

Office of State Procurement
State of Louisiana
Division of Administration

JOHN BEL EDWARDS
GOVERNOR



JAY DARDENNE
COMMISSIONER OF ADMINISTRATION

October 10, 2018

Via Email Only:

Mr. V. Thomas Clark, Jr.
Adams and Reese, L.L.P.
450 Laurel Street, Suite 1900
Baton Rouge, LA 70801
tom.clark@arlaw.com

Re: RFP for Acquisition of New Voting System for the Secretary of State;
File No.: Y 3000009864 P; Solicitation No.: 3000009864

Dear Mr. Clark:

This is my decision in response to your protest of August 23, 2018, on behalf of Election Systems and Software, LLC ("ES&S"), to the award made to Dominion Voting Systems, Inc. ("Dominion") in Request for Proposal Acquisition of New Voting System for the Louisiana Secretary of State, File Number Y 3000009864 P, Solicitation Number 3000009864 (the "RFP"). Upon review of the procurement file, including your protest, the responses by the Department of State ("DOS") and Dominion, and your replies thereto, I rescind the award made to Dominion and cancel the RFP.

BACKGROUND

On March 27, 2018, the Office of State Procurement ("OSP") issued the RFP on behalf of DOS. The purpose of the RFP was to obtain competitive proposals from bona fide, qualified proposers who were interested in providing voting systems that met standards acceptable to the Secretary of State ("SOS") as to durability, accuracy, efficiency, and capacity and were certified by the Secretary prior to award per La. R.S. 18:1361.¹

The implementation of the new voting system would be conducted in two phases, as provided in Section 2.1.4 of the RFP:

¹ RFP, § 1.1.1.

2.1.4 Implementation Plan and Schedule

Due to the scope and complexity of this effort, the Department plans to use a multi-phase approach for this project. The Department has specified the proposed number, make-up and sequence of the implementation plan to be as follows for the proposed phases, but will consider Proposer's implementation plan and schedule.

Phase one:

- **Install 1** Installation of central system on the Department's servers in Baton Rouge, Louisiana, set up of the programs and databases for use in programming paper ballots and early voting system ballots by the Department of State and training of all Department programmers on or before July 1, 2018. For payment terms, the Department must formally accept the system, programs, databases and completion of training satisfactory to the Department. This phase should be no greater than 10% of the total cost.
- **Install 2** Delivery, acceptance, removal of present equipment and installation of new absentee by mail voting system and early voting system and all component parts for full and complete operation in a minimum of five (5) parishes, including all training for the November 6, 2018 election, which early voting period begins October 23, 2018. Parish implementations to be determined by the Department in clusters of five (5) until all parishes are fully implemented throughout the state for elections held in 2020. Parish implementations to begin on or before August 1, 2018. This phase should be no greater than 100% of the total cost minus the phase two cost. Payment will be based upon the number of units deployed and formally accepted in the specified parishes and the successful completion of all contract deliverables.

Phase two:

- **Install 1** Installation of central system on the Department's servers in Baton Rouge, Louisiana and set up of the programs and databases for use in programming for the Election Day voting system by the Department of State and training of all Department programmers on or before April 1, 2019, unless already installed and trained during phase one. For payment terms, the Department must formally accept the system, programs, databases and completion of training satisfactory to the Department. This phase should be no greater than 10% of the total cost.
- **Install 2** Delivery, acceptance, removal of present equipment and installation of the new Election Day voting system and all component parts for full and complete operation in a minimum of five (5) parishes, including all training for the October 12, 2019 election. Parish

implementations to be determined by the Department in clusters of five (5) until all parishes are fully implemented throughout the state for elections held in 2020. Parish implementations to begin on or before April 1, 2019. This phase should be no greater than 100% of the total cost minus the phase one cost. Payment will be based upon the number of units deployed and formally accepted in the specified parishes and the successful completion of all contract deliverables.

NOTE: If Proposer has an alternative recommendation for the sequence of the implementation of either phase and the payment terms, the recommendation shall be clearly identified in the Proposer's response to the RFP.

The proposed voting system reasonably susceptible of receiving an award was required to be certified by the SOS prior to the issuance of a Notice of Intent to Award.² The SOS would certify the voting system according to the certification standards adopted by DOS pursuant to La. R.S. 18:1361.³ Section 2.1.2 of the RFP stated: "The Department's certification standards will be posted on its website (www.sos.la.gov) at the time of issuance of this RFP."

