



Maryland Department of Budget & Management

*DBM – people and technology...
a partnership for the new millennium*

*Office of the Secretary
Division of Policy Analysis*

ROBERT L. EHRLICH, JR.
Governor

MICHAEL S. STEELE
Lieutenant Governor

JAMES C. DIPAULA
Secretary

Questions and Answers #4 to Request for Proposals (RFP) High Capacity Circuit Services (HCCS) Project No. 050R3800141

Ladies and Gentlemen:

The State has received the following questions by e-mail, which are answered for all offerors to the referenced RFP. The numerical sequencing begins at question #26 since questions up to #25 were answered in Q&A #3.

26. Question. Section 2.3.8, Database. Please define “Termination Date.” Is it the date a circuit was disconnected or the expiration date of the circuit (i.e. the due date for it to be disconnected or renewed)?

Answer. It is the date a circuit is disconnected. Amendment #4 to the RFP addresses your question.

27. Question. Section 3.4.2, Format of the Proposal. We want to ensure we submit a proposal in line with what the State requires from a formatting perspective. With this in mind, we have two questions:

- 1) Based on the information provided in the RFP, please confirm that no responses are requested for the following RFP sections:
 - 1.0 General Information
 - 2.1 Purpose and Background
 - 2.2.1 First paragraph under 2.2 Service Ordering/termination Process and Purchase Orders
 - 3.1 Two Part Submission
 - 3.2 Proposals
 - 3.3 Submission
 - 3.4 Volume I Technical Proposal, subsections 3.4.1, 3.4.2, 3.4.2.1 (other than following the direction given), 3.4.2.2 (other than following the directions, 3.4.2.3 (other than following the directions)
 - 3.5 Volume II Financial Proposal (other than following the directions)
 - Section 4 – Evaluation Criteria and Selection Procedure

The only caveat is if we have an exception to anything in the above sections and that should appear in the Executive Summary. Correct?

- 2) The RFP says technical responses should be organized and numbered in the same order as the RFP. This allows the State to “map” responses to RFP requirements.

Is it acceptable to the State for Offerors, while maintaining the same order of the RFP requirements, to adopt a more natural proposal numbering system with mapping statements such as (RFP Section 3.4.2.5) included

with each section response? The alternative is a more forced numbering system, i.e., the References section being numbered section 3.4.2.5 in a case in which 3.4.2.5 is not next logical number.

Answer.

- 1) The sections of the RFP you have cited contain either information or instructions regarding how to respond and do not require a “numbered” response. The Offeror also need not respond to a heading, which contains no requirement. Information and proposal response instructions are not contract terms and conditions; accordingly, exceptions do not apply to the cited RFP sections. If an Offeror’s proposal is to be deemed “responsible,” it must address all the areas the State requests, follow instructions and consider information provided which has the purpose of helping the Offeror to develop its proposal.
- 2) The State wants the Offeror’s numbered proposal response to be identical to the corresponding RFP requirement and number so there is no doubt as to what the proposal is addressing. The intent is for the proposal numbering system to match the RFP and be presented in the same order as the RFP. The expanded reason, in addition to what is stated in Section 3.4.2, is to help the Evaluation Committee to be certain it knows which RFP requirement an Offeror is addressing without having to search for it or make interpretations and to make the correlated response easy to find.

28. **Question. Section 2.3.20.3, Insurance.** This section requests that the State of Maryland to be “named as an additional named insured on the policies of all property, casualty, liability, and other types of insurance evidencing this coverage....”. Our policies include blanket additional insured wording, which is broad enough to satisfy the insurance requirements of this RFP. As an alternative, is it acceptable if the State of Maryland is named as an additional named insured on our Certificate(s) of Insurance versus the actual policy itself?

Answer. Yes. Amendment #4 to the RFP addresses the question.

29. **Question. Atch A, Section 2.1, Scope of Work.**

- 1) We agree to the order of precedence, but based on customary practice, propose that applicable law and regulations take first precedence.
- 2) We also request that the title of Exhibit A be changed to Request for “Proposals and Responses Thereto” to clarify that the awarder’s responses are also made part of the overall agreement.

Answer.

- 1) Applicable law and regulations exist independently of the contract and may control aspects of the contractual relationship and contract performance. The existing order of precedence is the customary practice of the State and its contractors.
- 2) Attachment A is the Contract, which by its express terms incorporates the State’s Request for Proposals and the Contractor’s Technical and Financial Proposals.

