



Commonwealth of Kentucky
Finance and Administration Cabinet
OFFICE OF THE SECRETARY
Room 383, Capitol Annex
702 Capital Avenue
Frankfort, KY 40601-3462
(502) 564-4240
Fax (502) 564-6785

Steven L. Beshear
Governor

Jonathan Miller
Secretary

April 8, 2008

No. 08-13

William W. Cox
Board Chairman
Paducah Area Transit System
850 Harrison Street
P.O. Box 2267
Paducah, KY 42002-2267

RE: Determination of Protest: RFP 758-0700000925 (Paducah Area Transit System).

Dear Mr. Cox:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your two letters of protest on behalf of Paducah Area Transit System ("PATs") relating to RFP 758-0700000925 (the "RFP") for Brokerage Services for HSTD Regions 1, 2, 3, 4, 5 & 6.

FACTUAL BACKGROUND

The Office of Material and Procurement Services ("OMPS") issued the RFP on September 17, 2007. The RFP was subsequently modified five times. The RFP closed on November 9, 2007. For Region 1, proposals were submitted by PATs, LogistiCare Solutions, Inc. ("LogistiCare"), and LKLP Community Action Council ("LKLP").

Five members of an evaluation committee scored each proposal. The evaluation, for which 2700 total points were available, consisted of an evaluation of numerous categories. The scores of the individual committee members were averaged. The results of the evaluation were: PATs: 2275.6 points; LogistiCare: 2075 points; LKLP: 2349 points. Based upon this scoring, OMPS issued a written Determination and Finding which recited that LKLP presented the best offer for Region 1 and that LKLP should therefore be awarded a contract for Region 1. The award was issued on January 8, 2008.

By letters dated January 8th, 2008, and January 29, 2008, PATS protested the above-referenced award of the Region 1 contract to LKLP. PATS has broadly alleged that the award was "arbitrary and capricious." In specific, PATS alleges that (1) one evaluation committee member scored PATS as zero (0) because the member noted that he/she could not find PATS' confidentiality information; (2) the committee members adversely scored PATS because it did not provide evidence of FY09 operating authority; and (3) in many other instances, committee members scored PATS' proposal in an arbitrary and capricious manner. For the reasons stated herein, this protest is DENIED.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest and responses thereto, and other relevant information, the Secretary of the Finance Cabinet ("Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary of the Finance Cabinet. KRS 45A.285. PATS submitted a proposal for Region 1 in response to the RFP. PATS has standing to protest the award for Region 1 under KRS 45A.285.

A protest to an award must be made within two (2) calendar weeks within the date the protestor knew or should have known of the grounds for protest. KRS 45A.285. Here, the award was issued on January 8, 2008; the initial protest was dated and received on January 8, 2008. The protest was filed within two (2) calendar weeks after the award and, therefore, is timely. PATS submitted a supplemental letter of protest dated January 29, 2008 and received January 30, 2008. PATS submitted this "supplementary" protest letter based upon new information disclosed by Open Records requests. The January 29th letter was received within two weeks of the receipt of documents provided pursuant to the Open Record request.

In its letter of protest, PATS alleges that (1) an evaluation committee member scored PATS as zero (0) because the member noted that he/she could not find PATS information; (2) the committee members adversely scored PATS because it did not provide evidence of operating authority; (3) in many other instances, committee member scored PATS' proposal in an arbitrary and capricious.

This RFP was conducted pursuant to KRS 45A.085 as a "competitive negotiation" procurement. The award of a negotiated procurement is a discretionary act by an agency. *See Laboratory Corp. of America Holdings v. Rudolph*, 4 S.W.3d 68, 75 (Ky.App. 2005); *Hensley v. City of Russell*, 2006 WL 2988174 (the award of a public contract is a purely discretionary act). The limits of "discretion" are not boundless, however; agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law will be overturned. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). Yet, agency decisions are entitled to a presumption of correctness. KRS 45A.280. Therefore, the protestor has the burden to show that the agency's actions were either without a reasonable basis or in violation of applicable procurement law. *See GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 779 (Fed.Cl. 1997).

The protester must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protester's mere disagreement with the agency's judgment. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). The Secretary will not "substitute [his] judgment ... for that of the agency, but [will] intervene only when it is clearly determined that the agency's determinations were irrational or unreasonable." *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). If the agency shows that there was a reasoned basis for its decision, the award must be upheld. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998).

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) ("[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it."). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Accordingly, the Secretary will review the agency's determination to determine whether there was a rational basis for its evaluation and whether the evaluation was consistent with applicable law. If the Secretary finds error, the Secretary will then examine whether the error was prejudicial to the protestor.

As a first basis of protest, PATS alleges that there was an error scoring how PATS intended to comply with HIPAA confidentially guidelines. PATS notes that evaluation committee member No. 1 scored PATS as zero (0) for this 50 point item with the notation "could not find." PATS argues that the information was, in fact, contained in its proposal as evidenced by the proposal's table of contents. PATS observes that its average score from the other four committee members on this item was 44. PATS argues that the average score of 44 for this item should be added to committee member #1's score; this action would then increase PATS total average score from 2275.6 to 2284.4.

Four of the five committee members were able to locate PATS' information and score this item; one was not able to locate this information. Based upon the information provided, the reason that one committee member was unable to locate this information is pure conjecture. Had there been information that the information was available to committee member No. 1, and this member had just refused or failed to grade it, this would be arbitrary or capricious. OMPS states, though, that proposal copies may be incomplete. In such a case, a zero score for this item would not be arbitrary or capricious. Without more, it is not possible to determine whether the zero score was a rational determination. Since there is a presumption of correctness, PATS has the burden of providing evidence of arbitrary or capricious scoring and has failed to meet its burden. In any event, since the winning proposer LKLP was evaluated with an average score of 73.4 points more than PATS, the additional 44 point claimed by PATS would not have ultimately changed the final result. This basis for protest is without merit.

The second issue raised by PATS is its allegation that the RFP did not require evidence of operating authority for FY09 and that four committee members scored PATS as zero (0) for this item. The RFP at Section 60 – Technical Proposal Requirements and Evaluation at A.1. states: "Offeror must evidence actual capacity and operating authority for the Region offeror wishes to bid on." This basis is without merit.

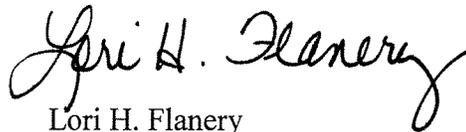
The third basis of protest concerns a series of categories which PATS alleges that the scoring was arbitrary and capricious: insurance; billing; letters of commitment; vehicle maintenance and inspections, infrastructure, and information of hours/days and availability of operators. A common theme for each these categories is that PATS disagrees with the committee members' evaluations. However, as noted above, PATS must clearly establish that the RFP evaluation was irrational. This is not accomplished by PATS's mere disagreement with the evaluations. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). The Secretary will not substitute his judgment for that of the committee members. PATS has not made a showing that the evaluations were arbitrary, capricious, or contrary to law. For this reason, the protest on this basis is without merit.

Accordingly, upon review of the record, the protest of PATS is without merit. Further, the presumption of correctness in KRS 45A.280 applies and PATS has failed to provide sufficient evidence to overcome this presumption. Since there is no basis to overturn this procurement, the protest must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by the Secretary shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation



Lori H. Flanery
Deputy Secretary

cc: Richard Mize, OMPS
Mark Leach, Esq.