

IN THE IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES
ON BEHALF OF THE IOWA DEPARTMENT OF EDUCATION

NCS PEARSON, INC.,)	RFP No. 1117282197
)	
Appellant,)	
)	
v.)	PETITION FOR STAY
)	
IOWA DEPARTMENT OF)	
ADMINISTRATIVE SERVICES and IOWA)	
DEPARTMENT OF EDUCATION,)	
)	
Appellees.)	

NCS Pearson, Inc. (“Pearson”), for its Petition for Stay, states:

1. Pearson has contemporaneously filed its Notice of Appeal from the Department of Administrative Services’ notice to award in RFP No. 1117282197 (the “RFP”). Pearson seeks a stay of the award pending review and determination of the contested case challenging the award. Pearson challenges the award of the contract to American Institutes for Research (“AIR”) due to the agency’s failure to follow the stated procedure for evaluating the Cost Proposal as set forth in the RFP and the preferential treatment and bias demonstrated by the resulting award.

2. The RFP includes scoring and evaluation components consisting of the Technical Proposal and the Cost Proposal. The Technical Proposal required bidders to affirm compliance with a series of mandatory requirements and obtain a minimum score to move onto the Cost Proposal evaluation. Pearson complied with the requirements of the Technical Proposal.

3. Section 4.3 of the RFP and instructions in Attachment 5 of the Cost Proposal required the bidder to include specific line item prices, in green shaded cells, and the sum of the bid to arrive at a grand total of each bidder’s Cost Proposal. The instructions in Attachment 5

directed bidders to include pricing associated with line item no. 165 relating to “Translations (Optional)” in the total price.

4. In its September 28, 2017 notification, DAS notified Pearson of an award of procurement to AIR and included with the notification an overview of bidder scores. The award document demonstrated that DAS did not determine the basis for the award based on requirements of the RFP. Instead, after opening and reviewing the bidders’ Cost Proposals, the agency removed line item no. 165 from consideration in making the award. The result was that instead of receiving 197 points for its Cost Proposal as it would have if the agency applied the scoring criteria provided in the RFP, AIR received 210 points under an apparently arbitrary decision to modify the basis for determining each bidders’ grand total price in the Cost Proposal.

5. No explanation or justification was provided for altering the terms on which the award would be made. Based on the terms specified in the RFP, Pearson had a higher score than AIR. The decision to alter the basis for the Cost Proposal calculations is a violation of the terms of the RFP and constitutes an abuse of agency discretion.

6. Due to irregularities in the award, DAS should vacate its intent to award to AIR and rescore the proposals consistent with the original RFP terms. In the alternative, DAS should cancel this procurement in its entirety and issue a new RFP that would be evaluated openly, impartially, and without bias.

7. Unless the agency action is stayed, a contract may be made with the apparent successful bidder before Pearson has had an opportunity to exhaust its administrative remedy at the agency level. The agency’s own regulations grant aggrieved bidders specific rights to protest bid awards. Those protest rights become meaningless, however, if the agency can short-circuit any result that might flow from a determination that a procurement award was improperly made

or denied. Nevertheless, that is precisely the fate potentially awaiting Pearson if no stay is granted and the Department of Education is permitted to execute and perform a contract with the purported winning bidder before the protest process is complete. The aggrieved bidder's right to appeal is no right at all if, even when the appeal has merit, it does not grant the aggrieved bidder the benefits to which it otherwise would have been entitled.

8. In accordance with the factors listed in Iowa Code § 17A.19(5)(c), a stay of the award is warranted. Pearson is likely to prevail in the contested case, will suffer irreparable injury if relief is not granted, no substantial harm will occur to any other party if a stay is granted, and the public interest will be better served if the stay is granted.

9. A stay is necessary because, in light of the nature of the procurement contract at issue, money damages would be an insufficient remedy. *Clark Const. Co. v. Pena*, 895 F. Supp. 1483, 1493 (M.D. Ala. 1995) (“Courts have found that generally monetary relief, i.e., recovery of bid preparation costs, is insufficient to compensate an unsuccessful bidder for the wrongful award of a government procurement contract.”). The public interest calls for ensuring state contracts—and particularly state contracts involving the size and scope of the contract at issue here—are properly awarded. The people of Iowa have a strong public interest in a fair, competitive procurement process through which the State awards contracts to bidders most advantageous to the State.

10. Pearson respectfully requests that the requirement of a bond to secure the stay should be waived as the delay until a hearing and determination of a contested case will not be lengthy and should not adversely affect the rights of the successful bidder. Public interest is better served if the important issues raised in the appeal are resolved before a contract with the successful bidder is entered.

WHEREFORE, NCS Pearson, Inc. respectfully requests that the director:

- (1) Set the terms of submission of this petition;
- (2) Upon submission, order a stay of the agency action during the pendency of the contested case without bond; and
- (3) If such stay is denied, provide a reasonable time for Pearson to seek a stay from the district court in accordance with Iowa Code § 17A.19(5)(c).

BELIN McCORMICK, P.C.

By: 

Mark McCormick
Matthew C. McDermott

666 Walnut Street, Suite 2000
Des Moines, IA 50309-3989
Telephone: 515- 283-4610; 515-283-4643
Facsimile: 515- 558-0610; 515-558-0643
E-mail: mmccormick@belinmccormick.com
mmcdermott@belinmccormick.com

ATTORNEYS FOR NCS PEARSON, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the parties to this action by serving a copy upon party listed below on October 5, 2017 by

Electronic Filing System Via Hand-Delivery

Iowa Department of Administrative Services
Hoover State Office Building
1305 E. Walnut Street
Des Moines, IA 50319

Signature: /s/ Lori McKimpson

P0859\0001\2792349.1)