30. **Question. Atch A, Section 4.1, Consideration and Payment.** State of Maryland Finance and Procurement Article § 15-103 requires payment 30 days after receipt but does not condition payment on acceptance by the purchasing agency of services provided by the Contractor. We therefore request deletion of “...acceptance by purchasing agency of services provided by the Contractor...” consistent with Article § 15-103 or, in the alternative, we request that it be permitted to take exception to this portion of the section, consistent with this request, without penalty.

Answer. The requested change could require the State to pay an invoice for work not performed, or for work performed in a manner that does not meet industry standards or contract requirements. The State requires that the ordering agency have the opportunity to verify that the work ordered has been performed by the Contractor in a timely manner and in accordance with industry standards and contract requirements. When

the Contractor's performance has been accepted by the ordering agency, and a proper invoice submitted for that work, the invoice will be paid in accordance with Contract terms and conditions.

31. **Question. Atch A, Section 4.2.** Since our performance standards and the remedies of the State for unsatisfactory performance are covered by the State's liquidated damages provision, Termination for Cause and, indirectly, by the Termination for Convenience provisions and since typically refusal to pay all or part of an invoice is covered by our billing dispute procedures (i.e. Customer is only required to pay any portion of an invoice that is not in dispute, and such disputed charges will not become due until we have completed an investigation and determined whether or not the charges are correct), we request that nonpayment of invoices be premised on billing disputes rather than overall satisfactory performance.

Answer. Billing disputes are a narrow and technical subset of Contractor performance issues that might arise under the Contract, and the requested change will limit the State's ability to verify that the work ordered is performed in a timely and proper manner. The State requires that the ordering agency have the opportunity to verify that the work ordered has been performed by the Contractor in a timely manner and in accordance with industry standards and contract requirements. The Contractor's billing dispute procedures will not necessarily control refusal to pay situations under the State Contract, however the State does expect that its Contractors will promptly investigate any issues that arise with regard to Contractor's failure to perform in a proper and timely manner.

32. **Question. Atch A, Section 6.2, Patents, Copyrights, Intellectual Property.** Our liability would be greatly increased unless this section is restricted to United States copyright, patent, trademark or trade secrets. As such, we request that we be permitted to limit our agreement to such U.S. copyright, patent, trademark or trade secrets.

Answer. The vendor that is awarded a Contract agrees to provide the required services in accordance with the Contract terms and conditions. Under section 6 of the Contract, the contractor is responsible for any improper use in the performance of the Contract, of designs, materials, processes, etc. which are the intellectual property of another party, and for which the Contractor does not have a license for use. The State cannot accept performance by a contractor that violates Federal or State intellectual property laws or international treaties to which the United States is a signatory, and which recognize the validity of foreign intellectual property rights.

33. **Question. Atch A, Section 6.3, Patents, Copyrights, Intellectual Property.** We believe that our liability would be greatly increased unless this section is restricted to United States copyright, patent, trademark or trade secrets. As such, we request that we be permitted to limit our agreement to such U.S. copyright, patent, or intellectual property.

Answer. See the answer to question 32.

34. **Question. Atch A, Section 8, Loss of Data.** We seek clarification of the type of data intended to be included in this section. We agree to backup and recreate data that is lost for billing records, databases that we maintain and the like but cannot be responsible for recreating data that is lost in transmission, for example. We request limitations based on our limited liability provision (as provided on the following page under, "Requested Additions to Contract" #2), which states, in part that we shall not be liable for consequential, incidental, indirect or special damages, including but not limited to loss of business profits, information or other commercial or economic loss.

Answer. See Amendment#5 to the Request for Proposals which incorporates the following sentence into Attachment A, the Contract, at Paragraph 8, "Data Loss", following the current last sentence:

"This paragraph does not apply to data lost in transmission within or across Contractor's network, except when such a loss of data in transmission is due to the gross negligence or intentional act of Contractor, its agents, servants, employees, or its subcontractors."

35. **Question. Atch A, Section 9.1, Indemnification.** We request that our obligation to indemnify be subject to our limitation of liability; that is we shall not be liable for consequential, incidental, indirect or special damages, including but not limited to loss of business profits, information or other commercial or economic loss.

