



DEPARTMENT OF INFORMATION RESOURCES

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RQ-0226-GA May 4, 2004

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MAY 17 2004

The Honorable Greg Abbott
Attorney General of Texas
Office of the Attorney General
300 W. 15th Street
Austin, TX 78701
CERTIFIED MAIL, RETURN RECEIPT REQUESTED

OPINION COMMITTEE

FILE # ML-43700-04
I.D. # 43700
43700

RE: Request for Opinion

Dear General Abbott:

I hereby request your opinion pursuant to Section 402.042, Texas Government Code on an issue concerning a recently cancelled procurement action by the Texas Department of Information Resources (DIR).

Question Presented

May a Respondent to an Agency Request for Offer ("RFO") obtain the return of the documents provided in response to the RFO, where (1) the RFO was cancelled and it is not known if there will be a reissue of the RFO, and (2) a co-sponsoring agency of the cancelled RFO issues a Request for Proposal ("RFP") for some of the services negotiated pursuant to the cancelled RFO? Alternatively, if the return of the materials to the Offeror is not allowed, should the submitted materials be considered not subject to release as public information because a final contract was not awarded?

Background

DIR is an agency of the State of Texas responsible for, among other things, information technology development and procurement. On September 4, 2002, DIR issued a Request for Offer for a Statewide eProcurement Application Solutions Provider and Associated Implementation Services. The RFO was issued pursuant to Section 2177, Texas Government Code, which provides that DIR, in cooperation with the Texas Building and Procurement Commission (TBPC), will establish an electronic Procurement Marketplace.

The RFO in Section 1.8.7 provided for compliance with the Texas Public Information Act as follows:

"1.8.7 Public Information Act

DIR is a government agency subject to the Texas Public Information Act. Offers

submitted to DIR in response to the RFO are subject to release as public information after contract award. If the Offeror believes that the offer, or parts of it, may be confidential, the Offeror must specify that either all or part of the offer is excepted and which exception(s) the Offeror believes applies, with specific and detailed reasons. Vague and general claims to confidentiality are not acceptable. This is necessary so that DIR will have sufficient information to provide the Office of the Attorney General (OAG) if an OAG opinion is requested. All proposals or parts of the proposals that are not marked as confidential automatically will be considered public information after a contract has been awarded. The successful offer may be considered public information even though parts are marked "confidential." DIR shall comply with all opinions of the OAG and the Public Information Act.

DIR assumes no responsibility for asserting legal arguments on behalf of the Offerors. Offerors are advised to consult with their legal counsel concerning disclosure issues resulting from this offer process and to take precautions to safeguard trade secrets and other proprietary information."

In Section 9.1.8, the RFO further addressed the content of the offers as follows:

"9.1.8

Offers and any other information submitted by Offeror in response to this RFO shall become the property of DIR. DIR will not provide compensation to Offerors for any expenses incurred by the Offerors for offer preparation, product evaluations or demonstrations that may be made, unless otherwise expressly agreed by DIR in writing and signed by a DIR employee with authority to bind DIR. Offers which are qualified with conditional clauses, alterations, items not called for in the RFO documents, or irregularities of any kind are subject to disqualification by DIR at its option."

During the course of negotiations, the two final Offerors (American Management Systems, Inc. (AMS) and Accenture LLP) each proposed a statewide Strategic Sourcing component of the Cost Offer as part of the funding methodology for the eProcurement project. The proposal, or portions thereof, was designated as confidential or proprietary by the Offerors.

In late 2003, negotiations were suspended with the two final Offerors, and on April 15, 2004, the RFO was cancelled. It is not certain at this time if or when the RFO will be reissued. Also on April 15, 2004, TBPC issued a Request for Proposal for Spending Analysis, Strategic Sourcing, and Spend Management Services. (RFP #303-4-10804, Bid Package #1 attached hereto as Exhibit B), which would, according to the eProcurement RFO Offerors, include some of the same services which were discussed with DIR and TBPC in the eProcurement RFO.

By communications dated April 16 and April 28, 2004, attached hereto as Exhibit A, both of the final Offerors have requested the return of the materials provided to DIR during the eProcurement negotiations so as to protect their confidential and proprietary information that may be used by other bidders on the TBPC Strategic Sourcing RFP, or on a reissued eProcurement RFO. AMS states in their attached letter that the release of the materials would place AMS at a "material competitive disadvantage". DIR believes that the release

of the materials would also place the State at a competitive disadvantage by allowing competitors to the TBPC RFP access to the strategic sourcing information provided to DIR by the eProcurement RFO Offerors.

Accenture states in the attached e-mail to DIR that the Office of Attorney General was involved in a similar request for the return of bidding materials involving Accenture and the Department of Health that was resolved to Accenture's satisfaction. Accenture informed DIR that after the bid was cancelled, the vendors were allowed by the Attorney General to withhold the bidding information from public disclosure.

If additional information is needed to issue an opinion, please contact DIR Attorney Martin Zelinsky. Mr. Zelinsky may be reached at 463-5070 or via e-mail at

Sincerely,



Larry A. Olson
Executive Director
Department of Information Resources

Chief Information Officer
State of Texas

Enclosure

Copy without enclosures:
DIR - Bill Miller
Martin Zelinsky

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