

STATE OF WISCONSIN
WISCONSIN DEPARTMENT OF INSTRUCTION

SKYWARD, INC.,

Protestor,

v.

Case No.

WISCONSIN DEPARTMENT OF PUBLIC
INSTRUCTION,

WISCONSIN DEPARTMENT OF
ADMINISTRATION

Protestees.

PROTEST

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Skyward, Inc., ("Skyward"), a domestic corporation, by its attorneys, Quarles & Brady, LLP protests the Department of Public Instruction and Department of Administration's Notice of Intent to move Infinite Campus, Inc. ("Infinite"), a foreign corporation, into contract negotiations for RFP #PA1150422, as follows:

OVERVIEW

The State of Wisconsin issued RFP #PA1150422 seeking proposals to implement a computer-based student information system on a statewide basis, and individually for each school district.

Skyward, a Wisconsin based company, is an industry leading student information system provider. Currently, Skyward is a contract partner with nearly half of the school districts in the State of Wisconsin. The 221 separate Wisconsin school districts that chose Skyward to be their student information system provider did so through open competition. In other words, those districts' own evaluations of student information system providers resulted in the selection of Skyward. In 33 years of responding to requests for proposal, Skyward never protested a single procurement, until now.

The State noticed its intent to award the RFP to non-Wisconsin company that currently contracts with less than 50 Wisconsin school districts. The procurement was plagued with irregularities, most notably, the removal of one evaluator, and the awarding of the maximum cost proposal points to Infinite when, in fact, Skyward's proposal was the lowest cost.

While the procedural irregularities are troubling and undermine public confidence in this procurement, the most significant errors occurred in scoring the proposals. When mathematical errors are corrected, and the evaluator's scores are corrected so that they comply with the evaluation criteria, Skyward's proposal achieved the highest score, and thus, is entitled to the contract.

PROTESTOR

1. Protestor Skyward is a Wisconsin corporation. Skyward is a current contract partner for student information systems ("SIS") with 221 of the 443 school districts in

Wisconsin. In 221 school districts, Skyward has consistently provided an outstanding product and service to its client districts.

GENERAL BACKGROUND

2. On May 2, 2012, the State of Wisconsin Department of Instruction ("DPI"), through the Department of Administration ("DOA" and collectively the "State") issued RFP #PA1150422 ("RFP"),¹ which sought proposals for a Statewide Student Information System.

3. Originally, proposals to the RFP were due by no later than June 5, 2012. That date was delayed until June 19, 2012. However, the day before proposals were due, DOA delayed the due date again to July 10, 2012 to permit it to hire a private attorney, Cari Anne Renlund, to oversee the procurement. As a part of that retention, Ms. Renlund issued a report which is attached as Exhibit 1.

4. Seven proposals were submitted in response to the RFP.

5. Skyward timely submitted its proposal to the RFP.²

6. The Evaluation Committee, made up of seven members, reviewed all of the proposals from July 17-18, 2012, and assigned initial scores by August 6, 2012.

7. During a review of the scores on August 7-9, 2012, the Evaluation Committee removed two proposals for failure to satisfy mandatory requirements.

8. For the remaining five proposals, the Evaluation Committee reviewed each proposal collectively. After further clarification questions were asked and answered, the Evaluation Committee invited Skyward and Infinite to demonstrate their respective products.

¹ Due to the length of the RFP, and the fact that the State already maintains a copy in the record, another copy of the RFP is not attached to this protest. If the State desires another copy of the RFP, Skyward will immediately provide one.

² Due to the length of Skyward's initial proposal, and the fact that the State already maintains a copy in the record, another copy of Skyward's proposal is not attached to this protest. If the State desires another copy of Skyward's proposal, Skyward will immediately provide one.

9. Before demonstrations commenced, one evaluator resigned, purportedly at the request of his employer due to time demands. This evaluator's scores were thrown out. *See* Exhibit 1 p. 5.

