

STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

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AT & T CORP.,

Petitioner,

vs.

STATE OF FLORIDA,
PUBLIC SERVICE COMMISSION,

Respondent.

RECORDS AND
REPORTING

991222-TP

**FORMAL WRITTEN PROCUREMENT PROTEST
AND PETITION FOR FORMAL ADMINISTRATIVE HEARING**

Pursuant to section 120.57(3), Florida Statutes, and Florida Administrative Code Rule 28-110.004, the Petitioner, AT & T Corp. ("AT&T"), protests the proposed decision of the Respondent, State of Florida, Public Service Commission ("the PSC"), to award a contract for a Florida telecommunications relay service system ("the FRS System Contract" or "the contract") to Sprint Communications ("Sprint") and requests a formal administrative hearing. In support, AT&T states as follows:

1. As explained in detail below, the award of FRS System Contract to Sprint, when the PSC evaluators awarded AT&T's proposal the highest

AFA	1	technical score and AT&T submitted the lowest price, violates the basic tenets
APP	1	
CAF		of public procurement law. AT&T's proposal offers the greatest benefit to the
CMU	1	
CTR		
EAG		State of Florida and complies, in all material respects, with the specifications
LEG	1	
MAS	3	issued by the PSC. Furthermore, if the contract is awarded to Sprint, the PSC
OPC		
PRR	1	
STC	1	will have arbitrarily and capriciously rejected the more responsive AT&T
YAW		
OTH		

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FPSC-RECORDS/REPORTING

Done 1/25/00

FPSC-BUREAU OF RECORDS

proposal for the less responsive Sprint proposal. Such differential treatment is contrary to notions of fair competition and adversely affects the State's interest in obtaining the services and commodities that best serve the public.

2. AT&T is a foreign corporation that is authorized to do business in the State of Florida. For the purposes of this proceeding, AT&T's principal place of business is 295 North Maple Avenue, Basking Ridge, New Jersey 07920, and its telephone number is (908) 221-2000.

3. The PSC is the agency of the State of Florida that has been delegated the responsibility to implement a statewide system to provide telecommunications access for hearing and speech impaired persons and those who wish to communicate with such persons. An integral part of such system is the telecommunications relay service, which is a "telecommunications transmission service that allows a person who is hearing impaired or speech impaired to communicate by wire or radio in a manner that is functionally equivalent to the ability of a person who is not hearing impaired or speech impaired." § 427.703(16), Fla. Stat.

4. On October 7, 1999, the PSC issued a request for proposals ("the RFP") through which it sought proposals from contractors to provide a Florida Relay Service ("FRS") System. The RFP specifically stated that potential bidders should submit any questions they had regarding the RFP to the PSC prior to the bidders conference scheduled for October 14, 1999. Answers to those questions were to be provided at the bidders conference. Only those

questions submitted in writing after the bidders conference were to be answered in writing. RFP § A-8, p.10.

5. The PSC received responses to the RFP from the following four contractors: 1) AT&T; 2) Sprint; 3) Hamilton Telephone Company ("Hamilton"); and 4) VISTA Information Technologies, Inc. ("VISTA"). PSC evaluated all four proposals and awarded the AT&T proposal the highest technical score. In addition, AT&T offered the lowest price per minute of the four proposers, with a price that is estimated to be more than \$1,000,000 lower than the next lowest proposal over the three-year life of the contract.

6. Nevertheless, the PSC staff recommended that AT&T's proposal be rejected as nonresponsive. The staff further recommended that the FRS System contract be awarded to Sprint. The basis for the rejection of AT&T's proposal was its response to the liquidated damages provisions in the RFP.¹

7. The RFP included the following language regarding liquidated damages:

Implementation of the Florida Relay Service in a timely matter is essential. Failure by the Provider to implement the service by June 1, 2000 shall be considered a significant and material breach of the Provider's commitment. For every day the service is delayed, the Provider shall pay to the Administrator, for deposit in its operating fund, the sum of \$25,000 per day.

