

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA


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J. PAUL CARLAND, II
GENERAL COUNSEL

MEMORANDUM

TO: School Board Members

FROM: J. Paul Carland, II, General Counsel 

DATE: August 3, 2015

SUBJECT: **Additional Information for Agenda Item 1, Toshiba Business Solutions (USA), Inc. v. The School Board of Broward County, Florida, for the August 4, 2015 Special School Board Meeting**

Counsels for the parties were asked to provide proposed rulings for each exception with the appropriate citations to the record and/or statements justifying the action as required by the statute to assist the Board in ruling upon the Exceptions. Attached please find:

- (1) Petitioner's Proposed Ruling on Exceptions to Recommended Order; and
- (2) Respondent School Board's Suggested Motions.

If you have any questions, please do not hesitate to contact me.

JPC:jcf
Enclosures

C: Robert W. Runcie, Superintendent of Schools
Robert Paul Vignola, Deputy General Counsel
William G. Salim, Jr., Esq.
Eric J. Rayman, Esq.
Albert E. Dotson, Jr., Esq.
Wendy Francois, Esq.
Ruby Crenshaw, Director - Procurement & Warehousing Services
Noemi Gutierrez, Supervisor - Official School Board Records

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

TOSHIBA BUSINESS SOLUTIONS
(USA), INC.,

DOAH CASE NO. 14-5300 BID

Petitioner,

v.

ITB No. 15-048E – “Multifunctional
Devices, Cost-Per-Copy”

SCHOOL BOARD OF BROWARD
COUNTY, FLORIDA,

Respondent,

and

IMAGENET CONSULTING OF MIAMI,
INC.,

Intervenor.

**PETITIONER’S PROPOSED RULING ON EXCEPTIONS
TO RECOMMENDED ORDER**

Petitioner, Toshiba Business Solutions (USA), Inc. (hereinafter “Toshiba” or “Petitioner”), by and through its undersigned counsel, and pursuant to Florida Statutes, § 120.57(1)(k), Rule 28-106.217(1), Fla. Admin. Code, and the Memorandum dated July 27, 2015 of the Respondent’s, the SCHOOL BOARD OF BROWARD COUNTY, FLORIDA (hereinafter “Respondent” or “School Board”), General Counsel, hereby submits its Proposed Rulings on the Petitioner’s Exceptions to Recommended Order dated June 25, 2015, and respectfully submits that the School Board rule as follows:

Exception A

Upon a review of the entire record, I move that the School Board ACCEPT Petitioner’s Exception A to the Recommended Order and reject the findings of fact contained in paragraphs 25 through 28 of the Recommended Order as not being based upon competent substantial evidence and contrary to the related requirements of the ITB and School Board Purchasing Policy 3320, Section VI. The School Board finds that Mrs. Wilcox’s selection of a 36 month term was contrary to the plain ITB specifications, not in the School Board’s best financial

interest, and was clearly erroneous, arbitrary, and/or capricious, for the following reasons:

i. The ITB, Addendum 1, Question 6 Answer, clearly provides that the School Board will award each Item bid “to the lowest responsive bidder for the contract term that provides the most financial benefit to the District.” [JE-2].

ii. Price is the controlling factor in an invitation to bid and a contract “shall be awarded to the responsible and responsive vendor who submits the lowest responsive bid.” § 287.057(1)(a)(4), Fla. Stat.

iii. The School Board’s purchasing policies evince a similar directive requiring that all purchasing personnel insure “maximum value is being received for any money expended.” Part II (Q), School Board Purchasing Policy 3320; see also Part II (HH), School Board’s Code of Ethics (requiring purchasing personnel to “strive to obtain the maximum value for each dollar of expenditure.”).

iv. The School Board’s Purchasing Policy 3320 Section VI–Technology Purchases “allow[s] for [a] 5 year term to ‘maximum [sic] the total cost of ownership over the intended useful life.’” [TE-8]. The Policy actually allows for terms of up to 7 years.

v. On ITB Item 3, Toshiba bid a lower price of \$134,842.81 for a 60 month term, while the recommended awardee, Ricoh, bid a price of \$157,385.49 for a 36 month term. [JE-4; JE-8; and JE-11]. **For \$23,000 less, the SBBC could get the same services for 2 years longer.**

vi. On ITB Item 1, Toshiba bid \$3,923,473.00 for a 60 month term and Imagenet bid \$3,310,420.88 for a 36 month term (and \$4,529,344.73 for a 60 month term). [JE-4; JE-5; and JE-11]. Overall, Toshiba’s bid provides the School Board the lowest cost per copy price bid on Item 1.

