement Law as it reads, but do so with these purposes in mind whenever the plain language of the statutes or rules promulgated to further them leave room for uncertainty or ambiguity about the intent of the General Assembly.

As noted in the Protest, whenever the state procures commodities or services through an RFP, Arkansas Procurement Law requires that the contract be awarded to the "responsible"<sup>10</sup> offeror whose proposal is

<sup>5</sup> Protest, Exhibit G, Page 2.

<sup>6</sup> See Protest, Exhibit G.

<sup>7</sup> Id.

<sup>8</sup> See Protest, Exhibit B, Page 4. Additional communications have also come to light in which DHS engaged in negotiations with RedMane in which RedMane indicated that it had reduced its original proposal price by over two million dollars. Reply, Exhibit A.

<sup>9</sup> Ark. Code Ann. § 19-11-202.

<sup>10</sup> As defined in Arkansas Procurement Law, the term "responsible offeror" means "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).



determined in writing to be the 'most advantageous to the state.'<sup>11</sup> As can be said of almost everything, doing this is often easier said than done.<sup>12</sup>

At a high level of abstraction, the RFP process may seem easy. The state posts an RFP to notify the public of an opportunity to offer the state a commodity or service that it is soliciting.<sup>13</sup> The RFP presents everyone interested with the same opportunity to have their proposals considered against the same evaluation factors set forth in the RFP.<sup>14</sup> Responsive proposals from responsible offerors are evaluated based on the evaluation factors set forth in the RFP—and no others.<sup>15</sup> During the process, the state can have discussions with responsible offerors who submitted proposals that look reasonably susceptible of supporting a contract award.<sup>16</sup> These discussions can be for the purposes of clarifying an offer<sup>17</sup> or for negotiating a better offer for the state.<sup>18</sup> Then, after considering the price, the evaluation factors, and the results of any discussions, award is made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state.<sup>19</sup>

With respect to discussions, it is important to note that "[p]re-award discussions with any offeror or offerors should be conducted in a manner that supports public confidence in the procedures followed in public procurement, ensures fairness in proposal improvement, and fosters effective competition."<sup>20</sup> After the original submission deadline, an offeror may be permitted to revise its original proposal as a result of discussions, but only for the purpose of providing a best and final offer.<sup>21</sup> If discussions conducted after the deadline for the receipt of proposals necessitate material revisions of proposals, then each offeror determined to be responsible and reasonably susceptible of being awarded a contract is required to be provided an opportunity to revise its proposal for the purpose of submitting a best and final offer.<sup>22</sup>

Lamentably, with respect to the RFP at issue, this conceptually simple process was complicated by a series of unfortunate events. First, there was the unfortunate omission of the annual hosting cost from the original template that DHS created as the required method for calculating and documenting the competing cost proposals. This template was identified as Attachment E. The omission was caught and corrected during the course of the question and answer (Q&A) period.<sup>23</sup> A new Attachment E was created that replaced the incomplete template. Next, there was RedMane's failure to submit the proper Attachment E with its proposal.<sup>24</sup> As a result of this error, RedMane's Attachment E differed substantially from the official Attachment E in that it lacked a cell for capturing the annual hosting costs, which was a required component of the price proposals to be evaluated.<sup>25</sup> All of the offerors responding to the RFP were required, as a rule of the procurement, to submit their price using the Official Bid Price Sheet and Attachment E.<sup>26</sup> If RedMane had met this requirement, all of the offerors would have been presented with exactly the same opportunity to provide precisely the same responsive pricing information to be tallied and considered. Although the competing offerors would have weighed in differently from each other, at least they would all have been asked to stand on the same scale.

<sup>11</sup> Ark. Code Ann. § 19-11-230(a)(4).

<sup>12</sup> "Just about everything in this world is easier said than done, with the exception of "systematically assisting Sisyphus's stealthy, cyst-susceptible sister," which is easier done than said." — Lemony Snicket, *The Hostile Hospital*.

<sup>13</sup> Ark. Code Ann. § 19-11-230(c).

<sup>14</sup> Ark. Code Ann. § 19-11-230(a)(4).

<sup>15</sup> Ark. Code Ann. § 19-11-230(g)(2) ("No other factors or criteria shall be used in the evaluation.")

<sup>16</sup> Ark. Code Ann. § 19-11-230(a)(3).

