



STATE OF NEW MEXICO
PUBLIC EDUCATION DEPARTMENT
300 DON GASPAR
SANTA FE, NEW MEXICO 87501-2786
Telephone (505) 827-5800
www.ped.state.nm.us

HANNA SKANDERA
SECRETARY OF EDUCATION

SUSANA MARTINEZ
GOVERNOR

June 9, 2014

Lawrence O. Maxwell
State Purchasing Agent
State Purchasing Division
1100 St. Francis Dr. Room 2016
Santa Fe, New Mexico 87505

Dear Mr. Maxwell,

Please find the New Mexico Public Education Department's Response to AIR's Protest below.

Introduction

As New Mexico works to reform our K-12 education system, frivolous protests by businesses looking to gain market share should first be examined for the affect they will have the State's students and educators. AIR's protest is centered on false allegations, and AIR has brought nothing to the table to show how it plans to help New Mexico's students lead the nation in education. Indeed, AIR did not even submit a proposal in this procurement. We believe bureaucratic obstacles like the one put forth by AIR only work to stymie student progress in New Mexico. AIR's protest is devoid of substance and is centered on its interest, not those of our students.

AIR's protest of Request for Proposal #40-000-12-00027 ("RFP") should be dismissed. AIR lacks standing under the Procurement Code to protest the RFP because it is not an offeror. Even if AIR had standing, its arguments fail. The RFP was competitive, and AIR misconstrues the RFP as a cooperative procurement. To the extent AIR argues that the RFP may create a conflict of interest in future procurements, its argument is neither ripe nor actionable under the Procurement Code. The State Purchasing Agent should dismiss AIR's protest—it is a thinly guised attempt to advance AIR's position in the assessment industry at the expense of obstructing and delaying New Mexico's implementation of the PARCC Assessment. AIR's interest in protecting its rank in the industry must not outweigh the needs of New Mexico's students.

AIR has requested that the State Purchasing Agent restructure the RFP to “[p]rocur[e] year one of the contract separately from years two through eight,” and “[s]eparately procure test development components and assessment administration components.” AIR’s central claim that “the requirements for year one of the contract clearly favor one offeror and thus are anticompetitive” is based on the false premise that year one of the contract requires the use of a particular test delivery platform. However, the RFP requests that offerors propose and cost the use of their own test delivery platform for all four years of the contract and does not require the use of any particular platform in year one.¹ See RFP, Appendix B, p. 87.

AIR also claims that the RFP “restricts competition by combining test development and administration components.” AIR’s argument is puzzling since AIR recently bid on and was awarded the contract for an assessment in Florida. Florida’s Invitation to Negotiate specified that the contract “will include development, psychometric services, administration, scoring, and reporting” of the assessment.² Additionally, AIR has been an assessment contractor for Ohio since 2006. It holds a contract for the development, scoring, and reporting of the Ohio Graduation Tests. AIR also holds a contract for Ohio’s K-8 Assessment System. Both of those contracts bundle test development and administration.

AIR has not shown that the RFP violates the Procurement Code or New Mexico Law. AIR’s arguments are often contrary to contracts it holds or procurements it has participated in, and appear to be an attempt to block its potential competitors rather than protect the interests of the State of New Mexico. The State Purchasing Agent should dismiss the protest.

I. AIR LACKS STANDING.

The Procurement Code provides a right of action to protest a solicitation or award of a contract. NMSA 1978, Section 13–1–172. It states: “Any **bidder** or **offeror** who is aggrieved in connection with a solicitation or award of a contract may protest to the state purchasing agent or a central purchasing office. The protest shall be submitted in writing within fifteen calendar days after knowledge of the facts or occurrences giving rise to the protest.”

AIR is neither a “bidder” nor an “offeror.” “Bidder” is defined as “one who submits a bid in response to an invitation for bid or submits a quote in response to a call for formal or informal quotes.” NMA 1.4.1.7(B)(4) “Offeror” is defined as “one who submits a proposal in response to a request for proposals.” NMAC 1.4.1.7(B)(13). Offeror: is defined in the RFP as “any person, corporation, or partnership who chooses to submit a proposal.” AIR has not submitted a proposal in response to the RFP and the deadline to submit proposals has passed.