10. Skyward and Infinite demonstrated their respective products from October 9-12, 2012.

11. During Skyward's demonstration, an additional irregularity occurred. An evaluator, identified only as "Evaluator X" in Ms. Renlund's report, asked a number of questions during Skyward's presentation.

12. A Subject Matter Expert ("SME"), who attended the demonstration, slipped a note to Ms. Aasen, DOA's representative, stating that the SME "perceived" that Evaluator X was "assisting" Skyward "in its responses to questions from the audience." Ms. Aasen privately spoke to Evaluator X about the note, after which Ms. Aasen concluded that nothing improper had occurred. Ms. Aasen's conclusion was also consistent with her own observations of the demonstration. Evaluator X did not ask another question nor speak aloud during the remainder of the demonstration.

13. Ms. Renlund also found no basis to conclude any impropriety had occurred. In her report, Ms. Renlund stated she "observed no inappropriate bias, conscious or subconscious, on the part of Evaluator X for or against any vendor during any part of the Evaluation Process."

14. Despite the fact that no impropriety was found, DOA removed Evaluator X from the Evaluation Committee. This evaluator's scores were thrown out.

15. With five remaining evaluation members, the Evaluation Committee rescored Skyward and Infinite's proposals. At that point, *without even reviewing or considering the cost*

proposals, the Evaluation Committee sought to request a best and final offer ("BAFO") from Infinite only.

16. Recognizing the obvious flaw in essentially eliminating all bidders except Infinite before even considering price, DOA recommended that the Evaluation Committee request BAFOs from both Infinite and Skyward.

17. On December 6, 2012, the Evaluation Committee sent the first BAFO request to Skyward and Infinite.

18. Further irregularities occurred in the BAFO process. The BAFO request added a new requirement that made the RFP requirements conform to the specifications of Infinite's program. The new requirement in the BAFO stated that "Proposers shall provide a Graphical User Interface (GUI) within the Statewide Database System that is equivalent to the GUI used by the Districts and has the same functionality as the District database systems."

19. Skyward timely responded to the revised BAFO request on December 17, 2012, and, as a part of its response, lowered its cost proposal. Infinite did not lower its cost proposal.

20. As discussed below, after Skyward's December 17, 2012 response to the BAFO request was the lowest cost, and thus, eligible for the maximum points allotted for the cost proposal.

21. The process from that point included further irregularities.

22. On December 19, 2012, the Evaluation Committee sent additional BAFO questions.

23. The new questions dramatically changed Skyward's cost proposal.

24. Skyward has already implemented its system in 221 school districts, which is nearly half (49.8%) of the districts in Wisconsin. Therefore, neither the State nor the school districts would be required to pay anything for the implementation of these districts by Skyward.

25. However, based upon the additional BAFO questions DOA required Skyward to artificially inflate its cost proposal by \$4,638,001.67. *See Exhibit 4.*

26. Skyward again timely responded. Infinite again did not modify their cost proposal.

27. On February 1, 2013, DOA issued its press release stating its notice of intent to award the contract to Infinite because it was the highest scorer based upon technical scores, and that Infinite had the lowest cost proposal. *See Exhibit 2.*

28. On February 8, 2013, Skyward timely filed its notice of intent to protest, attached as Exhibit 3.

ARGUMENT

29. Under Wisconsin law and the RFP, a Request for Proposal is awarded based on price and a subjective evaluation of quality factors determined by an evaluation committee in accordance with Section 10 of the Wisconsin Administrative Code. *See Wis. Adm. Code s Adm. § 10.08(1)(e).*

30. Mathematical errors were made in scoring proposals, and the Evaluation Committee failed to follow the evaluation criteria as set forth in the RFP and scoring documents. Additionally, numerous irregularities took place during the course of this procurement raising significant concerns about the propriety of the outcome.