<sup>17</sup> Ark. Code Ann. § 19-11-230(f)(1); TSS OSP Rule R8:19-11-230(b).

<sup>18</sup> Ark. Code Ann. § 19-11-230(a)(3).

<sup>19</sup> Ark. Code Ann. § 19-11-230(g)(1).

<sup>20</sup> TSS OSP Rule R8:19-11-230(a).

<sup>21</sup> Ark. Code Ann. § 19-11-230(e)(2)(B).

<sup>22</sup> Ark. Code Ann. § 19-11-230(e)(2)(A).

<sup>23</sup> See Protest, Exhibit C, Question ID # 59.

<sup>24</sup> See Protest, Exhibit G, Page 2.

<sup>25</sup> *Id.*

<sup>26</sup> RFP §§ 1.14 E and 1.14 H.

The RFP explicitly provides that, "[t]he terms **must** and **shall** signify a Requirement of this solicitation and that the Contractor's agreement to and compliance with that item is mandatory."<sup>27</sup> Under this standard, submitting the Official Bid Price Sheet with Attachment E was clearly a mandatory requirement of the RFP.<sup>28</sup> To designate something a "Requirement" is to signify that it is something required, something wanted or needed—a necessity, something essential to the existence of something else—a condition to be satisfied.<sup>29</sup>

When DHS first determined that RedMane had not submitted the required Attachment E with its Official Bid Price Sheet, it had unequivocal grounds to reject RedMane's proposal for failure to conform to the essential requirements of the RFP.<sup>30</sup> For whatever reason, it did not.

Rather than reject the proposal because it differed materially from what the RFP required, DHS engaged in discussions that it characterized as "clarification."<sup>31</sup> Arkansas Procurement Law authorizes a procurement official to seek clarification of a submitted proposal in order to "assure full understanding of and responsiveness to the solicitation requirements."<sup>32</sup> The ordinary meaning of the word "clarification"<sup>33</sup> and its usage in Ark. Code Ann. § 19-11-230(e)(1)(A) evidences a statutory intent for "clarification" to be sought regarding a proposal for the purpose of assuring a "full understanding of and responsiveness to the solicitation requirements" where there is a lack of clarity.<sup>34</sup> Clarification may not amend or "change the terms" of the submitted proposal.<sup>35</sup>

RedMane's price proposal was not responsive to the solicitation's essential requirements in that it clearly did not submit the required Attachment F.<sup>36</sup> so there was no need to seek clarity on this point. Where a failure to meet a mandatory requirement is clear and unambiguous, what further clarification is needed? DHS was aware of the failure as evidenced by the email it sent RedMane notifying it of this fact.<sup>37</sup> It also informed RedMane that, as a result, there was an error in the price proposal of over two million dollars.<sup>38</sup>

I note that there are instances where an error in a proposal or irregularity in a submission is discovered through the process of clarification or otherwise. TSS OSP Rule R7:19-11-230 regulates what types of deficiencies can be waived, when proposals can be amended, and what can be done if an offeror submitted an offer by mistake. It provides the following:

**R7:19-11-230. CORRECTION OR WITHDRAWAL OF PROPOSALS.**

- (a) There is a strong public interest in favor of conserving public funds in awarding public contracts, and little, if any, public benefit in disqualifying proposals for technical deficiencies in form or minor irregularities where the offeror does not derive any unfair competitive advantage therefrom. The State Procurement Director or agency procurement official **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

<sup>27</sup> RFP § 1.6.A.

<sup>28</sup> See RFP § 1.14.

<sup>29</sup> See [www.merriam-webster.com/dictionary/requirement](http://www.merriam-webster.com/dictionary/requirement).

<sup>30</sup> See TSS OSP Rule R6:19-11-230(1).

<sup>31</sup> See Protest, Exhibit G.

<sup>32</sup> See Ark. Code Ann. § 19-11-230(e)(1)(A).

<sup>33</sup> Clarification is the act of seeking clarity or the process of clarifying something. Clarity, as defined by Merriam-Webster, is "the quality or state of being clear." Clarity | Definition [www.merriam-webster.com/dictionary/clarity](http://www.merriam-webster.com/dictionary/clarity). To clarify something is "to make understandable" or "to free of confusion." Clarify | Definition [www.merriam-webster.com/dictionary/clarify](http://www.merriam-webster.com/dictionary/clarify).

<sup>34</sup> See *id.*

<sup>35</sup> See Ark. Code Ann. § 19-11-230(f)(2).

