

On November 12, 2008, the OA issued a request for proposals (RFP) for Telecommunications Managed Services (Contract). The purpose of the Contract was to consolidate 12 existing contracts for telecommunications services into one. Level 3 and Verizon both submitted proposals.

The proposals were evaluated by a committee consisting of representatives of OA, DGS, the Pennsylvania State Police, and the Departments of Health, Transportation, Labor and Industry, and Public Welfare. The RFP set forth the importance of the major evaluation criteria as follows: 50% technical, 30% cost submittal and 20% disadvantaged business participation submission. Based upon the evaluation criteria, Level 3's proposal scored 1440 and Verizon's proposal scored 1380.¹

By letter dated May 6, 2009, the Issuing Officer invited Verizon and Level 3 to submit best and final offers (BAFOs). The letters advised:

We request a BAFO for the **Technical, Disadvantaged Business, and Cost Sections** of your proposal. A list of the specific items is enclosed. **Please be advised that we will not conduct a reverse auction event for additional cost submittals for this RFP.** You should submit the **Technical, Disadvantaged Business, and Cost** BAFO as a replacement to and in accordance with the RFP requirements for your original **Technical, Disadvantaged Business, and Cost** submittals.

Reproduced Record (R.R.) at 50a, 53a (emphasis in original). Each letter included a customized list of specific items to be addressed by Level 3 and Verizon. The BAFOs were due May 15, 2009.

¹ Level 3 was higher on its technical proposal by a score of 700 to Verizon's 642 and on the combined "Technical/DB and BMWBO", Level 3 scored 1050 to Verizon's 960. Verizon was rated higher with respect to the cost portion of the proposal by a score of 420 to 390.

In response, Level 3's Vaughn Plassio sent an email to the Issuing Officer expressing his concerns about the relatively short time frame to submit their BAFO. Plassio wrote "if your expectation is that we recreate a technical BAFO that is focused on only the 14 issues in your letter, then the time frame you have given us is fine." R.R. at 57a. The Issuing Officer responded "[w]e only require the portions requested by the technical BAFO items." R.R. at 56a. Based upon this response, Level 3's technical BAFO addressed only those items requested in the May 6, 2009 letter.

Both Level 3 and Verizon submitted timely BAFOs, followed by oral presentations. The evaluation committee re-scored the proposals, which resulted in Verizon receiving an overall score of 1442 and Level 3 a score of 1350.94.²

By letter dated June 11, 2009, Level 3 was notified that Verizon had been selected for the contract negotiations. On June 29, 2009, Level 3 filed its bid protest. Therein, Level 3 objected on the grounds that the May 6, 2009 letter was a request limited to the items specified, not a request for a revised proposal. Level 3 also objected on the grounds that the RFP does not provide for post-BAFO negotiations.

The bid protest was assigned to DGS's Deputy Secretary for Administration & Procurement. Ultimately, the Deputy Secretary concluded that the May 6, 2009 letter "clearly gave the offerors the opportunity to submit replacements for their technical, disadvantaged business and cost submittals" and "provided both offerors the opportunity to make substantive changes to their proposals." The Deputy Secretary further concluded that contract negotiations

² The technical score for Verizon went from 642 points to 700 points and Level 3's technical proposal was reduced from 700 to 671 points. The cost proposal score for Verizon's

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with the selected offeror were clearly contemplated by the RFP. By decision dated August 20, 2009, the Deputy Secretary denied Level 3's protest. This appeal now follows.³ Level 3 raises the following issues for our review:

1. Whether the BAFO process engaged in by OA was inconsistent with the requirements of the RFP and Section 513(f) of the Procurement Code, which requires that "offerors ... be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals".
2. Whether post-BAFO negotiations engaged in by OA went beyond negotiating contract terms and conditions in a manner that was inconsistent with the requirements of the RFP and Section 513(g) of the Procurement Code, which provides that once an offeror's proposal is selected as being most advantageous to OA, only negotiations relating to the terms and condition's of the contract may take place.
3. Whether the hearing officer failed to base her decision denying Level 3's bid protest on relevant and probative evidence.

Level 3 contends that the BAFO process engaged in by OA was inconsistent with the requirements of the RFP and Section 513(f) of the Procurement Code. We disagree.

Section 513(f) of the Procurement Code provides:

Discussion with responsible offerors and revision of proposals.--As provided in the request for proposals, discussions and negotiations may be conducted with

remained unchanged – 420 points, but Level's 3 score was lowered from 390 to 335.