Section 2.1.2 also required each voting system and all of its components submitted in response to the RFP to be certified prior to submitting a proposal to the RFP by NASED Independent Testing Authorities according to the voting systems standards adopted by the Federal Election Commission or by an accredited Voting System Test Laboratory in accordance with the voting equipment requirements from the Elections Assistance Commission.⁴

With respect to the scope of work/services, the RFP provided that, "[T]he scope of this proposal is to provide a turnkey project for absentee by mail, early voting and Election Day voting with all associated applications/systems for ballot preparation, programming, testing and vote tabulation."⁵

The proposal elements would consist of a Financial Proposal and a Technical Proposal. In the Financial Proposal, a proposer was to submit a price schedule for purchasing and leasing for each of the two phases.⁶ The Financial Proposal would account for a maximum of 40 points as follows:

- Option one (Purchase Option), Phase one – 10 Points
- Option two (Lease Option), Phase one – 10 Points
- Option one (Purchase Option), Phase two – 10 Points
- Option two (Lease Option), Phase two – 10 Points⁷

² RFP, § 2.1.2, § 1.3

³ RFP, § 2.1.2.

⁴ RFP, § 2.1.2.

⁵ RFP, § 2.1.

⁶ RFP, § 2.6.1.

⁷ RFP, § 3.1 and Attachment 4.

A proposer's base cost score would be computed as follows:

$$BCS = (LPC/PC \times FPP)$$

Where: BCS = Computed cost score (points) for Proposer being evaluated
LPC = Lowest proposed cost of all Proposers
PC = Total cost of Proposer being evaluated
FPP = Financial Proposal Points⁸

The Technical Proposal would account for a maximum of 60 points. In the Technical Proposal, a proposer would be scored on the following categories:

- Company Qualifications and Experience (10 maximum points)
- Proposed Staff (10 maximum points)
- Ease of Use (10 maximum points)
- Product Operation and Support (10 maximum points)
- Product Availability and Warranty (10 maximum points)
- Security (10 maximum points)⁹

The scores for the Financial Proposal and Technical Proposal of each proposer would be combined to determine the overall score. The proposer with the highest overall score would be recommended for award.¹⁰

Although Section 2.1.2 of the RFP stated that DOS's certification standards would be posted on the SOS website at the time the RFP was issued, they were not.¹¹ It was not until April 26, 2018, approximately one month after the RFP was issued and four days prior to the May 1, 2018 deadline for proposal submittal, that DOS posted two sets of certifications on its website. Those certifications were titled: "Voting System and Machine Certification Standards for 2018" and "Standards for Absentee Counting System Approval and Certification" ("New Certification Standards").

Three proposers responded to the RFP: ES&S, Dominion, and Hart InterCivic, Inc. ("Hart"). On May 10, 2018, ES&S was invited to give an oral presentation of its proposal on May 23, 2018 based upon the New Certification Standards.

On May 22, 2018, ES&S protested the RFP based upon the New Certification Standards that were posted nearly a month after the issuance of the RFP. DOS responded to the protest on May 24, 2018, stating that the document entitled "Standards for Absentee Counting System Approval and

⁸ RFP, § 3.1.

⁹ RFP, §§ 2.6.2-2.6.2.6.

¹⁰ RFP, Part III, Evaluation, p. 56.

¹¹ On September 25, 2018, OSP asked DOS to provide OSP with a copy of the certification standards posted on the DOS website on March 27, 2018. On September 28, 2018, the Secretary of State's Office informed OSP that the only certification standards on the Secretary of State's website at the time of the issuance of the RFP were those contained in the Election Code, La. R.S. 18:1, et seq.

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Certification” was erroneously uploaded to the SOS website and did not contain the current voting machine standards for the RFP, but were instead standards which were previously required to be signed by the current vendor (i.e., Dominion) in order to certify the existing mail ballot counting system when it was purchased in 2011. With respect to the “Voting System and Machine Certification Standards for 2018,” SOS stated that those standards would be withdrawn, and SOS would rely solely on the RFP as advertised and the 2005 certification standards.

On May 25, 2018, I directed the following actions to be taken with regard to the RFP:

- The current RFP evaluation team members were to execute a confidentiality certification certifying they would not disclose any information from any proposal or about any proposer presentation with anyone at any time.
- The SOS was to remove himself from participating in the RFP evaluation of the respective proposers and their respective proposals.
- Letters were to be issued by OSP notifying all proposers that the proposers’ voting systems would be evaluated in accordance with the certification standards available to the proposers at the time of the issuance of the RFP.
- The SOS was to submit to OSP a revised schedule for Oral Presentations/Demonstrations no later than May 29, 2018.
- No later than May 30, 2018, a new RFP evaluation committee was to be selected and communicated to OSP, consisting of at least three and no more than five members, with no evaluation team member having any supervisory authority over another evaluation team member.

By May 30, 2018, a New Evaluation Committee had been selected.

On June 1, 2018, ES&S appealed my directive to the Commissioner of Administration (the “Commissioner”), seeking reversal of my directive and to cancel the RFP. On June 14, 2018, the Commissioner denied the appeal.

The New Evaluation Committee evaluated the proposals, including oral presentations, and scored the proposals as follows:

Proposer	Technical Score	Financial Score	Total Score
Dominion	53.5	40	93.5
ES&S (Config. 1)	39	20.1	59.1
ES&S (Config. 2)	39	21.12	60.12
Hart InterCivic	27	27.59	54.59

On July 11, 2018, the New Evaluation Committee recommended that the RFP contract be awarded to Dominion. On July 30, 2018, SOS concurred with the recommendation. OSP approved the recommendation on August 2, 2018 and issued the Notice of Intent to Award Letter to Dominion on August 9, 2018.