By definition AIR is not a bidder nor an “offeror” and lacks standing under NMSA 1978, Section 13-1-172. See *State ex rel. Educational Assessments Systems, Inc. v. Cooperative Educational Services of New Mexico, Inc.*, 1993 -NMCA- 024, ¶ 21 (“The Procurement Code regulates all the stages of the public procurement process. *The Code gives the disappointed bidder the right to protest pursuant to Section 13–1–172*, and also creates a statutory remedy, namely, judicial

¹ AIR erroneously claims the RFP will result in an eight year contract. Rather, the RFP specifies a four year contract which may be renewed for up to four one year renewals. RFP, P. 13.

² Florida ITN 2014-47, available at http://www.myflorida.com/apps/vbs/vbs_ad.view_ad?advertisement_key_num=110076.

review pursuant to Section 13-1-183”); **State ex rel. Regents of ENMU v. Baca**, 2008-NMSC-047, ¶ 13 (per curiam) (“As we have discussed, in enacting the Procurement Code, *the legislature created an administrative process that allows an **aggrieved bidder or offeror** to “protest to the state purchasing agent or a central purchasing office,” to receive a reasoned decision from the hearing officer, and to obtain judicial review of the administrative decision pursuant to Section 39-3-1.1.”) Because AIR is not an offeror it is not entitled to relief under the Procurement Code and its protest should be dismissed.*

II. THE RFP IS COMPETITIVE.

AIR focuses on competition throughout its protest through the lens of a potential vendor rather than through the lens of a state agency looking for the most advantageous solution to implementing a next generation assessment. As mentioned above, one of AIR’s main contentions is undercut by the fact that AIR bid and was awarded a contract under in Florida under an instrument substantially similar to the RFP. Additionally AIR holds a similar contract in Ohio. Apparently what is anticompetitive in New Mexico is perfectly competitive in Florida and Ohio. Moreover, AIR misconstrues the RFP as requiring the use of another vendor’s test delivery platform in the first year of the contract, when the RFP requests vendors to propose their own test delivery platform to be used throughout the contract.

- a. Test development and administration need not be bid separately.

AIR claims that bundling test development and administration into one RFP renders the procurement anticompetitive. AIR gloms onto language from NMSA 1978, Section 13-1-164, and remarkably that language is nearly the entirety of New Mexico authority cited in the protest. While AIR gloms onto the requirement that “[a]ll specifications be draft so as to ensure maximum practicable competition” AIR conveniently glosses over the qualification that such specifications must also “fulfill the requirements of state agencies and local public bodies.” Moreover, AIR cannot argue that the RFP limits the number of potential bidders, as it is substantially similar to the Florida procurement AIR participated in.

New Mexico case law makes clear that the Procurement Code is meant to protect the state not vendors. “The purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity.” Section 13-1-29(C). Of all the interests involved in competitive bidding, the public interest is the most important. *State ex rel. Educational Assessments Sys., Inc. v. Cooperative Educ. Servs. of N.M., Inc.*, 1993-NMCA-024, ¶ 19. Section 13-1-164 states: “[I]f, ***in the opinion of the state purchasing agent or central purchasing office***, a proposed component is of a nature that would restrict the number of responsible bidders or responsible offerors and thereby limit competition, ***if practicable***, the state purchasing agent or central purchasing office shall draft the specifications without the component and procure the component by issuing a separate invitation for bids or request for proposals or by entering into a sole source procurement.” (emphasis added). AIR’s arguments all center on its interests, not the State’s. The Procurement Code gives the State Purchasing Agent the authority to bid items separately if he determines bidding them

together would restrict the number of responsible bidders—and the RFP here evidences that the State Purchasing Agent did not believe the items needed to be bid separately from the outset. Moreover, while AIR claims that if test administration and development are bid separately competition would be increased, the experience of the Smarter Balanced Assessment Consortium (“SBAC”) shows otherwise. SBAC attempted to procure through separate competitive procurements its Test Delivery System and its Test Administration.³ Nonetheless, SBAC’s RFP for Test Administration did not result in the award of a contract, and was instead awarded under a sole source contract. One would assume the greater competition proposed by AIR would have resulted in a competitively awarded contract.

b. Year one does not need to be bid separately from years two through four.