31. By correcting the cost proposal calculation errors to reflect the true cost of the proposals, Skyward scores 6,159 points, and Infinite scores 5,123 points. And, after making

extremely conservative corrections to the fix the evaluators' deviations from the scoring criteria, Skyward scores 9,947 points, and Infinite scores 10,316 points. Taken together, Skyward scored higher than Infinite by at least 667 points.

32. Such errors violate Wis. Admin. Code Adm. § 10.08, and Chapter 16 of the Wisconsin Statutes.

33. The State should promptly correct the scores, rescind the notice of intent to contract with Infinite, and award the contract to Skyward.

34. Alternatively, the State should exercise its authority to throw out all proposals.

A. THE DOA MADE ERRORS IN CALCULATING THE COST PROPOSALS

35. The RFP expressly stated that submitted cost proposals will be calculated with the most points awarded to the Proposal with the lowest cost. Other cost proposals will be assigned points that correlate on a percentage basis to those assigned to the lowest cost proposal.

36. Instead, DOA awarded the most points to Infinite despite the fact that Infinite's proposal will cost the state \$14.5 million more than Skyward's proposal over the life of the contract.

I. Skyward's Cost Proposal Was Unfairly Inflated

37. Skyward is the incumbent provider of SIS for 221 school districts in Wisconsin. DOA's Cost Sheet required each proposal to list the cost of implementation for each size of district.

38. As the statewide SIS vendor, Skyward would not need to implement a new system in the 221 school districts in which Skyward already operates. For each of these incumbent districts, Skyward attempted in its Cost Proposal to reflect the fact that the State would not be

required to pay installation costs for those 221 districts that have already been implemented by Skyward.

39. However, DOA unreasonably refused to allow Skyward's cost proposal to reflect those cost savings. In a December 19, 2012 communication, Ms. Aasen again required that Skyward include in its Cost Proposal the cost associated with implementation, regardless of whether a district had already implemented the Skyward system.

40. By removing the implementation costs that will not be incurred, Skyward's cost proposal decreases by \$4,638,001.67. For purposes of the cost calculation below, Skyward also removed the cost of implementation for Infinite's proposal for those few districts in which Infinite already operates. As a result, the cost of implementation for Infinite's proposal decreased by \$594,043.56. See Exhibit 4.

II. Conservatively, Skyward's Proposal Was \$14.5 Million Less than Infinite

41. On February 1, 2013, the State issued a press release titled "DOA Issues Notice of Intent for Student Database System to Move Into Contract Negotiations," attached as Exhibit 3.

42. The press release relied significantly upon Attorney Renlund's report. The release quotes to the report stating "the vendor that received the highest technical score also proposed the lowest cost, and therefore received the highest cost score." (emphasis added). That is simply inaccurate.

43. Infinite did not propose the lowest cost, and when properly scored, should not receive the highest score.

44. In fact, over the life of the seven year contract and three one-year options, Wisconsin taxpayers save \$14,485,837 by using Skyward rather than Infinite.³

³ The length of the contract is seven years, plus three one year options. See RFP § 1.8.

45. Using the Cost Sheet submitted by both Skyward (attached as Exhibit 5), and Infinite (attached as Exhibit 6), Skyward calculated the total cost for all districts along with the licensing cost for the state database. *See* Exhibit 4.

46. The calculations in Exhibit 4 were derived by the following method.

47. For Skyward, the per enrollee cost of \$8.93 is calculated by adding: the State License Fee of \$0.15 per enrolled student; the State Support Fee of \$0.05 per enrolled student; the State Hosting Fee of \$0.15 per enrolled student; the District License Fee of \$5.48 per enrolled student; the District Support Fee of \$0.00 per enrolled student; the District Hosting Fee of \$1.00 per enrolled student; the annual messenger fee of \$1.35 per enrolled student; and the add-on annual food service fee of \$0.75.⁴ *See* Exhibit 5.