On August 23, 2018, on behalf of ES&S, you protested the award to Dominion.

ANALYSIS

Certification Standards for Voting Systems

The RFP was clear that prior to issuing the Notice of Intent to Award, the SOS would certify the selected voting system according to the certification standards adopted by DOS pursuant to La. R.S. 18:1361. Section 2.1.2 of the RFP provided as follows:

The proposed voting system reasonably susceptible of receiving an award shall be certified by the Secretary of State, as scheduled in this RFP. **The Secretary of State will certify the voting system according to the certification standards adopted by the Department pursuant to La. R.S. 18:1361.** All Department-certified voting systems must meet all state law requirements of Chapter 8 of the Louisiana Election Code, Title 18, specifically R.S. 18:1355 and be HAVA compliant. The Department's certification standards will be posted on its website (www.sos.la.gov) at the time of issuance of this RFP. (Emphasis added).

The certification by the SOS would occur after it was determined which proposal was reasonably susceptible of award but prior to the issuance of the Notice of Intent to Award.¹²

Section 2.1.2 of the RFP was also clear in providing that each voting system and all of its components submitted in response to the RFP were required to be certified by NASED Independent Testing Authority or by an accredited Voting System Test Laboratory:

Additionally, each voting system and all of its components submitted in response to this RFP shall be certified prior to submitting a proposal to this RFP by NASED Independent Testing Authorities according to the voting systems standards adopted by the Federal Election Commission or by an accredited Voting System Test Laboratory in accordance with the voting equipment requirements from the Elections Assistance Commission.

All voting unit firmware, software, and hardware shall be upgraded and certified by Contractor on a periodic basis to meet federal and state requirements for a period of 10 years and thereafter each year that the contract is renewed.

All software components depending upon any commercially available products by companies such as Microsoft or Apple, used in the implementation will be upgraded and certified at the discretion of the Department after the official release by the company or other contractor. (Emphasis added).

The RFP defined a "Voting System" as follows:

¹² RFP, § 1.3

DD. Voting System – The total combination of equipment (including electronic voting machines or electronic ballot marking devices and the software, firmware, hardware, and documentation required to program, control, and support the equipment), that is used to define ballots; to cast and count votes; to report or display election results; and to maintain and produce any audit trail information. Also includes the practices and associated documentation used to identify system components and versions of such components; to test the system during its development and maintenance; to maintain records of system errors and defects; to determine specific system changes made after initial certification; and to make available any materials to the voter.¹³

Therefore, in certifying a voting system, SOS would apply DOS's posted certification standards pursuant to La. R.S. 18:1361 not only for the voting machines, but for the entire system used to define ballots, cast and count votes, report or display election results, maintain and produce audit trail information, and the practices and associated documentation used to identify system components and versions of such components, and to test the system during its development and maintenance, to maintain records of system errors and defects to determine specific system changes made after initial certification, and to make available any materials to the voter. Consequently, the procured voting system had to meet specific certification standards posted by SOS for voting machines and for absentee by mail and early voting counting equipment pursuant to La. R.S. 18:1361.

Louisiana Revised Statutes 18:1361 provides as follows:

§1361. Approval of machines and equipment; certificate; expenses of examination

A. The secretary of state may examine any type or make of voting machine upon the request of a representative of the maker or supplier thereof, and if he determines that the machine complies with the requirements of this Chapter and that it meets standards acceptable to him as to durability, accuracy, efficiency, and capacity, he shall approve that type or make of machine for use in this state and shall issue his certificate of approval thereof. In addition, any electronic voting machine procured or used in the state must have been certified by NASED Independent Testing Authorities according to the voting systems standards adopted by the Federal Election Commission. This certificate, together with any relevant reports, drawings, and photographs, shall be a public record.

B. Any absentee by mail and early voting counting equipment to be procured for use in this state shall be certified by the secretary of state as meeting standards acceptable to him as to durability, accuracy, efficiency, and capacity.

C. The secretary of state may employ experts to assist him in making the examination provided for in this Section. The expenses of the services of such experts, not to exceed a total of five hundred dollars, shall be paid prior to the

¹³ RFP, § 1.2.DD.

examination by the person requesting examination of the machine. Experts employed in the examination shall sign the certificate of approval made by the secretary of state. No machine shall be used at any election which has not been approved by the secretary of state as herein provided.

As stated before, at the time of issuance of the RFP, there were no DOS certification standards adopted pursuant to La. R.S. 18:1361 posted on the SOS website. Instead, the only standards on the SOS website were those contained in La. R.S. 18:1361.