AIR claims that year one must be bid separately from years two through four because other vendors hold an advantage in year one rendering the RFP anticompetitive. AIR’s argument is based on the flawed premise that year one of the contract requires the use of another vendor’s test delivery platform. At the outset it should be clear that conducting separate procurements for year one and years two through four is not advantageous to the State. One, as the RFP evidences considerable time and effort went into this procurement. Being forced to conduct two such procurements in less than two years would be an unnecessary burden, and saddle unnecessary costs, on the State. Two, a multiyear contract provides both administrative efficiencies and will result in a price more advantageous to the State. In any event, AIR’s argument that a multiyear contract restricts competition is false. The RFP contained extensive, detailed specifications for offerors to base their proposals on. Rather than spending its time preparing a response that meets those specifications, the very specifications drafted to meet the State’s interests, AIR chose to file a protest attempting to obstruct its competitors and skew the procurement to its advantage.

c. Requiring offerors to take into account ongoing technology developments does not render the RFP anticompetitive.

AIR falsely asserts that the RFP requires offerors to submit a solution dependent upon a nonexistent test delivery platform. One, as made clear above the RFP did not require the use of any particular test delivery platform in year one. All potential offerors were in the same position, they could propose their own platform or draft a response based upon the detailed specifications made available to all offerors. Two, nothing in the Procurement Code prohibits an RFP from seeking proposals that account for future developments and future procurements. Indeed, SBAC’s example undercuts AIR’s claim that the RFP is not competitive because it depends on future procurements or ongoing development. For example, AIR complains that the RFP requires proposals for an operational assessment to be performed on a platform that has not been developed. P. 2. AIR has argued, “Either way, by seeking proposals now for future work that depends on requirements that are not yet developed, [the RFP] unnecessarily lose[s] the benefits of intelligent and robust competition and fail[s] to ensure maximum practicable competition based on a common understanding of the requirement. [sic]” P 5. There are examples throughout SBAC’s procurement process where a proposal would require the offeror to base its proposal on undefined requirements. AIR is the Test Delivery System contractor for SBAC and apparently had no qualms about submitting a proposal with undefined

³ See <http://www.k12.wa.us/SMARTER/Jobs-Contracts.aspx>.

specifications in that instance. For example, the questions and answers quoted below are from SBAC's Test Delivery System RFP. http://www.k12.wa.us/RFP/pubdocs/SBAC-11/SBAC_RFP_11_Q_and_A.pdf. They make clear that the offerors responding to the RFP had to draft proposals that would take into account undefined standards and future developments.

Q6. What kind of testing format do you look for? Are you looking for the popular QTI format with adapters to covert to other format?
Answer: Please refer to the Smarter Balanced system architecture regarding interoperability standards. *At this time, Smarter Balanced has not yet adopted specific standards.* However, we anticipate that we will likely adopt QTI with the APIP extensions. We also anticipate working with the SIFA and IMS to enhance the standards as required to describe the full body of data associated with Smarter Balanced items.

Q40. A.4 OBJECTIVE AND SCOPE OF WORK, Test Registration: This component registers the student(s) for assessments and interacts with the SIS to gather the student information and accessibility profile, used by the Test Administration component. It must also manage staff identification for managing the assessment event.

4. Does Smarter Balanced envision pulling this information from a district level SIS or a statewide SIS? When a statewide SIS is configured to be used for an instance, will it override district level SIS configurations in that state?

