



Commonwealth of Kentucky
Finance and Administration Cabinet
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April 8, 2008

No. 08-15

Theodore H. Lavit
Theodore H. Lavit & Associates, P.S.C.
One Court Square
P.O. Box 676
Lebanon, KY 40033

RE: Determination of Protest: RFP 758-0700000925 (Central Kentucky
Community Action Council, Inc.).

Dear Mr. Lavit:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letters of protest on behalf of Central Kentucky Community Action Council, Inc. ("CKCAC") 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 4, proposals were submitted by Logisticare Solutions, Inc. ("LogistiCare"), LKLP Community Action Council ("LKLP"), and CKCAC.

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: CKCAC: 2357 points; LogistiCare: 2080 points; LKLP: 2389 points. Based upon this scoring, OMPS issued a written Determination and Finding which recited that LKLP presented the best offer for Region 4 and that LKLP should therefore be awarded a contract. The award was issued on January 8, 2008.

By letter dated January 8, 2008 (received January 10, 2008), CKCAC protested the award to LKLP and alleged that the solicitation was manipulated for political considerations and was generally unfair. After receiving documents pursuant to an Open Records request, CKCAC submitted a second letter of protest on January 24, 2008 (and received January 28, 2008). This supplemental letter alleged that different scoring sheets were used, that CKCAC was improperly penalized for not providing evidence of FY09 operating authority, and various other allegations alleging arbitrary and capricious scoring. On January 30, 2008 (received January 31, 2008), CKCAC submitted evidence relating to a LKLP letter of recommendation. On February 8, 2008 (received February 8, 2008), CKCAC submitted its "final findings" which alleged several new grounds of protest. 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. CKCAC submitted a proposal for Region 4 in response to the RFP. Therefore, CKCAC has standing to protest the award for Region 4 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 January 8, 2008 (and received on January 10, 2008). CKCAC submitted a supplemental letter of protest dated January 24, 2008 (received January 28, 2008). This "supplementary" protest letter based upon new information disclosed by Open Records requests. CKCAC submitted a letter relating to a LKLP letter of recommendation on January 30, 2008 (received January 31, 2008). Finally, CKCAC submitted its "final findings" on February 8, 2008 (received February 8, 2008).

The initial protest letter was received within than two weeks after the ward was issued and is timely. This supplementary protest indicates that CKCAC received documents after the initial protest letter. This supplementary protest letter is therefore timely. CKCAC has failed to make any showing of timeliness for its January 30th or February 8th correspondence. These letters were not timely filed.

In its letters of protest, CKCAC makes numerous allegations against the award to LKLP. In general, CKCAC asserts that the solicitation process was unfair and motivated by political considerations. In short, CKCAC alleges the award to LKLP was 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 protestor must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protestor'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 protestor 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.

The January 8th letter states five grounds of protest. These grounds allege that the solicitation was conducted and evaluated in an arbitrary and capricious manner. The allegations, however, are stated without evidentiary support. CKCAC has failed to prove the solicitation and evaluation was conducted in an irrational manner. Therefore, the January 8th letter does not state any valid basis for protest and is without merit.

The January 24th letter states another seven grounds of protest. CKCAC asserts two different score sheets were used to analyze its proposal. One of the score sheets referenced by CKCAC is for an entirely separate solicitation (RFP 758-0700000996). Further, CKCAC asserts that it was improperly penalized for not including evidence of FY09 Operating Authority. But, the RFP, at Section 60 – Technical Proposal Requirements and Evaluation, A.1, states: "Offeror must evidence actual capacity and operating authority for the Region offeror wishes to bid on." The other grounds alleged by CKCAC assert an arbitrary and capricious award. Again, the allegations are stated without sufficient evidentiary support. CKCAC has failed to prove the solicitation and evaluation was conducted in an irrational manner. Therefore, the January 24th letter does not state any valid basis for protest and is without merit.

The January 30th letter alleges that LKLP submitted a fraudulent letter of support from "Community Alternatives Kentucky" in support of its proposal. Rather, the letter appears merely to be **addressed to** "Community Alternative[] Kentucky." This letter does not state a valid basis for protest.

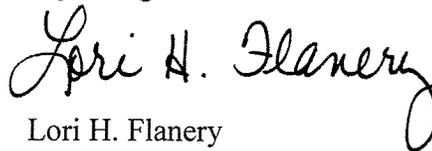
The February 8th letter states nine grounds of protest as CKCAC's "final findings." CKCAC has failed to prove the solicitation and evaluation was conducted in an irrational manner. Therefore, the February 8th letter does not state any valid basis for protest and is without merit.

Accordingly, upon review of the record, the protest of CKCAC is without merit. Further, the presumption of correctness in KRS 45A.280 applies and CKCAC 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.