48. For Infinite, the per enrollee cost of \$11.95 is calculated by adding: the State License Fee of \$2.00 per enrolled student; the State Support Fee of \$0.40 per enrolled student; the State Hosting Fee of \$0.15 per enrolled student; the District License Fee of \$3.00 per enrolled student; the District Support Fee of \$0.95 per enrolled student; the District Hosting Fee of \$0.75 per enrolled student; the annual messenger fee of \$2.30 per enrolled student; and the add-on annual food service fee of \$2.40.⁵ *See* Exhibit 6. A credit is provided to Infinite that reflects a zero amount for the district portion of the software license that they noted in their BAFO response.

49. Infinite's cost proposal is lower than Skyward's in the first year only. In every subsequent year Skyward's cost proposal is significantly less.

⁴ $\$0.15 + 0.05 + 0.15 + 5.48 + 0.00 + 1.00 + 1.35 + 0.75 = \8.93

⁵ $\$2.00 + 0.40 + 0.15 + 3.00 + 0.95 + 0.75 + 2.30 + 2.40 = \11.95

50. Presumably, if the State believes that Infinite was, in fact, the lowest cost proposal, and that Infinite received the highest cost score, then pursuant to § 3.3 of the RFP, Infinite received the maximum points available: 6,159.

51. However, since Skyward had the lowest cost proposal, it should receive the maximum points available: 6,159.

52. And, using the calculation required in § 3.4 of the RFP, Infinite's cost proposal score drops to 5,122.93.

B. THE TECHNICAL SCORES WERE NOT SCORED BASED UPON THE SET CRITERIA

I. In Seventy-Three Different Instances, Infinite Received a Higher Score Than was Possible Under the Scoring Protocol

53. The Administrative Code requires that the evaluating committee "review all proposals submitted in response to an RFP, using, as a basis, the evaluation criteria included in the RFP." *See* Wis. Adm. Code s Adm. § 10.08(4)(a). That did not happen.

54. 73 separate instances, the Evaluation Committee awarded Infinite more points than the evaluation criteria permitted. The Evaluation Committee made the same mistake with regards to Skyward, but only on 17 different occasions.

55. This is not a question of whether, subjectively, Infinite received an unfairly high score. It is much simpler than that. In 73 different instances, Infinite received a higher score than was possible under the scoring rubric.

56. For example, Section 5.13.2.3 of the RFP asks the proposer to: "Describe the planning and usability features in the scheduling Module such as the use of visual aids to organize scheduling Data."

57. In evaluating the response to Section 5.13.2.3, each evaluator was to assign a numerical score based upon the criteria. For this section in particular, an evaluator had the following descriptions to choose from:

- i. The application does not offer planning and usability features in the scheduling module such as the use of visual aids to organize scheduling data. (Like old fashioned scheduling board).
- ii. The application offers planning and usability features in the scheduling module such as the use of visual aids to organize scheduling data. (Like old fashioned scheduling board).

58. If an evaluator found that the proposal fit within description "i," the evaluator was to assign the numerical value of zero as a score.

59. If an evaluator found that the proposal fit within description "ii," the evaluator was to assign a numerical value within the range of 4-6 points.

60. In other words, each evaluator had the option to rate a proposal's response to Section 5.13.2.3 with a score of either "0," "4," "5," or "6."

61. Infinite was given the following scores for Section 5.13.2.3:

- Evaluator #1 = 8
- Evaluator #3 = 9
- Evaluator #4 = 9
- Evaluator #5 = 8
- Evaluator #7 = 12

62. Thus, Infinite received, conservatively, 16 points more than was even possible for this single section alone.⁶

63. Again, there are 73 instances where Infinite received a higher score than possible.⁷ With the 73 scores higher than was possible, Infinite scored 10,471.40 points for the

⁶ Skyward also received a score higher than was possible in seventeen different instances. Using the same methodology applied to Infinite's scores, we deducted a total of 30 points from Skyward's scores for the 17 increased instances.

technical scores. Removing the 73 impermissibly high scores, and conservatively giving Infinite the highest score permissible under each section in question, Infinite's score drops by 155.50 points to 10,316 points.