5. Which configuration takes precedence?

6. Does Smarter Balanced envision using objects in the Assessment Working Group of the SIF specification to obtain the registration information, along with Student Personal and Staff Personal objects?

7. It would be helpful to provide a list of all the required SIF objects that need to be supported as part of the scope of this project.

Answer: Smarter Balanced anticipates receiving information from State Systems. The specifications that have been determined are described in the Smarter Balanced architecture. *Vendors will have to make explicit their assumptions regarding additional details that have not yet been described in the architecture.*⁴

⁴ See also, Smarter Balanced Assessment Consortium Item Authoring and Item Pool Application, Questions & Answer, <http://www.k12.wa.us/RFP/pubdocs/SBAC-RFP-07QandAFinal.pdf>, "Q22 RFP states "Test items will be initially developed and stored using external application platform(s) and must be loaded into the new Item Authoring and Item Pool Application starting August 1, 2012." "What is the format in which this information will be provided to vendor? Who is responsible for developing the test items using the external application platform? Answer: The format is the SBAC standard as defined by the SBAC Architecture. *This standard will be defined by March 1, 2012.* There will be a successful contractor on RFP-14 Item/Task Writing/Review—Pilot and RFP-16 Item/Task Writing/Review—Field that will develop test items," and "Q174 There are no boundaries or specified formats listed to be imported in the RFP. Many data import formats will likely require some

(emphasis added). Apparently AIR was not disadvantaged by having to draft a proposal taking into account future developments and undefined specifications. AIR cannot now complain that the RFP is anticompetitive when it took advantage of other such procurements in other states and in SBAC.

d. The RFP does not ‘favor’ any particular vendor.

Throughout AIR contends that the RFP ‘favors’ particular vendors, ostensibly at AIR’s expense. AIR does not argue that the RFP was drafted *to favor* any vendor, but only that it will favor particular vendors by virtue of combining test administration and development and by other vendor’s experience with the PARCC Assessment. Whether a request for proposals ‘favors’ a vendor does not render the request anticompetitive nor does it violate the Procurement Code. Requests for proposals necessarily ‘favor’ some vendors more than others. If they did not there would be no reason for competitive procurements and no way to evaluate the proposals. The whole point of a competitive procurement is that the state or agency is able to determine the most favorable vendor. As the New Mexico Court of Appeals has noted “[c]ompetitive bidding statutes are primarily intended for the benefit of the public rather than for the benefit or enrichment of bidders, and consideration of advantages or disadvantages to bidders must be secondary to the general welfare of the public.” *State ex rel. Educational Assessments Systems, Inc. v. Cooperative Educational Services of New Mexico, Inc.*, 1993–NMCA–024, ¶ 19 (quoting 72 C.J.S. Supp. Public Contracts § 8 (1975)).

But, in essence AIR argues that the considerations of the agency must be secondary to the considerations of potential vendors. Indeed, AIR’s protest contends that the agency has no right to procure services in the manner the agency finds most advantageous if the procurement will ‘favor’ any vendor or vendors, even where the procurement was drafted objectively. AIR’s logic is flawed. As stated above, AIR’s argument that the RFP favors a vendor because the use of that vendor’s test delivery platform is required in year one is a smokescreen. The RFP requests vendors to submit proposals for the development and use of their own test delivery platforms in all years of the contract, including year one. Nor, does the RFP require the use of any particular test delivery platform in year one. The RFP does not favor any particular vendors, was not drafted to favor any particular vendors, and does not violate the Procurement Code.

e. AIR should not be allowed to substitute its business judgment for that of the State.