Liquidated damages shall accrue in amounts up to the following per day of violation:

¹ The staff also noted that AT&T's bid bond did not state that it automatically forfeited the entire \$500,000 if the bid was awarded to AT&T, but AT&T did not execute a contract within thirty (30) days. However, the bond did provide coverage for the price difference between AT&T's proposal and the next lowest proposal. Since the price difference was more than twice the \$500,000 specified as the minimum bond amount, the staff correctly determined that the bid bond satisfied the RFP specification.

- a. For failure to meet blockage rate or transmission level requirement - \$5,000
- b. For failure to meet complaint resolution requirement - \$1,000
- c. For failure to provide reports - \$500
- d. For failure to provide contracted services for the life of the contract, the FPSC reserves the right to require the payment by the Provider of liquidated damages in an amount commensurate with the duration and extent of the system deficiencies.

Liquidated damages shall accrue in amounts up to \$25,000 per month for failure to meet answer time requirements.

RFP at § B.47, p.40.

8. Subsection B-47(d) does not specify the amount of liquidated damages for failure to provide contracted services. By definition, the amount of liquidated damages is agreed upon before parties enter into a contract. See BLACK'S LAW DICTIONARY 353 (5th ed. 1979) ("the essence of liquidated damages is a genuine *covenanted preestimate* of such damages") (emphasis supplied). See also *Hartford Fire Ins. Co. v. Controltec, Inc.*, 561 So. 2d 1334, 1335 (Fla. 5th DCA 1990) ("[i]n a contractual setting, liquidated damages *exist when a specific sum of money has been expressly stipulated or agreed to by the parties* for recovery by either party following a breach of the contract by the other") (emphasis supplied); *Robinson v. Loyola Foundation, Inc.*, 236 So. 2d 154, 157 (Fla. 1st DCA 1970) ("[a] claim for debt or damages is held to be liquidated in character *if the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law*") (emphasis supplied). Since subsection B-47(d) of the RFP states only that the PSC intends to reserve the right to assess liquidated damages for failure to provide

contracted services – without specifying the any particular amount or suggesting which acts or omissions would warrant liquidated damages -- it is necessary for the parties to enter into negotiations to arrive at some stipulation or agreement that constitutes a genuine preestimate of possible damages.²

9. Prior to the October 14, 1999, bidders conference, AT&T submitted written questions to the PSC, including the questions regarding the meaning of the liquidated damages provisions. Among the AT&T questions were the following:

- B.47 1. Will the Commission consider setting forth any more detail about how liquidated damages would be assessed? Will there be a sliding scale for inability to meet certain requirements?
 - 2. Is there a cap for any or all of the violations?
 - 3. Should there be a delay in the award of the contract or a delay in issuing the letter of intent, will the Commission consider modifying the requirement for “Liquidated Damages for failure to initiate Services on Time?”
-

B.47.d. Could the Commission be more specific in clarifying what system deficiencies would result in the assessment of liquidated damages?

10. At the bidders conference, the PSC staff addressed AT&T’s questions regarding liquidated damages by stating that liquidated damages would be recommended only for material variances from the contract requirements. The response given to AT&T by PSC’s staff regarding liquidated

² Liquidated damages are unenforceable if they do not bear a reasonable relationship to the possible, actual damages that could result from the specific act of breach that could result in an assessment of liquidated damages. *See Bill*

damages was that "it will depend upon the circumstances." The PSC staff emphasized that "[o]ur emphasis is not on this section of the RFP. Our emphasis is on having the service provided and provided well." The staff also indicated that, if there were to be a delay in the procurement process, there would be a "domino effect" on the entire schedule and that whether a delay in the schedule affected the liquidated damages for missing the June 1, 2000, start date would depend on the length of the delay.