Louisiana Revised Statute 18:1361 provides for minimum certification requirements of procured electronic voting machines.¹⁴ However, La. R.S. 18:1361 does not provide for any certification standards for absentee by mail and early voting counting equipment, a critical component of the solicited voting system. Without these certification standards, no adequate evaluation of the proposed voting systems could be made because the RFP required SOS to certify the selected voting system in accordance with the certification standards adopted by DOS pursuant to La. R.S. 18:1361. As such, the RFP was inherently defective.

Certification of Voting System Components

Ironically, even though the RFP evaluators allowed for component upgrades to existing voting systems to serve as the equivalent of an entirely new voting system, they did not apply the RFP's certification requirements to those components.

As stated above, Section 2.1.2 of the RFP required "each voting system **and all of its components** submitted in response to this RFP [to] be certified **prior** to submitting a proposal to this RFP by NASED Independent Testing Authorities according to the voting systems standards adopted by the Federal Election Commission or by an accredited Voting System Test Laboratory in accordance with the voting equipment requirements from the Elections Assistance Commission." (Emphasis added).

ES&S protested that the Canon DR-M260 document scanner that Dominion proposed does not appear in the VSTL test reports for DVS's Democracy Suite 5.4-E system. Dominion did not refute this protest ground. Instead, Dominion merely stated that EAC is not a requirement in Louisiana. While EAC may not be a State law requirement, it was undoubtedly a requirement of the RFP that each voting system and all of its components submitted in response to the RFP be certified prior to proposal submission. Nowhere in Dominion's proposal is it indicated that the Canon DR-M260 was tested and certified as a component part of the system. The test report included in Dominion's proposal only lists the Canon DR-M160-II. Accordingly, no proof was submitted by Dominion showing that the Canon DR-M260 was certified as a component of the voting system prior to the submission of its proposal. Consequently, Dominion's proposal was non-responsive.

¹⁴ See La. R.S. 18:1361(B).

Dominion Voting Systems, Inc. or Dominion Voting Systems Corp.

ES&S contends Dominion was improperly assigned a maximum score of 10 points under the category of “Proposer Qualifications and Experience” because Dominion failed to disclose it had an office in Belgrade, Serbia, was recently acquired by Staple Street Capital, and was not the entity which handled the installation of the State’s current voting system.

Dominion’s response on this issue was that the Serbian office was not required to be disclosed because it belonged to Dominion Voting Systems Corp. (“Dominion Corp.”), a “sister company” to proposer Dominion Voting Systems, Inc. Additionally, regarding the change in ownership, Dominion countered that ES&S has a very similar ownership structure.

The First Circuit Court of Appeal in *Catamaran v. State*, 2014-1672 (La. App. 1 Cir. 6/5/15); 174 So.3d 683, citing *United Healthcare Ins. Co. v. State*, 2011-1398 (La. App. 1 Cir. 9/28/12); 103 So.3d 1095, articulated the applicable standards to be applied in review of a contract award pursuant to an RFP or contract negotiation process:

The general principle governing the standard of review to be used when reviewing the findings of an administrative agency is that, if the evidence, as reasonably interpreted, supports the agency’s determinations, then the agency’s decisions are accorded great weight and will not be reversed or modified in the absence of a clear showing that the administrative action was arbitrary or capricious. Further, an administrator vested with authority to exercise discretion, is free to exercise that discretion as he or she sees fit as long as the exercise of that discretion is rational and not arbitrary or capricious. The agency’s discretion must be exercised in a fair and legal manner and not arbitrarily. The test for determining whether an action was arbitrary or capricious is whether the action taken was without reason. *Catamaran*, at 688.

In evaluating a proposal, an agency is “afforded great deference in decisions made within its scope of experience, expertise, and reasonable perceptions.” *Id.*, at 689, citing *Executone of Central Louisiana, Inc. v. Hospital Service Dist. No. 1 of Tangipahoa Parish*, 99-2819 (La. App. 1 Cir. 5/11/01); 798 So.2d 987, 990.

I will not substitute my judgment for that of the Evaluation Committee on this issue, as the Evaluation Committee has wide discretion. However, it should be noted that a review of the existing procurement file for the current voting system contract between DOS and Dominion indicates that, while Dominion touts its long-standing relationship with the State and dismisses any obligation to disclose a Serbian office of its “sister company”, it was Dominion Corp., not Dominion Systems, Inc., which acquired the assets of Sequoia Voting Systems, Inc. (“Sequoia”). Sequoia entered into a contract with DOS in 2005 for the current voting system. In 2011, Dominion Corp. purchased the assets of Sequoia. An assignment of contract was subsequently executed, assigning the contract from Sequoia to Dominion. Accordingly, although the employees

and assets may not have changed, the proposer, Dominion, has only had a relationship with the State since 2010.

Furthermore, records from SOS and the California Secretary of State's Office ("California SOS") reflect that Dominion Corp. was not simply Dominion's "sister" company, as stated in Dominion's response to the protest; it appears to be a parent company. SOS records reflect Dominion Corp. owns more than 5% of Dominion, and California SOS records reflect that in 2014, Dominion Corp. owned 100% of Dominion. Additionally, in light of Dominion's recent acquisition by Staple Street Capital, Dominion must disclose to OSP whether Dominion retained or transferred its current voting systems contract with the State. If that contract was transferred, Dominion must request approval of that assignment from OSP.