AIR demands that the State Purchasing Agent rewrite the RFP so that it is more favorable to AIR, but AIR has made no showing that the RFP is not in the best interest of the State. Take for example AIR’s request that test development and administration be bid separately. AIR’s claim is that there should be separate RFP’s for those components so that more vendors can bid. But AIR does not acknowledge the advantage to having one vendor responsible for both components. The PARCC Assessment is intended to be available as a computer based test. There is a significant advantage and efficiency gained by having the same vendor develop and administer the assessment. In any event, AIR should not be allowed to substitute its business judgment as to

customization—QTI 2.0 has incomplete specifications that forces each entity to customize certain parts (so is a gray area) and so import routines have to be tailored to each vendors custom QTI 2.0 components. Hopefully QTI 2.1 will improve this but the specs are so new that vendors will not have likely moved to it yet, but will do so over next few years. Can you give any estimates for the types of data import formats that existing content/item providers will adhere to, in order for the vendor to understand this portion of the requirements and how much custom import work will be needed. Answer: *The data import formats have yet to be determined. As discussed in Q22, the interoperability standards will be defined by March 1, 2012.*”

what is the best way to procure an assessment for that of the State—especially given AIR’s overt interest maintaining its competitive advantage at the expense of its competitors.

AIR has not shown any violation of the Procurement Code and its attempt to skew the RFP to its favor should be denied.

III. THE RFP WAS NOT A COOPERATIVE PROCUREMENT.

This procurement was not a cooperative procurement. Protestor contends that by failing to execute a cooperative procurement agreement PED has violated NMSA 1978, Section 13-1-135. P. 2. “Cooperative procurement” means procurement conducted by or on behalf of more than one state agency or local public body, or by a state agency or local public body with an external procurement unit. NMSA 1978, Section 13-1-44. The RFP was “issued on behalf of the New Mexico State Public Education Department.” RFP at 20. While the RFP contemplates a price agreement that would be available to entities both within the State of New Mexico as well as entities outside of the State of New Mexico, it was not a cooperative procurement. The New Mexico Public Education Department is the only entity procuring goods or services through the RFP. Other entities are able to use the resulting Price Agreement, but must do so through their own separate procurements.

IV. AIR’S ARGUMENT THAT THIS RFP PRECLUDES PARCC OR ANY VENDORS FROM BIDDING IN FUTURE PROCUREMENTS IS NOT RIPE.

AIR’s contention that PARCC or other entities should be precluded from bidding on future procurements is not properly before the State Purchasing Agent. In a future procurement should an aggrieved offeror argue that an entity could not participate due to a conflict of interest or access to confidential information, that offeror could raise the argument at that time. AIR’s argument makes clear its true intention, to block one of its competitors. AIR stated that the award of a contract under this RFP “will position the awardee as a significant player in the industry when competing for future operational work.” It appears AIR’s concerns are not the competitiveness of this RFP, but its competitive position in the assessment industry. AIR has been more than happy to bid on and provide services under large assessment contracts, and is a principal contractor for the only other assessment consortium in the nation. Rather than letting its work product and experience speak for itself in the competitive marketplace, AIR is attempting to “level the playing field” to its advantage by blocking potential competitors.

Conclusion

AIR's protest fails. AIR lacks standing and has not shown that the RFP is contrary to the Procurement Code or New Mexico law. AIR's credibility is lacking, as it has participated in substantially similar procurements without raising the specter that they are anticompetitive. It seems AIR is using its protest as a shield to protect itself from having to compete with other vendors. But, the Procurement Code is designed to protect the interest of the State, not vendors. AIR has made no showing that the RFP is anticompetitive nor that it is not in the best interest of the State and its students. The protest should be dismissed.

Sincerely,

/s/ Dan Hill

Dan Hill
General Counsel
New Mexico Public Education Department

Pursuant to Rule 1.4.1.92 NMAC a copy of this correspondence has been sent to:

John Cohen
Executive Vice President, and President, AIR Assessment
American Institutes for Research
1000 Thomas Jefferson Street, NW
Washington, DC 20007

John F. Kennedy
CUDDY & McCARTHY, LLP
1701 Old Pecos Trail
Post Office Box 4160
Santa Fe, New Mexico 87502-4160
Jkennedy@cuddymccarthy.com

Karen Walker
HOLLAND & KNIGHT LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
Karen.walker@hklaw.com