64. Now, adding Infinite's conservatively permissible technical score of 10,316 to its actual cost score of 5,123, Infinite's correct total points scored is 15,439.

65. Mistakes by the evaluators did not end there.

II. In 139 Different Sections Skyward Was Mistakenly Underscored

66. In 139 instances, evaluators gave Skyward scores lower than what Skyward objectively achieved.⁸

67. For example, Section 5.7.2.19 of the RFP asked a proposer to:

- Describe how the Application provides transfer of student (sic) between classes when then (sic) Gradebook and assignments are not identical between schools.

68. In its proposal, Skyward proposed the following:

- When a student is transferred to a different section of the same course, the teacher will have a 'new' button appear next to the student's name. They can then click that button and walk through a wizard process that allows them to transfer grades in from the Gradebook of the previous class/section into the Gradebook for the new class/section even if the assignments do not match..

⁷ §§ 5.1.2.3; 5.3.2.5; 5.3.2.7; 5.3.2.10; 5.5.2.4; 5.5.2.7; 5.5.2.8; 5.5.2.9; 5.5.2.10; 5.5.2.11; 5.6.2.3; 5.6.2.4; 5.6.2.10; 5.6.2.11; 5.7.2.12; 5.7.2.18; 5.7.2.20; 5.7.2.29; 5.8.2.1; 5.8.2.3; 5.10.2.1; 5.10.2.14; 5.11.2.5; 5.11.2.6; 5.11.2.13; 5.11.2.17; 5.11.2.18; 5.13.2.3; 5.13.2.4; 5.13.2.10; 5.13.2.14; 5.13.2.15; 5.13.2.17; 5.13.2.18; 5.13.2.19; 5.13.2.21; 5.13.2.23; 5.17.2.5; 5.18.2.11; 6.1.2.1; 6.5.2.2; 6.7.2.2; 6.14.2.1.

⁸ §§ 5.1.2.3; 5.1.2.4; 5.1.2.5; 5.2.2.3; 5.3.2.1; 5.3.2.3; 5.3.2.4; 5.3.2.6; 5.3.2.7; 5.3.2.8; 5.3.2.11; 5.3.2.13; 5.3.2.14; 5.4.2.1; 5.4.2.2; 5.5.2.1; 5.5.2.5; 5.5.2.8; 5.5.2.9; 5.5.2.10; 5.5.2.11; 5.6.2.1; 5.6.2.2; 5.6.2.3; 5.6.2.4; 5.6.2.5; 5.6.2.6; 5.6.2.7; 5.6.2.10; 5.6.2.11; 5.7.2.1; 5.7.2.2; 5.7.2.3; 5.7.2.4; 5.7.2.5; 5.7.2.6; 5.7.2.7; 5.7.2.10; 5.7.2.11; 5.7.2.14; 5.7.2.16; 5.7.2.19; 5.7.2.23; 5.7.2.29; 5.7.2.32; 5.8.2.1; 5.8.2.4; 5.9.2.2; 5.9.2.6; 5.10.2.6; 5.10.2.8; 5.10.2.9; 5.10.2.11; 5.10.2.12; 5.10.2.13; 5.10.2.16; 5.11.2.2; 5.11.2.3; 5.11.2.4; 5.11.2.6; 5.11.2.9; 5.11.2.10; 5.11.2.12; 5.11.2.14; 5.12.2.1; 5.12.2.2; 5.12.2.3; 5.12.2.4; 5.12.2.6; 5.12.2.7; 5.12.2.8; 5.12.2.9; 5.12.2.10; 5.12.2.13; 5.13.2.1; 5.13.2.2; 5.13.2.3; 5.13.2.8; 5.13.2.10; 5.13.2.11; 5.13.2.12; 5.13.2.13; 5.13.2.14; 5.13.2.15; 5.13.2.16; 5.13.2.17; 5.13.2.18; 5.15.2.1; 5.15.2.2; 5.15.2.3; 5.15.2.4; 5.15.2.7; 5.15.2.8; 5.15.2.9; 5.15.2.10; 5.15.2.11; 5.15.2.12; 5.15.2.13; 5.16.2.1; 5.16.2.3; 5.16.2.4; 5.17.2.1; 5.17.2.2; 5.17.2.4; 5.17.2.7; 5.18.2.1; 5.18.2.3; 5.18.2.5; 5.18.2.6; 5.18.2.7; 5.18.2.8; 5.18.2.9; 5.18.2.10; 5.19.2.1; 5.19.2.4; 5.19.2.5; 6.3.2.1; 6.3.2.2; 6.4.2.1; 6.4.2.2; 6.4.2.5; 6.4.2.6; 6.4.2.7; 6.4.2.8; 6.5.2.2; 6.7.2.2; 6.11.2.4; 6.11.2.5; 6.13.2.1; 6.13.2.3; 6.13.2.4; 6.13.2.5; 6.13.2.7; 6.15.2.1; 6.17.2.1; 6.17.2.2. See Exhibit 7.