<sup>36</sup> See Protest, Exhibit G.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

do so.

- (b) Amendments to proposals shall be allowed if the amendments are in writing and signed, are received prior to the date and time of the proposal opening, and clearly indicate the date and time of proposal opening and Request for Proposals number.
- (c) If there is a suspected proposal mistake or the State Procurement Director or agency procurement official chooses to seek a clarification on a matter that is evaluated in the proposal, the State Procurement Director or agency procurement official may request a clarification of a proposal.
  - (1) The response by the offeror must be made in writing. Clarifications made verbally, in demonstration presentations, or communicated in any other matter shall not be considered a clarifying response by the offeror and should be reduced to a written clarification by the offeror to be considered.
  - (2) The response of any offeror who fails or refuses to clarify in writing within a reasonable time any matter contained in his or her proposal may be rejected. (3) Any written clarification submitted shall become a part of the contract awarded on the basis of that proposal.
  - (3) Any written clarification submitted shall become a part of the contract awarded on the basis of that proposal.
- (d) Proposal prices shall not be increased after the date and hour of the proposal opening.
- (e) When a mistake in a proposal is claimed by the vendor prior to award and the evidence is clear and convincing that a material mistake was made in the proposal, and that due to such mistake the proposal submitted was not the proposal intended, the bidder may be permitted to withdraw his proposal.

TSS OSP Rule R7: 19-11-230 (emphasis added).

TSS OSP Rule R7: 19-11-230(a) recognizes that there is a "strong public interest in favor of conserving public funds in awarding public contracts, and little, if any, public benefit in disqualifying proposals for technical deficiencies in form or minor irregularities where the offeror does not derive any unfair competitive advantage therefrom." DHS did not contend that it waived the amended RFP's requirement that each offeror submit a fully completed Attachment E, but TSS OSP Rule R7: 19-11-230(a) is important to consider because it helps outline the limits on a procurement official's discretion to waive technicalities and irregularities. It is not an unfettered discretion, since that could lead to arbitrary enforcement of requirements, which would undermine the fairness of the RFP process. The power to waive requirements under TSS OSP Rule R7: 19-11-230(a) is limited to "technical deficiencies in form or minor irregularities where the offeror does not derive any unfair competitive advantage therefrom."<sup>39</sup> It does not extend to deficiencies or irregularities "which affect the material substance of the Request for Proposals."<sup>40</sup> It is hard to imagine any scenario where an offeror's failure to submit required pricing information is waivable under this rule because "[s]ubmission of cost or pricing data from the offeror where required" is one of the defining features of an RFP.<sup>41</sup> When an RFP provides a mandatory price proposal

<sup>39</sup> TSS OSP Rule 7: 19-11-230(a).

<sup>40</sup> *Id.*

<sup>41</sup> See Ark. Code Ann. § 19-11-230(a)(1). Because Ark. Code Ann. § 19-11-230 is the source of a procurement official's authority to engage in an RFP, I question whether a procurement agency or official has authority to waive any of the statutorily defined elements of Ark. Code Ann. § 19-11-230, including submission of cost or pricing data from offerors where required by the RFP. However, I do not need to decide this question in order to determine the merits of this Protest.



template that outlines all of the elements of a price proposal that will be formally evaluated, that is the official instrument that the state announces it will be using to uniformly draw responsive information from each responsible offeror so that it can perform a clean and transparent apples to apples comparison between them. If an offeror were simply not to provide a price proposal, or to submit a price proposal on a form so different from the required price template that it could cause a multi-million dollar price difference in otherwise equal proposals, that would not be a minor technicality or irregularity. It would put the offerors in an unequal position and frustrate a clean, apples to apples comparison with respect to any other competing price proposals submitted using the mandatory template.

