



Commonwealth of Kentucky
Finance and Administration Cabinet
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Secretary

August 11, 2008

No. 08-28

Steve Trumble, J.D.
Senior Vice President and Health & Benefits Practice Leader, Southeast Region
AON Consulting
500 East Pratt Street
Baltimore, MD 21202

RE: Determination of Protest: RFP 746-0700000984.

Dear Mr. Trumble:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of AON Consulting ("AON") relating to RFP 746-0700000984 (the "RFP" or "Solicitation") for Actuarial Services for the Department of Medicaid Services.

FACTUAL BACKGROUND

The Cabinet for Health and Family Services, Office of Contract Oversight ("CHFS-OCO") issued the RFP on behalf of the Department for Medicaid Services on November 14, 2007. The RFP was subsequently modified three times to respond to vendor questions. The RFP closed on December 12, 2007. AON submitted a proposal to the RFP. The RFP was to be scored based upon two criteria: (1) a technical proposal and (2) a cost proposal. The cost proposal sought a price based upon (a) proposed hourly rates and (b) estimates of total hours required to complete certain defined tasks.

After an initial scoring, CHFS-OCO announced its intention to award a contract to AON. By letter dated January 4, 2008, PricewaterhouseCoopers ("PwC") protested the intended award of the RFP to AON and alleged that CHFS-OCO had not properly evaluated the RFP. On February 22, the Secretary of the Finance Cabinet sustained the protest and directed CHFS-OCO to re-score the proposals. The RFP was then re-scored and, on March 25, 2008, AON was notified that a contract was to be awarded to PwC. Pursuant to an Open Records Request, on April 3, 2008, AON received information from CHFS-OCO relative to the RFP. On April

17, 2008, AON then submitted a written protest. In its protest, AON contends that CHFS-OCO should have scored the RFP cost proposals based upon proposed hourly rates multiplied by a common fixed hour assumption for the task(s) required to be performed. 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. AON submitted a proposal in response to the RFP. AON has standing to protest the award 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. The RFP was first issued on November 14, 2007. The RFP disclosed the basis upon which the Solicitation was to be evaluated. On March 25, 2008, AON was notified that it was not a successful proposer. On April 3, 2008, AON received documents relative to the RFP pursuant to an Open Records Request. On April 17, 2008, AON filed a written protest. Since this protest is directed at the terms of the Solicitation, the protest was filed more than two (2) calendar weeks after AON knew or could have known the basis for its protest. The protest is untimely.

In its letter of protest, AON contends that CHFS-OCO should have scored RFP proposals based upon proposed hourly rates multiplied by a fixed hour assumption for the task(s) required to be performed.

The RFP consisted of two separate evaluations: a technical proposal and a cost proposal. RFP, Sections 5 and 6. For the cost proposal, the RFP sought a price based upon the proposer's hourly rates and the proposer's estimate of hours required to complete each task. RFP, Section 6. AON contends that this evaluation procedure is flawed: AON asserts that each proposer should be measured by the same number of hours. This protest, therefore, is directed at the evaluation criteria in the RFP, that is, at the Solicitation document. AON, however, submitted a bid in response to the RFP. This constituted a waiver of objections to the RFP. *Parsons Precision Products, Inc.*, Comp. Gen. B-249940, 92-2 CPD 431 ("a bidder who participates in a procurement through the point of bid opening without objection is deemed to have acquiesced in the agency's statement of the terms and conditions."). The protest, therefore, has been waived.

This RFP was conducted pursuant to KRS 45A.085 as a "competitive negotiation" procurement. 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). AON has failed to state any violation

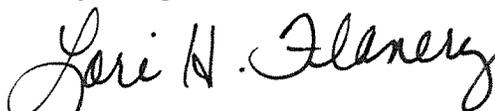
of the statutes, regulations, or policies relating to this procurement. AON has not shown that the RFP evaluation criteria were irrational or arbitrary. The protest, as a consequence, is without merit

Accordingly, upon review of the record, the protest of AON is without merit. Further, the presumption of correctness in KRS 45A.280 applies and AON 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: Patricia Niceley, CHFS-OCO