CLARIFICATIONS RE: OTHER PROTEST ISSUES

I wish to address several inaccurate allegations and/or misunderstandings contained within your protest. These inaccuracies, while not forming the basis of this decision, merit correction, and I respond to each as follows:

"The quality of the equipment was determined through a single oral presentation without any individual testing of any of the equipment for its intended purpose and zero comparative testing of the equipment occurred."

ES&S raises this issue on page 4 of its protest. Quality of Equipment was not an evaluation criterion. Rather, Ease of Use was an evaluation criterion; therefore, that is what the oral presentations focused on. Specifically, on page 54 of the RFP, Section 2.6.2.3 is titled "Ease of Use." This Section outlines the factors to be considered by the Evaluation Committee. These factors are also identified on page 57 of the RFP. Nowhere in the RFP is there a Section titled "Quality of Equipment." With regard to comparative testing of the equipment, nothing in the Procurement Code requires comparative testing of products between proposers. To the contrary, proposals are to be compared to the criteria contained in the RFP itself during the evaluation process. These comparisons to the RFP on the factor of Ease of Use did occur. Therefore, this argument is without merit.

"There was no independent assessment of the ADA compliance of the systems. ES&S offered to demonstrate the ADA capabilities of its system, but the Committee declined."

The above argument is also advanced on page 4 of the ES&S protest. The plain language of the RFP called for "the best available technology in absentee by mail, early and Election Day voting that is ADA accessible..." In other words, the RFP required systems which were compliant with the Americans with Disabilities Act ("ADA"). The Evaluation Committee sought only to confirm a system's ADA accessibility and not necessarily the particulars of how a system was compliant with the ADA. The Evaluation Committee did confirm ADA compliance of ES&S's system. Thus, this argument by ES&S is of no consequence, as a demonstration was not required.

“There were no comparative assessments of the systems for their respective security features.”

Again, in lodging this argument on page 5 of its protest, ES&S cites no authority whatsoever which would require the Evaluation Committee to compare the proposers’ systems to each other on any factor, including security. Rather, the Evaluation Committee is charged with comparing each proposer’s response to the RFP itself. On page 58 of the RFP, four factors are specifically identified to evaluate a system’s security. These factors were considered by the Evaluation Committee for each of the proposals received in accordance with the criteria contained in the RFP. As such, ES&S’s statement that no comparative assessment of the systems for security features occurred is inaccurate.

“...on May 30, 2018, Derick Bond Sr. of OSP e-mailed the Evaluation Committee to invite them to the kickoff meeting for the RFP to be held at the Secretary of State’s Office.”

In an effort to maintain an accurate record, Mr. Bond is not employed by the Office of State Procurement. Rather, he is the Purchasing Director for the Secretary of State’s Office.

“Committee Chairwoman is not mentioned in the RFP and is explicitly prohibited by virtue of the CPO’s directive that the committee be comprised ‘with no evaluation team member having any supervisory authority over another evaluation team member’”

This argument misinterprets the directive given. The Chief Procurement Officer’s (“CPO’s”) directive was not intended to prohibit the selection of a chairperson whose role would be to lead the committee. In fact, an acting chairperson is standard practice and is supported by the RFP manual. Rather, this directive was intended to prohibit two individuals from serving on the Evaluation Committee if one individual has any supervisory authority over the other outside of the Evaluation Committee. The reasons for this directive should be self-explanatory, as it sought to prevent any undue influence or coercion among committee members.

“No Indication that References were Checked.”

On page 15 of its protest, ES&S argues there was “[n]o indication that References were Checked.” In support of this statement, ES&S cites a June 15, 2018 email from Brad Manuel to Chairwoman Cangelosi inquiring into the logistics of sending reference questions in which she responds to “hold until the committee meeting the following week.” While there may have been some uncertainty from Mr. Manuel at the time, the notion that no references were checked is simply inaccurate. To the contrary, the Evaluation Committee’s notes of Strengths and Weaknesses from the Second Evaluation, which were provided to ES&S in response to one of its Public Records Requests, indicate that references were, in fact, checked. Thus, ES&S’s argument in this regard is not supported by the record.

The Committee did not know about the Accountant.

On page 15, ES&S also references a statement from the Committee Chairwoman that because the Committee, at some point, did not know about the use of an accountant, “there might be other things the Committee doesn’t know.” The purpose of citing this statement is unclear, but ES&S seems to imply that the statement somehow supports a lack of guidance for the Committee. The accountant at issue, Caryn McGlinchey, was used as a subject matter expert (“SME”), a common practice in complex procurements. It is a standard practice to use an SME to assist the Evaluation Committee in evaluating financial information contained in proposals. Simply put, no rule or law prohibits the use of an SME to assist with the evaluation process. Any implication that the use of an accountant contaminated the evaluation is not supported by law.