TSS OSP Rule R7: 19-11-230(c) allows for clarification to be sought in the event of a "suspected proposal mistake" regarding a matter that is evaluated in the proposal, but if the word "clarification" is allowed its ordinary meaning, and if taken harmoniously with the rule that immediately precedes it, it certainly cannot be read to allow a "clarification" that effectively acts as a substantive amendment of either the RFP or a change in the terms of an offeror's price proposal. However, DHS responds to the Protest's suggestion that the "clarification" constituted a change in terms as follows:

The State's clarification sought a mutual understanding that the \$10,354,525.03 figure included hosting because of potentially conflicting information in the Cost Proposal template. The respondent confirmed that hosting was included as part of the \$10,354,525.03 figure and that no additional funds would be invoiced for hosting. No prices were changed, no terms or language were added or removed. Nothing was different.<sup>42</sup>

This assertion, clear and unambiguous, is belied by an equally clear and unambiguous assertion that DHS made on September 1, 2020, that there was "an error" on RedMane's cost proposal summary and on RedMane's Official Bid Price Sheet, and an apparent omission of \$2,014,269.45 in hosting costs as a result of RedMane's failure to submit a completed version of the official Attachment E:

Accordingly, because the wrong template was used there is an error on RedMane's "3. Cost Proposal Summary" tab in the template and on RedMane's Official Bid Price Sheet. Specifically, while RedMane proposes \$2,014,269.45 of hosting costs, these costs appear to not be included in the \$10,354,525.03 "Total M&O & Other On-Going Costs" figure represented in the Cost Proposal Template and on RedMane's signed Official Bid-Price Sheet.<sup>43</sup>

DHS did not simply ask RedMane to clarify whether the price it submitted on the Office Bid Price sheet was inclusive, instead it told RedMane that "there is an error" on the Cost Proposal Summary tab in the template and on RedMane's Official Bid Price Sheet caused by RedMane's use of "the wrong template." Asserting an error is not the same as ascertaining whether there is one. To assert an error and then demand its adoption upon pain of rejection does not seem to align with the statutory intent of allowing procurement officials to seek clarification regarding a proposal. After asserting the \$10,354,525.03 figure was an error that did not include over two million dollars in hosting costs, DHS presented RedMane with the stark options of "honoring" the \$10,354,525.03 figure represented in its proposal as inclusive of all hosting RedMane proposed to offer, or withdrawing its proposal from consideration by the State as an error pursuant to R7:19-11-230(e). This put RedMane in a challenging position, between certain rejection or affirming an interpretation of the Cost Proposal Summary that DHS referred to as "an error." The September 3, 2020 response from RedMane to DHS indicates that, rather than merely being presented with an opportunity to clarify its original cost proposal, it considered itself as being faced with "a challenging situation."<sup>44</sup> Presenting an offeror with such limited, drastic, and potentially coercive options seems inconsistent with simply asking an offeror to clarify its original proposal. The idea that DHS simply obtained clarification of an offer, instead of a substantial price concession, also appears inconsistent with a statement

<sup>42</sup> DHS Response, Page 10.

<sup>43</sup> Protest, Exhibit G, Page 2.

<sup>44</sup> Protest, Exhibit G, Page 5.

RedMane made in an email to DHS, dated October 14, 2020, in which it remarked, in pertinent part, that:

We also understand your position that RedMane should accept the additional scope associated with supporting the data migration effort at no additional cost to AR DHS. While these items may have the appearance of "modest requests" from the State's perspective in the context of a \$36 million dollar headline, there is real cost to RedMane to accommodate your requests. **These costs were not previously factored into the RedMane cost proposal, which has already been substantively reduced by over \$2 million dollars since our proposal was originally submitted.**

This communication establishes that, at the time, RedMane considered its cost proposal to have been substantively reduced by over two million dollars after its proposal was originally submitted. A change of this magnitude to RedMane's original price proposal would clearly be a material revision. Arkansas Procurement Law provides that, "[i]f discussions conducted after the deadline for the receipt of proposals necessitate material revisions of proposals, each offeror determined to be responsible and reasonably susceptible of being awarded a contract shall be provided an opportunity to revise its proposal for the purpose of submitting a best and final offer."<sup>45</sup>

In sum, the DHS email to RedMane regarding its failure to submit the required Attachment E did not fall cleanly within what can pass for clarification of an error, since it claimed an error and then invited its adoption under penalty of forfeiture of a lucrative opportunity. In the paraphrased words of Don Vito Carleone, DHS made RedMane a "clarification" request that it couldn't reasonably refuse. If DHS had limited itself to informing RedMane of the issue and asking RedMane to clarify whether the price it submitted was inclusive of hosting, then the record might support a conclusion that DHS had properly exercised its authority to seek clarification. However, it could not have simply waived a mandatory RFP requirement that it expressly amended the RFP to include. As it stands, the record now shows that DHS did not adhere to the RFP's rules regarding mandatory requirements so as to ensure the "fair and equitable treatment of all persons who deal with the procurement system of this state"<sup>47</sup> and did not properly seek "clarification" as contemplated in Ark. Code Ann. § 19-11-230(f).