³ On appeal, the Court shall affirm the determination of the purchasing agency unless it finds from the record that the determination is arbitrary and capricious, an abuse of discretion or is contrary to law. Section 1711.1(i) of the Procurement Code, 62 Pa. C.S. §1711.1(i); Cummins v. Department of Transportation, 845 A.2d 983 (Pa. Cmwlth. 2004).

responsible offerors for the purpose of clarification and of obtaining best and final offers. Responsible offers shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

62 Pa. C.S. §513(f). A “responsible offeror” is an “offeror that has submitted a responsive bid and that possesses the capability to fully perform the contract requirements in all respects and the integrity and reliability to assure good faith performance.” Section 103 of the Procurement Code, 62 Pa. C.S. §103. A “responsive bid” is one which “conforms in all material respects to the requirements and criteria in the invitation for bids.” Id.

Here, the May 6, 2009 invitation letter for BAFOs requested Verizon and Level 3 to address specific items in their initial proposals. In response to Level 3’s query on whether the BAFO had to be recreated given the short time-frame, the Issuing Officer responded, “[w]e only require the portions requested by the technical BAFO items” as an addendum to the RFP response. R.R. at 56a. As required, Level 3’s technical BAFO addressed only those items requested.

Verizon was also requested to address certain items contained in its proposal. In response, Verizon made revisions to its original proposal by agreeing to change its approach to the solution it was offering. OA asked Verizon to explain its proposed service level methodology and standard service levels. Verizon responded by accepting the service level agreement methodology terms defined in the RFP. OA also requested information regarding Verizon’s proposed SMP system and how it would transition from CTMS to SMP. Verizon responded that it would retain and support CTMS for the life of the contract.

Level 3 argues that the BAFO process was unfair because Verizon's submission went beyond the items requested by reversing the methodologies it had initially proposed. While neither party was required to completely recreate or substantively change their proposals in the BAFO, neither party was prohibited from doing so either. The email exchange between Level 3 and OA addressed what was required. What was required was that the offeror address the questions asked. Contrary to Level 3's assertions, Verizon did not submit an entirely new proposal, but rather addressed the questions asked by OA and in doing so revised portions of its proposal. If no substantive changes were allowed in response to the BAFO, there would be little point in re-evaluating the proposals.

Level 3 also argues unfairness because the offerors were asked to supply different information in the BAFO invitation letter. However, Verizon and Level 3 did not submit identical proposals. Therefore, it is reasonable that OA had different questions for each offeror.

Level 3 further claims that OA essentially disclosed information regarding the contents of Level 3's proposal when it requested Verizon to provide universal rates, which were included in Level 3's proposal but not in Verizon's. The questions asked by OA were consistent with the RFP. The RFP specifically provided that the "Offeror shall provide the Commonwealth with a universal rate structure which charges the same rates for the same services statewide, regardless of serving distance, and/or geographical area." R.R. at 2641a. By requiring both offerors to submit universal rates, OA was fostering a level playing field where the same specification would be evaluated under the same criteria. There is simply no evidence that OA disclosed any information in violation of Section 513(f).

Based upon our review of the record, the offerors were accorded fair and equal treatment throughout the process. The offerors submitted proposals

based upon the same specifications and those proposals were scored based upon the criteria set out in the RFP. The BAFO process did not change the specifications. The invitation letter asked each offeror to address items contained in its original proposal. The invitation letter did not preclude substantive changes. Verizon answered OA's questions by agreeing to change its approach to the solutions it was offering. Such a revision is acceptable and permitted by the Procurement Code and the RFP. We, therefore, conclude that the Deputy Secretary correctly determined that the BAFO process engaged in by OA was consistent with the requirements of the RFP and Section 513(f) of the Procurement Code.

Level 3 contends that the post-BAFO negotiations engaged in by OA went beyond negotiating contract terms and conditions in a manner that was inconsistent with the requirements of the RFP and Section 513(g) of the Procurement Code. Level 3's initial protest did not challenge the post-BAFO process on this basis, but rather that the RFP did not provide for a post-BAFO process.⁴ The Deputy Secretary addressed the issue as framed and correctly

⁴ Specifically, Level 3 stated:

The RFP does not provide for a post-BAFO process. Once the issuing office selects a proposal for award no further negotiations may take place. The only action that may be taken is the signing of the contract. The contract terms and conditions, by virtue of the fact that they are set forth in the RFP/Appendix A, should not be subject to negotiation. Your June 22, 2009 letter to Level 3, however, states that it is the intention of the Commonwealth "to begin negotiations with Verizon Business." Any post-BAFO negotiations are inconsistent with the terms of the RFP.