11. None of AT&T's questions on liquidated damages were ever answered in writing.

12. AT&T and Sprint both responded to the RFP in reliance upon, and consistent with, the clarifications provided at the bidders conference. AT&T responded to the liquidated damages provisions in the RFP by stating:

1) that it would "agree to liquidated damages for a *material* breach of its commitment to implement service by June 1, 2000, *or an appropriate later date if award of the bid is delayed,*"

2) that it would agree to the liquidated damages provisions set forth in section B-47(a), (b), and (c);³

3) that it would agree to negotiate mutually agreeable terms for the liquidated damages addressed in B-47(d); and

Heard Leasing, Inc. v. Rocco Enter., Inc., 334 So. 2d 296, 297 (Fla. 2d DCA 1976) (liquidated damages are enforceable only if they are reasonable under the circumstances and do not constitute a penalty).

³ The PSC staff apparently misconstrued the AT&T proposal to: (1) include some limitation on AT&T's agreement to a \$500 liquidated damages amount for failure to satisfy answer time requirements, as required in section B-47(c); and (2) fail to agree to the \$25,000 a day amount of liquidated damages for failure to meet the service date. However, AT&T's proposal includes no such limitations or disagreements.

4) that it would agree to all liquidated damages provisions up to a total limit of \$1,000,000.

13. Sprint responded by stating that

Sprint's liability for damages of any kind to the State of Florida **shall** be limited to the **lesser** of \$100,000 or the total amount paid to Sprint under this contract during the twelve months immediately preceding the accrual of the claim or cause of action resulting in such damages.

Sprint Proposal Response at 79 (Emphasis supplied). By placing a cap on its liability for **all** damages and at a lower amount than that offered by AT&T, Sprint actually offered the PSC less protection than that offered by AT&T. Nonetheless, the PSC staff treated Sprint's response regarding damages as "a suggested contract clause" and recommended that the provision be excluded from any resulting contract, thereby confirming their determination that any deviation from the RFP was immaterial. The PSC's disparate treatment of AT&T's proposal was arbitrary and capricious. There is no basis in the two parties' responses or in law for the PSC to have treated the responses differently.

14. AT&T's and Sprint's responses regarding liquidated damages are both fully responsive to the RFP as clarified at the bidders conference. The rejection of AT&T's response, when it fully complies with the terms of the RFP is contrary to applicable statutes, rules, and the RFP and is clearly erroneous, contrary to competition, arbitrary, and capricious. *See* § 120.57(3)(f), Fla. Stat. Clearly, the PSC's rejection of a proposal must satisfy these standards of accountability established under chapter 120, Florida Statutes. *See Couch*

Constr. Co. v. Department of Transp., 361 So. 2d 172, 175 (Fla. 1st DCA 1978) (finding that an agency “erroneously assumed that the bids could be rejected without accountability under Chapter 120.”)

15. There is no factual basis for differing treatment of the AT&T and Sprint responses relating to liquidated damages. By accepting Sprint’s proposal as responsive – with its greater restriction on Sprint’s potential liability – while finding AT&T’s proposal nonresponsive, the PSC has acted in a manner that is inconsistent with applicable statutes, rules, and the RFP, clearly erroneous, contrary to competition, arbitrary, and capricious. *See Agrico Chem. Co. v. State, Dep’t of Envtl. Regulation*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978) (“an arbitrary action is one not supported by facts or logic, or despotic”). The bar against differential treatment is designed to prevent the **appearance** of favoritism. Therefore, differential treatment of the Sprint and AT&T proposals violates one of the basic tenets of public procurement law. *See Department of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 913 (Fla. 1988) (“the system of competitive bidding protects against collusion, favoritism, and fraud in the award of public contracts.”), *citing Liberty County v. Baxter’s Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982), & *Wester v. Belote*, 138 So. 2d 721, 723-24 (Fla. 1931). Florida law requires that “award must be made to the one submitting the lowest and best bid.” *Hotel China & Glass Co. v. Board of Pub. Instruction*, 130 So. 2d 78, 81 (Fla. 1st DCA 1961) (a “public authority may not arbitrarily or capriciously discriminate between bidders, or make the award on the basis of personal preference”).