Answer. See Amendment #5 to the Request for Proposals which incorporates the following Limitation of Liability clause for the Contractor within Attachment A, the Contract:

“27. Liability

27.1. For breach of this Agreement, negligence, misrepresentation or any other contract or tort claim, Contractor shall be liable as follows:

- A. For infringement of patents and copyrights as provided in Section 6 of this Contract;
- B. Without limitation for damages for bodily injury (including death) and damage to real property and tangible personal property;
- C. For all other claims, damages, loss, costs, expenses, suits or actions in any way related to this Contract, regardless of the form, Contractor’s liability shall be limited to three (3) times the total dollar amount invoiced under this Contract up to the date of settlement or final award of any such claim. Third party claims arising under Section (6) of this Contract are included in this limitation of liability only if the State is immune from liability. Contractor’s liability for third party claims arising under Section 6 of this Contract shall be unlimited if the State is not immune from liability for claims arising under Section 6.

27.2. As provided in this section, the limitations contained in this section are the maximum for which the Contractor and its subcontractors are collectively responsible for damages arising as a result of this contract.”

Attachment A, Contract, original paragraph 27 “Administrative”, is renumbered and is now Paragraph 28 “Administrative”.

36. **Question. Atch A, Section 15, Non-availability of Funding.** We request an additional sentence to clarify that the State agrees that it will not terminate for non-appropriation and replace our terminated service with a competitor’s service.

Answer. The clause is a direct quotation of COMAR 21.07.01.10 and is a mandatory clause in State contracts. A termination for non-appropriation is inconsistent with the replacement of the terminated service with a competitor’s service. As stated in Section 1.1 of the Request for Proposals, “The State makes no guarantee that it will purchase any service from any resulting contract. This contract will not be construed to require the State to purchase exclusively from the contractor. The State reserves the right to procure goods and services from other sources when it is in the best interest of the State to do so and without notice to the contractor”.

37. **Question. Atch A, Section 16, Termination for Cause.** We believe that certain subsections of this provision are, inapplicable, would increase our liability or would not provide sufficient time for cure of a default. As such we request the following changes to the COMAR provision, if such changes are permitted by applicable law:

Provision (B)(1): change to a thirty (30) day cure period;

Provision (B)(2): insert in 3rd sentence, ...may deem appropriate and, “if provided for in the contract,”...;

Provision (B)(5): delete or, in the alternative, insert in 1st sentence ...of this clause “and except where Contractor has retained the right of title and ownership,”.

Answer.

Paragraph (B)(1): COMAR 21.07.01.11(B)(1) provides a minimum of 10 days to provide a "cure". The procurement officer may allow more time for cure, depending upon circumstances. The State declines to make the requested change.

Paragraph (B)(2): The State declines to make the requested change, which if implemented might prevent the State from obtaining needed services from another vendor in the event of a default by the Contractor. The solicitation clearly states, "The State makes no guarantee that it will purchase any service from any resulting contract. This contract will not be construed to require the State to procure exclusively from the contractor. The State reserves the right to procure goods and services from other sources when it is in the best interest of the State to do so and without notice to the contractor.

Paragraph (B)(5): This paragraph provides additional rights of recovery to the State in the event of a default by the Contractor. While some of the categories of items enumerated in the paragraph are not directly applicable to the type of services to be provided under this Contract, the State requires that this clause remain as stated in order to facilitate, in the event of a Termination for Default, the right of the State to obtain records, reports, etc. which the Contractor is required to provide under the Contract terms.

38. **Question. Atch A, Section 17, Termination for Convenience.** The equipment, parts, etc. which are used to provide services to the State are part of our network and may not be transferred or otherwise assigned to a customer. As such, we request the following changes in the COMAR provision, if such changes are permitted by applicable law:

Provision (A)(2)(2d): "Except where the Contractor has retained the right of title and ownership,..." at beginning of provision;

Provision (A)(2)(2f): "Except where the Contractor has retained the right of title and ownership,..." at beginning of provision;

Provision (A)(2)(2g): "Except where the Contractor has retained the right of title and ownership,..." at beginning of provision;

Provision (A)(2)(2i)-1st paragraph: "If applicable,..." at beginning of provision;

Provision (A)(2)(2i)-2nd paragraph: "If applicable,..." at beginning of provision.