In *Executone of Cent. Louisiana, Inc. v. Hospital Service Dist. No. 1 of Tangipahoa Parish*, 1999-2819 (La. App. 1 Cir. 5/11/01), 798 So.2d 987, 991-992, the court rejected a similar argument which characterized the input and recommendation from non-evaluators as a “secret assessment.” The court stated that it would have been a violation of the public trust for the hospital to have ignored available comparisons and opinions provided by those who would not be voting on the award of the contract, even if these non-voters had formed their opinion on functions and features not listed in the RFP. *Id.* This is because “the inquiry is whether the hospital had a reasonable basis for finding the Hill-Rom proposal was the “most advantageous,” based on a proper evaluation of the factors provided in the RFP.” *Id.*

Similarly, in the RFP, the Evaluation Committee utilized the input of Ms. McGlinchey, a DOS employee, to assist them with the evaluation of the proposers’ financial statement and Financial Proposal. Moreover, Ms. McGlinchey executed a confidentiality agreement. There is no support that the decision to use an accountant as an SME in any way compromised the evaluation process.

Issues pertaining to the budget and funding of the RFP.

At the outset, ES&S lodges the general opinion that “none of the proposers submitted bids that met the available budget or even the projected budget of \$60 million dollars for the Solicitation based on the proposals that mandated proposers submit a price for approximately 20,000 machines, which would allegedly double the State’s current voting machine inventory, which is approximately 10,000 machines.” More specifically, ES&S argues that the Secretary of State has publicly stated that there is only \$10 million dollars in the current budget to acquire a voting system; however, the lowest proposal was \$89 million dollars. ES&S overlooks that nothing in the RFP indicated any precise budget. Moreover, the language on page 28 of the RFP, Section 1.37, entitled “No Guarantee of Quantities,” states:

The quantities referenced in the RFP are **estimated** to be the amount needed for each option of each phase of the estimated quantities in Section 2.1.1.6 and Attachment 10. In the event a greater or lesser quantity is needed in each option of each phase of the estimated quantities in Section 2.1.1.6 and Attachment 10, the right is reserved by the State of Louisiana, Department of State, to increase

or decrease the amount for each option of each phase, at the unit price stated in the proposal, during the initial or renewal terms of this agreement.

ES&S also complains that “the Secretary of State wanted the vendors to provide a price based on specifications that required almost four times the number of voting machines as the entire state of Florida and almost twice what Louisiana currently utilizes to conduct its elections.” The requested number of voting machines would serve approximately 6.9 million voters while there are only an estimated 3 million registered voters in Louisiana and approximately 4.7 million residents of the State. Simply put, as with any protest related to the specifications of an RFP, if ES&S believed, based on the cited statistics, that the number of voting machines was inflated or unjustified, then ES&S should have challenged the specifications at least two days prior to the proposal opening date and time in accordance with La. R.S. 39:1671(A). Its decision to take issue with the specifications following the notice of intent to award is untimely and improper.

Furthering its position on the specifications, ES&S states, “as a direct result of this single specification, none of the proposals can be paid with identified or even anticipated funds, therefore the entire contract is based on pure speculation despite the contractual term of five years.” Again, to reiterate, there was no guarantee of quantities in the RFP. Perhaps more importantly, and as with all RFPs, the opportunity to negotiate a contract with the award winning vendor is a critical piece of the RFP process. Multi-year contracts that cross a fiscal year are more often than not negotiated with some degree of uncertainty as to funding.

Finally, ES&S concludes its argument on this issue by summarizing, “the funds are not there and cannot be assured to be there until the Legislature appropriates the funds or the federal government provides sufficient funds for the perceived needs of this Secretary of State.” In fact, the Secretary of State does have funds available and can negotiate a contract based on these available funds. The fact that ES&S does not believe the funds to exist, or that the Legislature has not yet appropriated the funding for a 5-year contract, would not, in and of itself, nullify the RFP.

“Despite allowing for alternative proposals, ES&S’ alternative proposals were not scored despite being the lowest cost bids submitted.”

As a threshold matter, ES&S takes the position that neither of its alternative proposals were considered by the Evaluation Committee or by the non-committee member...“because the sole reference to these alternative proposals states, ‘Alternative proposals were reviewed, and the award did not change.’” To the contrary, the Evaluation Committee did review and consider the alternative proposals as ES&S acknowledges in its very argument. It is confusing as to why ES&S would concede that there is an explicit reference to its proposals being reviewed, but in turn argue that its proposals were not considered. Regardless, the Evaluation Committee did review and consider the alternative proposals, but determined that these proposals were not in the best interest of the State. The Evaluation Committee is given discretion, and the fact that the award did not change does not logically lead to the conclusion that ES&S’s alternative proposals were not adequately reviewed or considered.

