



Commonwealth of Kentucky  
Finance and Administration Cabinet  
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**Steven L. Beshear**  
Governor

**Jonathan Miller**  
Secretary

April 8, 2008

**No. 08-14**

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175 East Main Street  
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Lexington, KY 40588-9945

RE: Determination of Protest: RFP 758-0700000925 (LogistiCare Solutions LLC).

Dear Mr. Sammons:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your two letters of protest on behalf of LogistiCare Solutions LLC ("LogistiCare") 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 6, proposals were submitted by LogistiCare Solutions, Inc. ("LogistiCare"), LKLP Community Action Council ("LKLP"), and Federated Transportation Services of the Bluegrass, Inc. ("FTSB").

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: FTSB: 2465.8 points; LogistiCare: 2259 points; LKLP: 2425.2 points. Based upon this scoring, OMPS issued a written Determination and Finding which recited that FTSB presented the best offer for Region 6 and that FTSB should therefore be awarded a contract for Region 6. The award was issued on January 8, 2008.

By letters dated January 8th, 2008, January 28, 2008, and March 26, 2008 LogistiCare protested the above-referenced award of the Region 6 contract to FTSB.<sup>1</sup> LogistiCare has alleged that the award was “arbitrary and capricious,” that FTSB’s proposal did not comply with the RFP, and that the award was the result of bias. 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. Logisticare submitted a proposal for Region 6 in response to the RFP. LogistiCare has standing to protest the award for Region 6 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. LogistiCare submitted a supplemental letter of protest dated January 28, 2008. LogistiCare submitted a “supplementary” protest letter based upon new information disclosed by Open Records requests. Finally, LogistiCare submitted a second supplemental protest on March 26, 2008. This second supplementary protest does not contain information concerning when the allegedly new information was received. The January 8<sup>th</sup> letter was received within two calendar weeks of the award and is timely; the January 28<sup>th</sup> letter was received within two weeks of the receipt of documents provided pursuant to the Open Record request. This letter is timely. However, the March 26, 2008, second supplementary protest fails to establish that it is timely.

In its January 28<sup>th</sup> letter of protest, LogistiCare alleges that the award was “arbitrary and capricious,” that FTSB’s proposal was non-responsive, and that the award was the result of bias..

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).

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<sup>1</sup> LogistiCare submitted proposals for Regions 1, 2, 3, 4, 5, and 6. The letters of protest, however, are directed to the award to FTSB, which only submitted a proposal for Region 6.

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 protester 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 protester 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 protester.

As a first basis of protest, LogistiCare alleges that the scoring of the proposals was arbitrary and capricious. As examples of such arbitrary and capricious scoring, LogistiCare points to (1) its proposal for the Region 6 provider network, (2) its staffing plan, (3) its hours of operation, (4) its vehicle inspection and maintenance program, (4) its computer hardware and software capability, (5) its data reporting, and (6) its billing procedures. Upon a review of the factual allegations, the agency's scoring decisions were not irrational or unreasonable. This basis for protest is without merit.

As a second basis for protest, LogistiCare alleges that the FTSB proposal did not comply with the RFP requirements. LogistiCare argues that FTSB failed to properly complete the solicitation form, failed to describe its phone system, and failed to describe its complaint management system. However, the solicitation form in the possession of OMPS is correctly filled out with the exception that the fax number is missing. A proposal is responsive if it conforms to the *essential requirements* of the solicitation. *Mangi Environmental Group, Inc. v. United States*, 47 Fed.Cl. 10, 16 (Fed.Cl. 2000) (proposal must conform to *mandatory* requirements); See 200 KAR 5:306(4)(2)(a) (competitive sealed bidding). However, a minor irregularity in a bid may be waived. See 200 KAR 5:306(4)(1). An irregularity is minor if it does not provide that bidder with a competitive advantage by affecting price, quality, or delivery. See 200 KAR 5:306(5). The inclusion of a fax number is not a mandatory or material requirement; its absence did not give FTSB any sort of competitive advantage. The failure to include this information was not a cause for rejection of the proposal.

A review of the solicitation reveals that FTSB did describe its phone system and did describe its complaint management process. This basis for protest is without merit.

As a third basis for protest, LogistiCare alleges that the difference in scoring between its 2005 proposal and its 2007 proposal evidences bias against LogistiCare. LogistiCare asserts that its 2005 proposal was

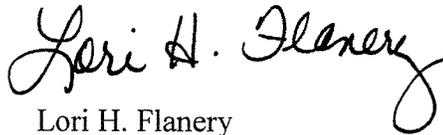
“virtually identical” to its 2007 proposal yet its 2007 proposal received a lower score. LogistiCare asserts that other offerors submitted “very similar” proposals to their 2005 proposals and that these other offerors were not “systematically downgraded” as it was. LogistiCare’s assertion of bias is inferential only. It has provided no concrete evidence of bias in the selection process to overcome the presumption of correctness. As such, this basis for protest is without merit.

Accordingly, upon review of the record, the protest of LogistiCare is without merit. Further, the presumption of correctness in KRS 45A.280 applies and LogistiCare 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  
Oliver H. Barber, Jr., Esq.