69. In evaluating the response to Section 5.7.2.19, each evaluator was to assign a numerical score based upon the given criteria. For this section in particular, an evaluator had the following descriptions to choose from:

- i. Gradebooks cannot be transferred from one to another.
- ii. Identical gradebooks as evidenced by identical assignments can be transferred from one teacher to another.
- iii. Multiple options are provided when students are transferred and the gradebooks and assignments are not identical.
- iv. The master scheduler supports changes of teacher assignments while maintaining the integrity of the gradebook.

70. If an evaluator found that the proposal fit within description "i," the evaluator was to assign the numerical value of zero as a score.

71. If an evaluator found that the proposal fit within description "ii," the evaluator was to assign a numerical value within the range of 1-3 points.

72. If an evaluator found that the proposal fit within description "iii," the evaluator was to assign a numeral value within the range of 4-6 points.

73. If an evaluator found that the proposal fit within description "iv," the evaluator was to assign a numeral value within the range of 7-9 points.

74. Skyward was given the following scores for Section 5.7.2.19:

- Evaluator #1 = 2
- Evaluator #3 = 3
- Evaluator #4 = 3
- Evaluator #5 = 3
- Evaluator #7 = 1

75. Thus, the evaluators seemingly determined that Skyward's proposed software only permitted transfer of identical gradebooks.

76. Yet, objectively speaking, at a minimum Skyward's proposal matches description iii. Likely, Skyward's proposal should have been scored under description iv.

77. Indeed, Skyward's proposed software, as stated in the written description permits transferring a gradebook "even if the assignments do not match."

78. Thus, at a minimum, Skyward should have received a score of 4, or more likely, a minimum of a 7.

79. Adding the points objectively lost in the 139 instances of underscoring for Skyward, Skyward's technical score increases by 920, to a total technical score of 9,947.

80. Adding Skyward's actual technical score of 9,947 points, to its actual cost score of 6,159 points, achieves a total correct score for Skyward of 16,106 points.

81. Adding Infinite's actual technical score of 10,316 points, to its actual cost score of 5,123 points, achieves a total correct score of 15,439 points.

82. Thus, Skyward had the highest scoring proposal by 667 points.

C. CONCLUSION

83. As stated in the RFP, after proposals are submitted to the best and final offers, they will be evaluated and scored. "The award then will be granted to the highest scoring Proposer." § 3.6.

84. For the reasons set forth above, the intent to award RFP # PA1150422 to Infinite Campus should be vacated and awarded to the highest scorer, Skyward, Inc.

Dated this 15th day of February, 2013.

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