vii. Mrs. Michelle Bryant-Wilcox, the Purchasing Agent III assigned to the ITB, lacked subject matter expertise and yet made all the decisions with respect to the content of the ITB, whether to incorporate Managed Print Services (which she did not), and the ultimate choice of a 36 month term. [T. p. 47; 84; 87; 104 and 161]. Yet, she wrote that if the School Board chose “a 60 month term with the apparent low bidder [Toshiba], the District would realize an annual savings of \$872,527.65.” [TE-8].

viii. Paragraphs 25 through 28 of the Recommended Order address Mrs. Wilcox’s factual determination that a 36 month term was in the best financial interest of the School Board. Paragraphs 65 through 74 of the Recommended Order set forth the legal conclusions applicable thereto.

ix. The finding in paragraph 27 that the School Board had a policy of not entering into a contract term greater than 36 months is erroneous for the reasons stated above.

x. The findings that a 36 month term provides the School Board flexibility “in finding solutions to its copying needs and to take advantage of changes that may arise in technology” is irrelevant to the ITB criteria of choosing the lowest cost per copy price that provides the most financial benefit to the School District. Numerous provisions within the ITB protect the School Board from technology changes or advances, including the option to terminate on 30 days notice; the requirement to supply new products and upgrades; substitution of new product lines; the right to resize equipment; replacement of machines with excessive repair histories; and a warranty of currency. [JE-1, Section 3, Par. 57; and Section 4, Subsections 20, 23, 38, 40 and 44].

xi. Managed Print Services was not a factor in the ITB and should not have been a factor in determining the appropriate term of the contract.

xii. The appropriate term of the contract was and is the policy decision of the School Board, to be made and determined by the majority vote of all nine members of the School Board.

xiii. The School Board finds that a 60 month term provides the most financial benefit for the School District, and that the findings of fact to the contrary are not supported by competent substantial evidence, and Mrs. Wilcox’s determination rejected as arbitrary and capricious, and contrary to the express requirements of the ITB and School Board Purchasing Policy 3320.

Accordingly, the Recommended Order’s decision to uphold the proposed award on ITB Item 1 to ImageNet and Item 3 to Ricoh for 36 month terms must be rejected, and a contract awarded to Toshiba on both Items for a 60 month term.

Exception B

Upon a review of the entire record, I move that the School Board ACCEPT Petitioner’s Exception B to the Recommended Order and reject the findings in the Recommended Order that Managed Print Services played no role in the selection of a 36 month term as not being based upon competent substantial evidence and contrary to the related requirements of the ITB for the following reasons:

i. Mrs. Wilcox acknowledged that her selection of a 36 month term was based on a future Managed Print Services solution, yet nowhere in the ITB or either Addendum did Mrs. Wilcox suggest that MPS would be a factor in determining the contract term. [T. p. 111-112; 136].

ii. Although testifying that Managed Print Services would provide savings to the School Board, thus justifying the 36 month term selected, Mrs. Wilcox had no knowledge whatsoever as to the actual potential savings that might be realized. [T. pp. 105-06].

iii. The IT department clearly intended for a Managed Print Services solution to be considered in this ITB but Mrs. Wilcox did not include it and ultimately IT was satisfied that any concern with a five year term could be resolved by exercising the 30 day cancellation right so as to proceed with Managed Print Services. [TE-9].

iv. Notwithstanding the statements in the ITB that Managed Print Services played no factor or role in this ITB, Mrs. Wilcox clearly admitted that it was a factor in her decision to recommend a 36 month contract term. IT similarly noted its concerns with the ability to implement Managed Print Services in the future, to the extent it even had any input into the 36 month term selection.

Accordingly, the Recommended Order's findings that Managed Print Services played no role in the proposed award on the ITB was not based upon competent substantial evidence. The School Board finds that Managed Print Services was a material factor in deciding on a 36 versus 60 month term, which was contrary to the plain ITB specifications and was clearly erroneous, arbitrary, and/or capricious.

Exception C

I move that the School Board ACCEPT Petitioner's Exception C to the Recommended Order and reject the Administrative Law Judge's Conclusions of Law contained in paragraphs 75 through 89 of the Recommended Order for the following reasons:

i. The ITB and School Board Purchasing Policy 3320 allow the School Board to waive minor irregularities or technicalities in bid submissions.

ii. It has long been recognized that "although a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. [A deviation] is material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. State Dep't of Gen. Servs., 493 So.2d 50, 52 (Fla. 1st DCA 1986).

iii. In Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d 505 (Fla. 1982), the Supreme Court expressly rejected speculative and unidentified economic advantage as a basis for disqualifying a bid that failed to include a bid on one of two required alternative proposals. As no competitive or economic advantage accrued to the bidder upon its failure to bid on alternate "A," it was properly found responsive and the failure to bid could be waived.

iv. Likewise here, there has been no showing of any identifiable competitive or economic advantage. All vendors could and did submit 60 month term bids. [T. p. 162]. All vendors were, and could be, equally evaluated as to their lowest cost-per-copy price for a 60 month term. [JE-13].

v. Under Florida law, “[t]here is a very strong public interest in favor of saving tax dollars in awarding public contracts. There is no public interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, where the low bidder did not derive any unfair competitive advantage by reason of the technical omission.” Intercontinental Properties, Inc. v. State Dept. of Health & Rehabilitative Services, 606 So.2d 380, 386 (Fla. 3d DCA 1992).

vi. The School Board finds that Toshiba was not afforded any competitive economic advantage over the other bidders and, thus, its failure to submit bids for 36 or 48 month terms is a minor irregularity and non-material, and can be and is hereby waived.