Answer. A termination for convenience under the Contract is to be governed by COMAR 21.07.0112A(2), which contains broad language applicable to contracts for the provision of goods, services, or both goods and services. The proposed Contract is for services (only) to be provided to the State of Maryland. COMAR 21.07.01.12(A)(2) does not contemplate or require in such a contract; and neither the State, nor the contractor could reasonably expect that in the event of a termination for convenience, the State would be entitled to: (A)(2)(2)(d)-assignment of all right, title, and interest to the Contractor's equipment or network infrastructure; (A)(2)(2)(f)-transfer and delivery to the State of the Contractor's equipment or network infrastructure; (A)(2)(2)(g)-sale by the contractor of the Contractor's equipment or network infrastructure in order to credit or offset payments owed by the State to the contractor; (A)(2)(2)(i)(1st paragraph)-an interest in the property in the possession of the Contractor; (A)(2)(2)(i)(2nd paragraph)-items of termination inventory not otherwise disposed of under the terms of the clause.

39. **Question. Atch A, Section 2.6, Subcontracting; Assignment.**

- 1) We do not contemplate that it will be necessary to subcontract any portion of the services provided under the RFP. However, we reserve the right to subcontract with reasonable notice to but without approval from the State of Maryland, if such subcontract arrangement is necessary or desirable to provide services to the State. We request changes to this section 26, consistent with this provision.

- 2) Due to the nature of the subsequent contract from this RFP and our long-term relationship with the State, we do not expect to assign this contract. We, however, reserve the right to assign the services to a corporate affiliate where required by applicable law or as a part of our business strategy. We propose the following alternative language:

“Upon reasonable prior written notice, either party may assign or transfer the contract to any company or government entity that is the successor to substantially all of its assets or to a corporate affiliate of such party, subject to reasonable verification of financial ability to perform all payment obligations hereunder. Moreover COMPANY reserves the right to assign customer contracts in connection with the sale of a COMPANY business. In the event of such assignment, COMPANY will ensure that the assignee agrees to the terms of Sections 10 and 12 through 25 of this Contract as agreed to by the State and COMPANY. All other attempted assignments shall be void without the prior written consent of the other party.”

Answer. The State of Maryland requires that reasonable written notice be provided to the procurement officer, prior to any attempted assignment of the Contract to be awarded as a result of this solicitation. Upon receipt by the procurement officer of verification that the proposed assignee has the financial and technical ability to perform all aspects of the Contractor’s obligations under the contract, and with prior written approval of the procurement officer, which approval will not be unreasonably withheld, the Contractor may assign the contract to a third party.

40. **Question. Atch A, Requested Additions to Contract.** We propose that the following terms and conditions be included in any resulting contract, subject to the State’s statutory limitations/prohibitions:

- 1) Limitation of Liability. COMPANY will not be liable for consequential, incidental, indirect, or special damages, including, but not limited to, loss of business, profits, information, or other commercial or economic loss, whether such damages are based upon breach of contract, tort, including negligence, or otherwise, even if COMPANY has been notified of the possibility of such damages. COMPANY liability for service outages is set forth under “liquidated damages” in this contract. COMPANY’s liability to customer for any other damages relating to this agreement shall be limited to the amounts paid by customer hereunder for the affected service.
- 2) Limited Warranty. COMPANY will use commercially reasonable efforts to provide the services substantially in accordance with any service descriptions set forth in this agreement or under COMPANY’s applicable and effective tariffs. If the services do not function substantially in accordance with such service descriptions through no fault of customer or its agents, or due to scheduled maintenance, COMPANY’s sole obligation shall be to repair and restore the services at COMPANY’s expense and to provide to customer any credits for the affected services in accordance with the liquidated damages set forth under this contract or in any subsequent addenda. The foregoing warranty and remedy is COMPANY’s exclusive warranty and customer’s exclusive remedy for breach of warranty, unless otherwise stated in an applicable exhibit hereto. COMPANY hereby disclaims all other warranties, express or implied, including warranties of merchantability and fitness for a particular purpose.
- 3) Miscellaneous:
 - a) Either party's failure to enforce any of the provisions of this Agreement or to exercise any right or option is not a waiver of any such provision, right, or option, and shall not affect the validity of this Agreement. Any waiver must be written and signed by the Parties. If any provision of this Agreement or the provision of any Service under the terms hereof is held to be illegal, invalid, or otherwise prohibited under applicable law or regulation in any State or jurisdiction, then this Agreement shall be construed as if not containing such provision or not requiring the provision of such invalid, illegal, or prohibited Service in such State or jurisdiction.
 - b) The obligation of COMPANY to provide Service is subject to the availability of suitable facilities and special construction that may be required to provide such Service.

Answer for Limitation of Liability: See Amendment #5 to the Request for Proposals, which incorporates the following Limitation of Liability clause for the Contractor within the Contract terms and conditions:

“27. Liability.