* * *

Level 3 recognizes that section 513(h) of the Procurement Code authorizes the purchasing agency to negotiate a contract with the

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determined that OA was authorized to conduct contract negotiations as part of its procurement process. On appeal, Level 3 now argues post-BAFO negotiations went beyond negotiating contract terms and conditions in a manner that was inconsistent with the requirements of the RFP and Section 513(g) of the Procurement Code. The issue, as now framed, was not part of Level 3's original protest and is therefore waived on appeal. Common Sense Adoption Services v. Department of Public Welfare, 799 A.2d 225 (Pa. Cmwlth. 2002); S.T. v. Department of Public Welfare, 681 A.2d 853 (Pa. Cmwlth. 1996), petition for allowance of appeal denied, 547 Pa. 747, 690 A.2d 1165 (1997).

Even if this issue was preserved, the contract negotiations between Verizon and OA were not inconsistent with the Procurement Code or the RFP. Section 513(g) of the Procurement Code, 62 Pa. C.S. §513(g), provides:

Selection for negotiation.--The responsible offeror whose proposal is determined in writing to be the most advantageous to the purchasing agency, taking into consideration price and all evaluation factors, shall be selected for contract negotiation.

The RFP specifically permits an offeror to identify which terms and conditions it would like to negotiate and what additional terms and conditions the offeror would like to add to the standard contract terms and conditions. R.R. at 2417a.

Level 3 relies upon Federal Acquisition Regulations, 48 C.F.R. §§ 1.000-9905.506-63, and related case law in support of its position that OA and Verizon engaged in "discussions", not negotiations. Level 3 maintains

selected offeror once the evaluation process is complete. However, we submit that this provision does not apply where terms and conditions are already part of the RFP.

R.R. at 62a.

that discussions occur when an offeror is given an opportunity to revise or modify its proposal and are inconsistent with Section 513(g) and the RFP.

Pennsylvania's procurement process is governed by the Procurement Code, RFP and DGS's Handbook, not federal law. Level 3's attempts to distinguish between "discussions" and "negotiations" based upon federal law are unpersuasive because the Federal Acquisition Regulations differ markedly from the Procurement Code. The Procurement Code, RFP and Handbook all contemplate contract negotiations after selection and do not distinguish between discussions and negotiations. While the term "contract negotiation" is not defined by the Code, "contract modification" is defined as "a written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract" (62 Pa. C.S. §103) and is a strong indication of what can be negotiated. We, therefore, conclude that even if the issue was preserved, the post-BAFO negotiations engaged in by OA did not violate the Procurement Code, RFP or Handbook.

Lastly, Level 3 contends that the Deputy Secretary failed to base her decision denying Level 3's bid protest on relevant and probative evidence. We disagree.

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Section 754(b) Administrative Agency Law, 2 Pa. C.S. §754(b); Direnzo Coal Co. v. Department of General Services, 825 A.2d 773 (Pa. Cmwlth. 2003). The presence of conflicting evidence does not mean that there is not "substantial evidence" to support the agency's findings. Direnzo. It is the hearing officer who must resolve evidentiary conflicts,

and it is not the function of the reviewing court to judge the weight and credibility of evidence. Id.

Based upon our review of the record, substantial evidence supports the Deputy Secretary's decision. At issue is the *process*, not the decision which resulted therefrom. The Deputy Secretary reviewed the documents relevant to the BAFO process - Level 3's protest letter; the July 10, 2009 response from OA; the June 11, 2009 recommendation for contractor selection; the May 6, 2009 letters requesting BAFOs; the email exchanges; and Level 3's July 23, 2009 response to OA's July 10, 2009 letter. The BAFO request letters and email exchanges speak for themselves and provide sufficient evidence to support the determination that the BAFO process was conducted fairly. The common standard was maintained throughout the procurement process. Both offerors submitted proposals on the same specification. Those proposals were reviewed using the same criteria as set forth in the RFP. Both offerors were offered the opportunity to submit BAFOs. Both BAFOs addressed the questions asked by the Issuing Office. The BAFOs were evaluated using the same criteria as were used for the original proposals. We, therefore, conclude that the Deputy Secretary's decision is supported by substantial evidence.

Accordingly, the decision of Deputy Secretary denying Level 3's bid protest is affirmed.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Level 3 Communications, LLC,	:	
Petitioner	:	
	:	
v.	:	No. 1719 C.D. 2009
	:	
Office of Administration,	:	
Respondent	:	

ORDER

AND NOW, this 20th day of May, 2010, the decision of the Deputy Secretary for Administration & Procurement of the Department of General Services, dated August 20, 2009, is AFFIRMED.

JAMES R. KELLEY, Senior Judge