#### CONCLUSION

RedMane's submission did not satisfy the mandatory price proposal requirements of the RFP. The superseded Attachment E RedMane submitted was materially different from the one required by the amended RFP in that it did not require explicit identification and inclusion of a large potential expense item in its cost proposal. All responsible offerors who used the mandated Attachment E were required to explicitly identify and include that expense category in their price proposal. eSystems was one of the responsible offerors who did so and was effectively held to a different set of requirements than RedMane was. When DHS learned that the price proposal was not submitted with an Attachment E that met the requirements of the amended RFP, it advised RedMane of the fact and gave it the option of either affirming a price that DHS identified as a pricing error or having its proposal rejected. It characterized this as clarification, but this conduct does not fall neatly within the bounds of what can properly be called clarification. Accordingly, the Protest of eSystems' is sustained. I cannot, however, grant the remedy eSystems asks for. At this point, Ark. Code Ann. § 19-11-247 is applicable and, consistent therewith, DHS may decide how it wishes to proceed in connection with the solicitation and award of the contract. eSystems may only seek the remedy provided in Ark Code Ann. § 19-11-244(g) if it is denied the contract award.

Pursuant to Ark. Code Ann. § 19-11-244(e)(1) this determination is final and conclusive.

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<sup>45</sup> Reply, Exhibit A.

<sup>46</sup> Ark. Code Ann. § 19-11-230(e)(2)(A).

<sup>47</sup> Ark. Code Ann. § 19-11-202.

Respectfully,



Edward R. Armstrong  
State Procurement Director

cc: Amy Fecher  
Secretary, TSS

Ann P. Ivins  
Chief of Staff, TSS

Exhibit C

[Protest Determination of Award in Solicitation No. S000000162: Food Distribution Services]



Department of Transformation and Shared Services  
Governor Sarah Huckabee Sanders  
Secretary Joseph Wood  
Director Edward Armstrong

April 5, 2023

Mr. Michael N. Shannon  
Quattlebaum, Groom & Tull  
111 Center Street, Suite 1900  
Little Rock, Arkansas 72201

Re: Protest of Award in Solicitation No. S000000162: Food Distribution Services

Dear Mr. Shannon:

On behalf of Educational Catering, Inc., d/b/a ECI Management Group (ECI), you submitted on March 24, 2023, a timely protest of the March 10, 2023, Anticipation to Award to Hebrews 11:1, LLC (Hebrews) in the above-referenced solicitation (the "Solicitation" or the "IFB"). Arnetta Bradford, owner and director of Hebrews, submitted Hebrews's timely protest response on March 31, 2023. Solicitation No. S000000162: Food Distribution Services was issued by the Department of Transformation and Shared Services Office of State Procurement (OSP) for the Arkansas Department of Military.

Every protest presents me with an opportunity to review and assess our procurement processes for compliance with applicable law, rules, policies, and solicitation terms, as well as an opportunity to learn more about how OSP can better serve and support the state and its citizens in the future. Where, upon review, it is determined that a solicitation or anticipated award of a contract violated the law, then the solicitation or proposed award can be cancelled or revised to comply with the law.<sup>1</sup>

With the aforesaid in mind, I appreciate that both ECI and Hebrews submitted bids in response to Solicitation No. S000000162 for Food Distribution Services, and ECI's protest has provided me with an opportunity to review the solicitation and selection processes in this case. After reviewing the protest, the response by Hebrews, the applicable law, and further relevant information, I have determined that the protest is sustained. My reasoning and the authority I have relied upon are provided below.

#### **I. THRESHOLD CONSIDERATIONS**

As a threshold matter, I note that Arkansas Procurement Law only authorizes me to determine the merits of a protest that has been timely submitted by an interested party who raises one or more statutory grounds of protest.<sup>2</sup> A protest that is untimely or that does not rest on statutory grounds is dismissed.

In this case, it is undisputed that ECI's protest was timely submitted, and ECI asserts that its protest of the anticipated award of the Food Distribution Services contract to Hebrews rests on "one or all" of two statutory grounds identified in Arkansas Code Annotated § 19-11-244(a)(4)(A)(ii) and (iii).

<sup>1</sup> See Arkansas Code Annotated § 19-11-247(b).