Accordingly, the Conclusions of Law contained in the Recommended Order’s Paragraphs 75 through 89 are rejected. The School Board finds that its substituted conclusion of law and interpretation of the ITB and School Board Purchasing Policy 3320 is as or more reasonable than that which is being rejected.

Costs Affidavit

Based on the aforesaid Rulings, the School Board finds that Toshiba’s Bid Protest Bond shall be returned without deduction, offset or claim, and the surety thereon, and Toshiba, discharged of any liability for any costs to the School Board.

Conclusion

The School Board’s Office of the General Counsel is hereby ordered to prepare a Final Order consistent with the Rulings made herein for formal execution by the School Board.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by electronic mail this 3rd day of August, 2015 to ROBERT E. VIGNOLA, ESQ., Office of the General Counsel, Eleventh Floor, 600 SE 3rd Avenue, Fort Lauderdale, Florida 33301, robert.vignola@browardschools.com; and Albert Dotson, Esq./Wendy Francois, Esq., Bilzin,

Sumberg, Baena, Price and Axelrod, P.A., 1450 Brickell Avenue – Suite 2300, Miami, FL 33131, adotson@bilzin.com and wfrancois@bilzin.com.

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THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

TOSHIBA BUSINESS SOLUTIONS (USA),
INC.,

Petitioner,

vs.

DOAH CASE NO. 14-5300 BID

THE SCHOOL BOARD OF BROWARD
COUNTY, FLORIDA,

Respondent,

and

IMAGENET CONSULTING OF MIAMI,
INC.,

Intervenor.

RESPONDENT SCHOOL BOARD'S
SUGGESTED MOTIONS

Petitioner Toshiba's Exception A

**[Petitioner cites Paragraphs 25 through 28 (Findings of Fact) and
Paragraphs 65 through 74 (Conclusions of Law)]**

Statements Justifying the Action as Required by Statute;

- Section 120.57(2)(1), Florida Statutes, provides that in order to reject or modify a finding of fact, the agency must first determine from a review of the entire record, and state with particularity in the order, that the findings of fact were not based upon competent substantial evidence.

Record Citations Providing Competent Substantial Evidence
to Support the Findings of Fact:

Findings of Fact - Paragraphs 25-26 accurately recite excerpts from the ITB [Joint Exhibit JE-1; RFP at Page 12 at Paragraph 2] and Addendum 1 [Joint Exhibit JE-2, Addendum No. 1 at Pages 52, 61, 71 and 84A] and Addendum No. 2 [Joint Exhibit JE-3, Addendum No. 2 at Pages 87-90].

Findings of Fact - Paragraph 27: The selection of the shorter 36-month contract term was consistent with the expressed terms of the ITB [Joint Exhibit JE-1; RFP at Page 12 at Paragraph 2] and addenda [Joint Exhibit JE-2, Addendum No. 1 at Pages 52, 61, 71 and 84A; Joint Exhibit JE-3, Addendum No. 2 at Pages 87-90] and the expressed preference of SBBC's governing board

to refrain from entering into long-term contracts [Transcript of Formal Hearing at Page 139, Lines 12-20] and enabled SBBC to be flexible in finding solutions to its copying needs and to take advantage of changes that may arise in technology [Transcript of Formal Hearing at Page 109, Lines 11-19]; avoided problems the school district was currently experiencing with a long-term cost-per-copy contract which ranged from equipment performance issues to the long-term placement of technology in schools [Transcript of Formal Hearing at Page 109, Line 19 through Page 110, Line 2]; and enabled the school district to conduct research to determine whether future implementation of a managed print solution would provide the school district with additional cost savings or financial benefits in contrast to the cost-per-copy services being procured through the ITB [Transcript of Formal Hearing at Page 122, Line 18 through Page 123, Line 8].