In further advancing its argument, ES&S elaborates that the RFP “specifically requested innovative concepts and that is what these alternative proposals are, an innovative modern way of addressing the cost and handling of elections that would bring Louisiana in line with other states as we adopt a tracked ballot system for the first time in modern history.” The RFP did invite “innovative concepts”, as identified in Section 1.5(F). However, the alternative proposals submitted by ES&S merely reduced the quantity of machines, while not modifying the unit price. The Evaluation Committee apparently did not find this concept to be innovative. Thus, any notion that ES&S’s alternative proposals contained innovative ideas is without merit.

ES&S also suggests that “the RFP must be interpreted as presented.” To the extent that this statement is referencing the quantity of machines that must be purchased, it is absolutely inaccurate. The State was not under any obligation to buy 20,000 machines if that is ES&S’s contention. Again, inherent in each and every RFP is the ability to negotiate the resulting contract. Finally, ES&S proposes that “this two to one replacement of voting machines that would result in the State of Louisiana acquiring 19,714 voting units was either a massive error by the State in estimating its potential needs or a gross mistake that can only be addressed by consideration of the alternative proposals submitted by ES&S.” This argument is misplaced. As explained above, the State was under no binding obligation to purchase at least 20,000 machines, and any interpretation that the RFP binds the State to do so is inaccurate. Again, if ES&S believed that the number of voting machines was unjustified or problematic, then ES&S should have protested the specifications at least two days prior to the proposal opening date and time in accordance with La. R.S. 39:1671(A). ES&S’s position that its alternative proposals were innovative through their reduction in quantity and that the State was required to purchase 20,000 voting machines through the RFP is simply not substantiated.

The Cost Proposal was not evaluated by the Evaluation Committee.

On page 24 of its protest, ES&S submits its first argument in this regard, suggesting that the base cost score determination by the Evaluation Committee did not occur, as required by Section 1.25 of the RFP. However, a review of the record reflects that this did occur, as the accountant, Caryn McGlinchey, performed an administrative function on the Financial Proposal – namely – preparing spreadsheets and calculations. The Evaluation Committee then evaluated the Financial Proposals and requested that revisions be made to the spreadsheets. These revisions were based on the Evaluation Committee’s evaluation of the Financial Proposals.

ES&S then cites a statement from the Committee Chairwoman in which she advised, “the committee members do not have to review the financial statement. This is being done by an accountant.” It further explains that “Caryn McGlinchey, an accountant within the Secretary of State’s office, who was not a member of the Evaluation Committee, was tasked with evaluating the financial statements provided by the proposers.” There seems to be confusion between the financial statements and the Financial Proposals. In an effort to clarify, the Committee was given access to, and reviewed, the responsive Financial Proposals as well as the proposers’ financial statements. Ms. McGlinchey, as an SME, did prepare a spreadsheet based upon the Financial Proposals that was reviewed by the Evaluation Committee. In doing so, Ms. McGlinchey did not make any dispositive decisions. Rather, she provided information. Ms. McGlinchey’s alleged

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“evaluation” consisted of providing ratios and information, but ultimately, the Evaluation Committee evaluated the proposers’ financial suitability and Financial Proposals.

Next, presumably in an effort to suggest that Ms. McGlinchey was confused or unclear about her role in the RFP, ES&S quotes a July 2, 2018 email from Ms. McGlinchey to Roxane Williams, in which she wrote that she “was under the impression that she just needed to review the attachments and confirm that the company was sovereign and financially sound.” This misunderstanding was addressed, and there was no uncertainty about Ms. McGlinchey’s role in this process.

ES&S also raises the issue that there was no “report generated by the SOS accountant” and that “all that has been provided is a spreadsheet along with notes that only pertain to ES&S’ and Hart’s cost proposals.” Whether described as a “report” or “spreadsheet” or “document”, the fact is that the work product prepared by Ms. McGlinchey was done so in an effort to assist the Evaluation Committee in its understanding of the financial statements and Financial Proposals submitted by each proposer. It is my understanding that these documents have been produced to ES&S. If there were no notes on Dominion’s proposal, one can only assume that Ms. McGlinchey did not believe that any notes were necessary on its proposal. Regardless, the information provided by Ms. McGlinchey, was generated for one purpose and one purpose only – to facilitate the Evaluation Committee’s understanding of all proposers’ financial statements and Financial Proposals.

ES&S later submits that the “cost proposals necessarily must be qualitatively reviewed to determine whether all of the elements of the cost proposals complied with the RFP itself” and cites several examples before concluding that “there is no evidence that any of these critical analyses occurred.” These analyses most certainly did occur; however, such a qualitative review of these elements is conducted as part of the technical evaluation, while the quantitative review is done in evaluating the Financial Proposal. ES&S further states that “it appears that the Evaluation Committee simply adopted the financial analysis and cost proposal analysis presented by the SOS accountant, and did not fulfill its duty to actually evaluate this part of the proposals at all.” This contention is not supported. In fact, there is evidence that the Evaluation Committee actually requested revisions be made to Ms. McGlinchey’s analysis, suggesting that critical analysis did occur, and not the unquestioning credulity suggested by ES&S. Finally, ES&S correctly references that there were “two note entries for ES&S’ cost proposal and four entries for Hart Intercivic. Most notably, there were no notes in the materials with respect to DVS’ cost proposal.” This discrepancy is easily explained in that notes for Financial Proposals were written only if adjustments needed to be made to those proposals. There were no notes on Dominion’s Financial Proposal because no adjustment was needed. Any inference that the number of notes on a proposal reflects more or less consideration of any proposal is simply unfounded and misleading.