16. In this instance, the PSC's action not only favors Sprint , to the disadvantage of AT&T, it operates to the detriment of the public at large. AT&T, which was scored by the PSC staff as the most technically qualified and which submitte the lowest cost proposal, leaving the State with less beneficial service and commodities and a higher price. *See Fairbanks, Inc. v. State, Dep't of Transp.*, 635 So. 2d 58 (Fla. 1st DCA 1994) (finding an agency's unjustified rejection of one product, in favor of another, comparable product, to be detrimental to both the rejected product's supplier, as well as to the public generally, and, thus, fraudulent, arbitrary, illegal, or dishonest).

17. Even assuming, for the purposes of argument only, that AT&T's responses relating to liquidated damages deviate to some extent from the RFP specifications, such deviations are not material.

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.

Overstreet Paving v. Department of Transp., 608 So. 2d 851, 853 (Fla. 2d DCA 1992) quoting *Intercontinental Properties, Inc. v. State, Dep't of Health & Rehabilitative Servs.*, 606 So. 2d 380, 386 (Fla. 3d DCA 1992). AT&T garnered no competitive advantage due to its responses regarding liquidated damages, nor do such responses adversely affect the interests of the State.

18. AT&T's substantial interest in having its response to the RFP fairly evaluated and scored and its interest in competing for the FRS System contract are adversely affected by PSC's proposed decision to reject the AT&T proposal

and award the contract to Sprint. Similarly, the rejection of AT&T's proposal adversely affects the substantial public interest in receiving the best services and commodities and the lowest price.

19. The material issues of fact and law that are raised by this proceeding are as follows:

- a) Whether AT&T's proposal is responsive to the liquidated damages provisions in the RFP;
- b) Whether AT&T's proposal is responsive to the liquidated damages provisions in the RFP in all material respects;
- c) Whether the RFP's silence regarding any specified amount of liquidated damages and specified acts or omissions constituting system deficiencies necessitates negotiation between the PSC and the successful vendor before a contract can be executed;
- d) Whether AT&T fully complied with the procedure set forth in the RFP itself for obtaining clarification of RFP provisions;
- e) Whether the answers to AT&T's questions regarding liquidated damages provisions, given at the bidders conference, established that the liquidated damages were not material terms.
- f) Whether Sprint's proposal limits Sprint's potential liability for damages more than does any limitation on damages included in AT&T's proposal;

g) Whether AT&T and Sprint justifiably relied upon the clarification given by the PSC in response to AT&T's written questions regarding liquidated damages;

h) Whether AT&T's proposal complies fully with the liquidated damages provisions of the RFP, as clarified at the bidders conference;

i) Whether the PSC acted arbitrarily and capriciously by rejecting AT&T's proposal while finding Sprint's to be responsive in all material respects;

j) Whether the PSC acted in a manner that is inconsistent with applicable statutes, rules, and the RFP by rejecting AT&T's proposal;

k) Whether the PSC acted in a manner that is clearly erroneous, contrary to competition, arbitrary, or capricious by rejecting AT&T's proposal; and

j) Whether the PSC failed to accept the best and most cost-effective proposal.

BASED ON THE FOREGOING, AT&T requests the following:

1) that the PSC schedule a meeting, to be held within seven (7) business days of the filing of this petition, within which AT&T and the PSC may attempt to resolve this matter without the necessity of a hearing;

2) that, if an amicable resolution cannot be reached within seven (7) business days, this matter be transferred to the Division of Administrative Hearings for a formal administrative hearing; and

3) that, ultimately, the PSC make a final decision to evaluate the proposal submitted by AT&T to determine whether AT&T is the most qualified proposer under the terms of the RFP.

Respectfully submitted,

For the Petitioner, AT&T Corp.,



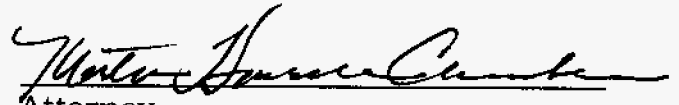
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been furnished by hand delivery and facsimile to to the Clerk, Florida Public Service Commission, 2540 Shumard Oak B10, Tallahassee, Florida 32399-0850, and a copy by hand delivery and facsimile to the Office of General Counsel, 2540 Shumard Oak B10, Tallahassee, Florida 32399-0850, this 24th day of January, 2000.


Attorney