



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

Jonathan Miller
Secretary

April 23, 2008

No. 08-20

Judy Planck
Executive Director
Licking Valley Community Action Program, Inc.
203 High Street
Flemingsburg, KY 41041

RE: Determination of Protest: RFP 758-0700000996.

Dear Ms. Planck:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Licking Valley Community Action Program, Inc. ("LVCAP") relating to RFP 758-0700000996 (the "RFP") for Brokerage Services for HSTD Regions 9, 11, 13, 15 & 16.

FACTUAL BACKGROUND

The Office of Material and Procurement Services ("OMPS") issued the RFP on November 27, 2007. The RFP was subsequently modified four times. The RFP closed on January 15, 2008. LVCAP submitted a proposal for Region 16.

On March 13, 2008, LVCAP was notified that it was not a successful proposer. On March 24, LVCAP filed a written protest. LVCAP alleges that it is a local provider and would be able to provide better service. 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. LVCAP submitted a proposal for Region 16 in response to the RFP. LVCAP has standing to protest the award for Region 16 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. On March 13, 2008, LVCAP was notified that it was not a successful proposer. On March 24, LVCAP filed a written protest. Therefore, the protest was filed within two (2) calendar weeks after the award and is timely.

In its letter of protest, LVCAP alleges that it is a local provider and would be able to provide better service.

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 examines whether the error was prejudicial to the protestor.

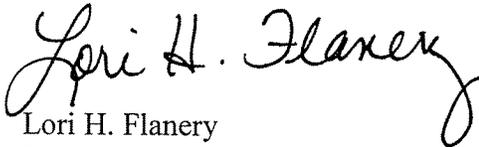
Here, LVCAP has alleged that it could offer better service than the contract awardee. The RFP was evaluated by objective criteria. LVCAP's argument that, as a local agency, it would offer better service is a subjective opinion. The protestor must clearly establish that a solicitation evaluation was irrational. 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). LVCAP has not alleged that the award was arbitrary, capricious, or contrary to law.

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