Findings of Fact - Paragraph 28: SBBC's elected governing board has made it known by its actions taken at public meetings that it disfavors long-term contracts for the procurement of goods and services and has gone so far as to reduce the term of contracts from the dais. [Transcript of Formal Hearing at Page 139, Lines 12-20]. SBBC's staff determined that the pricing offered to SBBC for a 60-month contract term was not significant enough to recommend a contract longer than the 36-month term SBBC had been requesting since the release of the ITB. [Transcript of Formal Hearing at Page 122, Line 15 through Page 123, Line 11; page 123, Line 19 through Page 124, Line 14]. Any cost advantages offered by Toshiba's bids for Items 1, 2 and 3 were reduced by \$525,000 per year due to the disqualification of its bid for Item 2, which failed to meet the ITB's specifications. [Transcript of Formal Hearing at Page 152, Lines 1-6].

Conclusions of Law - Paragraph 65: The 36-month contract period avoids locking SBBC into an obligation that would limit its ability to take advantage of technological changes and new solutions to its copying needs, particularly when marketplace leaders informed SBBC that it could save millions of dollars annually through a copying program other than the one being solicited under the ITB. [Transcript of Formal Hearing at Page 105, Lines 13-15; at Page 106, Lines 1-7; at Page 109, Lines 11-19]. It also avoids performance problems such as those currently being experienced by SBBC when copying service technology is kept in place for more than three years. [Transcript of Formal Hearing at Page 109, Line 19 through Page 110, Line 2]. In addition, the 36-month period was in keeping with the expressed preference of SBBC's elected governing board for contracts that do not exceed three years in duration. [Transcript of Formal Hearing at Page 139, Lines 12-20].

Exception A – Respondent SBBC's Suggested Motion

I move that The School Board REJECT Petitioner's Exception A as competent substantial evidence exists within the record to support the ALJ's Findings of Fact in Paragraphs 27 and 28 and 65 through 74 in the Recommended Order.

Petitioner Toshiba's Exception B

[No page numbers or paragraphs of disputed findings are cited by Petitioner]

Statements Justifying the Action as Required by Statute;

- Section 120.57(1)(k), Florida Statutes, provides that “an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

Exception B – Respondent SBBC's Suggested Motion

I move that The School Board decline to rule on Petitioner's Exception B to the ALJ's Recommended Order as such does not clearly identify a disputed portion of the Recommended Order by page number or paragraph and does not identify a legal basis for the exception.

Exception C

[Petitioner cites Conclusions of Law in Paragraphs 75 through 89]

Statements Justifying the Action as Required by Statute;

- Section 120.57(2)(l), Florida Statutes, provides that the agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.

Exception C – Respondent SBBC's Suggested Motion

I move that The School Board REJECT Petitioner's Exception C to the ALJ's Conclusions of Law in Paragraphs 75 through 89 in the Recommended Order as The School Board lacks the substantive jurisdiction necessary to reject or modify those conclusions of law.

Recommended Order – Disposition of Protest

Statements Justifying the Action as Required by Statute;

- Section 120.57(2)(l), Florida Statutes, provides that the agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying its action.

Disposition of Protest – Respondent SBBC’s Suggested Motion

I move that The School Board issue a Final Order accepting the Recommended Order in its entirety; dismissing the bid protest of Petitioner TOSHIBA BUSINESS SOLUTIONS (USA), INC.; and upholding the award of contracts under ITB No. 15-048E for a 36-month term to IMAGENET CONSULTING OF MIAMI, INC., as the primary awardee for Item 1 and to Innovative Software Solution, Inc. and the alternate awardee for Item 1, and to Ricoh USA, Inc., as the primary awardee for Item 3 and to IMAGENET CONSULTING OF MIAMI, INC., as the alternate awardee for Item 3.

Respondent SBBC’s Costs Affidavit

Statements Justifying the Action as Required by Statute;

- Rule VIII.N of School Board Policy 3320 provides that, if The School Board prevails, then The School Board shall recover all costs and charges which shall be included in the Final Order, including charges made by the Division of Administrative Hearings.

Costs Affidavit – Respondent SBBC’s Suggested Motion

I move that the Final Order award costs in favor of The School Board of Broward County, Florida and against Toshiba Business Solutions (USA), Inc. in the amount of \$12,390.68.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by electronic transmission to WILLIAM G. SALIM, JR., ESQUIRE of Moskowitz, Mandell, Salim & Simowitz, P.A., Attorneys for Petitioner TOSHIBA, 800 Corporate Drive – Suite 500, Fort Lauderdale, Florida 33334; ERIC J. RAYMAN, ESQUIRE of Genovese, Joblove & Battista, P.A., Attorneys for Petitioner TOSHIBA, 200 East Broward Boulevard – Suite 1110, Fort Lauderdale, Florida 33301; and ALBERT E. DOTSON, JR., ESQUIRE and WENDY FRANCOIS, ESQUIRE of Bilzin, Sumberg, Baena, Price & Axelrod, LLP., Attorneys for Intervenor IMAGENET, 1450 Brickell Avenue – 23rd Floor, Miami, FL 33131 this 1st day of July, 2015.

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