The evaluation of proposals was materially and irreparably flawed.

On page 28 of its protest, ES&S proposes numerous ways in which the evaluation of proposals was flawed, the first of which being: “the evaluation committee was given grossly inadequate time.” First, I note that the Evaluation Committee is given wide latitude to evaluate the proposals, and any preconceived notion of how long any evaluation “should take” is completely subjective.

Notwithstanding this, some of the facts alleged by ES&S to support its position are not accurate and bear discussion.

A brief restatement of the events is below:

May 31, 2018 - Evaluation Committee members received proposals.

June 1 – June 7, 2018 - Evaluation Committee members worked through the weekend performing individual evaluations. Their normal workload was also reduced.

June 8, 2018 - Consensus meeting held, during which the Evaluation Committee discussed strengths and weaknesses and points for all categories of the Technical Proposals except Ease of Use.

June 19 (Hart), June 20 (Dominion), July 10 (ES&S) - Oral presentations held. Following each oral presentation, the Evaluation Committee again went over the elements of the Technical Proposal for the presenting proposer, spending approximately four (4) hours each time.

July 10, 2018 - After the final presentation, the Evaluation Committee finalized its evaluation of the Technical Proposals.

July 10, 2018 - Subsequently, the Evaluation Committee was given the Financial Proposals for review.

July 11, 2018 - There was a final consensus meeting. At this meeting, Ms. McGlinchey provided initial calculations regarding the financial statements and Financial Proposals. After reviewing the initial calculations, the Evaluation Committee requested re-calculations. The Evaluation Committee then used the revised calculations in the evaluation formula.

ES&S has suggested that the Evaluation Committee members had three (3) consecutive business days to review all of the proposals. This is not true. The members had more than five (5) days: the afternoon of May 31, June 1, June 4, June 5, June 6, and June 7. ES&S has also contended that “the Evaluation Committee spent the better part of three weeks editing its supporting documents after it issued its supporting documents further evidences the rushed fashion in which this evaluation was conducted.” Again, this is not accurate. In reality, the Evaluation Committee spent approximately two (2) days revising the supporting documents. This scenario offered by ES&S is all speculative and completely contradicted by the facts of the evaluation process and has no merit whatsoever.

ES&S points out a second way in which the evaluation was allegedly defective was that “the Evaluation Committee submitted a flawed evaluation that the Office of State Procurement then materially edited the committee’s evaluation thereby substituting its assessment for that of the committee charged with making the evaluation.” In support of this position, on page 33 of its Protest, ES&S boldly alleges that a third-party vendor, Pitney Bowes, made revisions to the award recommendation. This is not an accurate statement. In fact, Pitney Bowes had no role in any part of this RFP process. It is my understanding that a document with the name of “Pitney Bowes” may have been mistakenly turned over to ES&S in response to one of its numerous public records requests. Any such disclosure was inadvertent, and any such document has no bearing at all on this RFP or the instant protest.

ES&S further states that “it was at least partly due to OSP’s desire to make revisions that border on substantive changes to the findings of the Evaluation Committee that accounted for some of the delay in the process.” The edits requested by OSP served to clarify information and preserve the record. Again, any substantive changes would result in the scores being changed. That did not happen. In sum, ES&S’s position that the evaluation of proposals was materially and irreparably flawed for the reasons identified herein is rebutted by the facts of the evaluation process. Thus, its argument fails in that regard.

CONCLUSION

For the aforementioned reasons, I hereby determine that it is in the best interest of the State to rescind the award made to Dominion Voting Systems, Inc. and cancel the RFP. Accordingly, the award made to Dominion Voting Systems, Inc. is hereby rescinded, and the RFP is hereby cancelled.

This decision may be appealed to the Commissioner of Administration within seven (7) days of receipt of this decision in accordance with La. R.S. 39:1683. Additionally, should a timely appeal of this decision be made to the Commissioner of Administration and an unfavorable decision received, La. R.S. 39:1683(E), La. R.S. 39:1691, and La. R.S. 39:1692 provide for an appeal to the 19th Judicial District Court to the person adversely affected by the Commissioner of Administration’s decision.

Sincerely,



Paula Tregre
State Chief Procurement Officer

- c: Felicia Sonnier, Assistant Director, Office of State Procurement (via email only)
- Karen A. Loftin, Assistant Director, Office of State Procurement (via email only)
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