27.1. For breach of this Agreement, negligence, misrepresentation or any other contract or tort claim, Contractor shall be liable as follows:

- A. For infringement of patents and copyrights as provided in Section 6 of this Contract;
- B. Without limitation for damages for bodily injury (including death) and damage to real property and tangible personal property;
- C. For all other claims, damages, loss, costs, expenses, suits or actions in any way related to this Contract, regardless of the form, Contractor’s liability shall be limited to three (3) times the total dollar amount invoiced under this Contract up to the date of settlement or final award of any such claim. Third party claims arising under Section (9) “Indemnification”, of this Contract are included in this limitation of liability only if the State is immune from liability. Contractor’s liability for third party claims arising under Section 9 of this Contract shall be unlimited if the State is not immune from liability for claims arising under Section 9.

27.2. As provided in this section, the limitations contained in this section are the maximum for which the Contractor and its subcontractors are collectively responsible for damages arising as a result of this contract.

Attachment A, Contract, original paragraph 27 “Administrative”, is renumbered and is now Paragraph 28 “Administrative”.

Answer for Limited Warranty. Contractor is required to agree to and comply with the terms and conditions contained in the Contract documents, including Paragraph 24, “Representation and Warranties”. The Contractor is expected to employ commercially reasonable efforts to provide the services set forth in the contract documents. If the services are not in conformance with the contract requirements, the State reserves the right to pursue any and all remedies available to it under the terms and conditions of the Contract and in accordance with the laws of the State of Maryland.

Answer for Miscellaneous.

- a) The State declines at this time to include the specific suggested provision in the Contract.
- b) Any necessary “suitable facilities”, “special construction”, or other additional items required for the provision of high capacity circuit services are to be identified by the Contractor to the ordering agency at the time that the Contractor is requested to provide such services.

41. **Question. Atch A, Section 5.1.** We retain all right and title to its records used to provide services to the State. Upon reasonable request, however, we will consider allowing the State the use of non-proprietary records, such as billing, provisioning of service records, etc. with the exception of our internal costs data, which is deemed proprietary pursuant to regulation of the Maryland Public Service Commission. We propose a change to this provision consistent with these comments.

Answer. In order to avoid disputes regarding the right of the State to has access to and copies of reports, billing data, and other records necessary to the State for proper contract management or audit, the State has, for many years included this same clause in its contracts. The clause by its express terms applies to “...documents and materials...prepared by the Contractor, solely for purposes of this Contract with the State of Maryland...”. Internal costs data is not prepared solely for the purposes of this Contract with the State.

42. **Question. Atch A, Section 5.2, Rights to Records.** We do not believe that this section applies for the following reasons: (1) In the event a contract is entered into between the State of Maryland and the Contractor, such contract will not include the development of software or any other work or material that would fall within the definition of “Work for Hire”, as that term is interpreted under U.S. copyright law; (2) To the extent that the Contractor and the State enter into a separate agreement under which the Contractor

provides “Work for Hire”, the parties may agree to amend the contract and include in any such amendment a description of the work product(s) to be provided and the development of such product(s); and (3) With respect to products created that are not works for hire, the Contractor retains all rights, title and interest (including all intellectual property rights) of all such products created under the contract. We propose a change to this provision consistent with these comments.

Answer. The State will retain the clause in the event that any work created or services performed under this Contract is a “work for hire” as that term is interpreted under U.S. Copyright law.

43. **Question. Atch A, Section 5.4, Rights to Records.** We seek clarification of this section, given that the parties agree not to disclose certain information provided by the other party, which has been marked confidential and proprietary. In the event that we provide information so marked, we request that such markings be retained.

Answer. The Solicitation addresses the specific manner in which each offeror is to indicate whether any portion of their proposal is regarded as confidential. With regard to disclosure of documents in the custody or possession of a State government agency, such records may be subject to disclosure, with certain limitations, under the terms of the Maryland Public Information Act (“PIA”). The State cannot agree not to disclose information provided by the Contractor, simply because the Contractor marks a document as confidential and proprietary. In the event that a PIA request is received for materials provided to the State by the Contractor, the State is obligated to review such materials, and make an independent determination regarding whether they may be disclosed under the terms of the PIA. In the ordinary course of events the Contractor is notified of receipt by the State of a request for documents and Contractor input is sought regarding the nature of the materials sought by the requestor.

Date Issued: June 19, 2003

By <signed> .
Norman H. Grinnell
Procurement Officer