<sup>2</sup> See Ark. Code Ann. § 19-11-244 and OSP Rule R1:19-11-244.



## II. LEGAL AUTHORITY

The primary statutory authority governing competitive sealed bidding, also called an invitation for bids, is found at Arkansas Code Annotated § 19-11-229 and provides, in pertinent part, as follows:

- a) **Definition.** "Competitive sealed bidding" means a method of procurement which requires:
- (1) Issuance of an invitation for bids with a purchase description and all contractual terms and conditions applicable to the procurement;
  - (2) Public, contemporaneous opening of bids at a predesignated time and place;
  - (3) Unconditional acceptance of a bid without alteration or correction, except as authorized in §§ 19-11-204 and 19-11-228 — 19-11-240;
  - (4) Award to the responsive and responsible bidder who has submitted the lowest bid that meets the requirements and criteria set forth in the invitation for bids; and
  - (5) Public notice.

Furthermore, one of several underlying purposes and policies of Arkansas Procurement Law is to provide for increased public confidence in the procedures followed in public procurement.

For purposes of Arkansas Procurement Law, "may" indicates something is permissive and "shall" means it is imperative.

To identify and remedy material deviations, Arkansas Procurement Law contains a protest process by which offerors may inform the State Procurement Director of instances where the: (i) award of the contract exceeded the authority of the director or the procurement agency at issue; (ii) procurement process violated a constitutional, statutory, or regulatory provision; (iii) director or the procurement agency failed to follow the rules of the procurement as stated in the solicitation, and that failure materially affected the contract award; (iv) procurement process involved responses that were collusive, submitted in bad faith, or not arrived at independently through open competition; or (v) the anticipated contract award resulted from a technical or mathematical error made during the evaluation process. *See* Arkansas Code Annotated § 19-11-244(a)(4)(A).

## III. DISCUSSION

ECl contends that the bid Hebrews submitted should be rejected because it was not opened during the bid opening scheduled at 2:00 p.m. on February 24, 2023, pursuant to the terms of the Solicitation. This contention is partially accurate as Hebrews's documentation, with the exception of the pricing document, was opened at the appropriate time. As noted by ECl, Hebrews's pricing sheet was submitted in an Apple Numbers format and had to be converted to Microsoft Excel format by OSP personnel in order to be viewed, which process was completed at 3:34 p.m. on February 24, 2023. Hebrews acknowledges that it permitted OSP to convert the formatting of its pricing sheet in order to be viewable but asserts that it timely submitted its documentation and followed applicable guidelines. Hebrews was apparently not put on notice by any terms in the IFB that its bid might not be ready for contemporaneous viewing with the other bids if it submitted its electronic bid in a format other than Microsoft Excel format.

The legal requirements of competitive sealed bidding are clear in requiring a "[p]ublic, contemporaneous opening of bids at a predesignated time and place." In addition, Section 19-11-229(c) provides that, "[b]ids shall be opened publicly in the presence of one (1) or more witnesses at the time and place designated in the invitation for bids. Each bid, together with the name of the bidder, shall be recorded and open to public inspection." Here, it is undisputed that Hebrews's pricing sheet was opened and converted at 3:34 p.m., instead of 2:00 p.m. This opening was not open to public viewing since the live stream had already been terminated. As an underlying purpose and policy of Arkansas Procurement Law is to provide for increased

public confidence in the procedures followed in public procurement, and pricing is a fundamental component of competitive sealed bidding, I cannot consider the technical anomaly that occurred in this case to negate the mandatory requirement of publicly and contemporaneously opening bid submissions. While the particular circumstances in this case are unfortunate, public confidence in procurement processes is paramount as reflected in statutory mandatory requirements.

#### IV. CONCLUSION

The competitive sealed bidding requirements mandate that ECI's protest be sustained as Hebrews's pricing sheet was not publicly and contemporaneously opened in accordance with the solicitation's requirements; accordingly, the protest is sustained. The agency shall determine whether to cancel and reissue the IFB or award to the lowest sealed bid that was publicly and contemporaneously opened with the others.

Pursuant to Ark. Code Ann. § 19-11-244 (e)(1), this determination is final and conclusive as to the protest.

Respectfully,

A handwritten signature in blue ink, appearing to read "Edward R. Armstrong". The signature is fluid and cursive, with a large loop at the end of the last name.

Edward R. Armstrong  
State Procurement Director