



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

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Secretary

July 17, 2008

No. 08-35

Daryl Brown
Vice President – Operations
CRS Demolition
1520 Algonquin Parkway
Louisville, KY 40210

RE: Determination of Protest: Louisville Arena Authority: Hazardous Material Remediation
And Building Demolition RFP (Re-bid).

Dear Mr. Brown:

The Finance & Administration Cabinet (the “Finance Cabinet”) is in receipt of your letter of protest dated June 6, 2008, on behalf of CRS Demolition (“CRS”) relating to the Louisville Arena Authority (“LAA”) Hazardous Material Remediation and Building Demolition RFP (“RFP”). For the reasons stated herein, this protest is denied.

FACTUAL BACKGROUND

This protest arises from the planned Louisville Arena project. On May 23, 2008, the Finance Cabinet issued a Determination (No. 08-12) which sustained a protest by CRS Demolition to an award for site demolition and hazardous material remediation to O’Rourke Wrecking (“O’Rourke”). The LAA then issued this RFP on May 28, 2008. This RFP was then modified by two Addenda, the last of which was issued on June 2, 2008. Proposals were due on June 4, 2008 at 4:30 p.m. CRS submitted a “no bid” proposal on June 4, 2008. On June 6, 2008, CRS mailed a protest alleging (1) unfairness in the RFP process and (2) possible “bid rigging and collusion.”

DETERMINATION

After a review of the solicitation, the protest and responses, the applicable statutes, regulations, and case law, and other relevant information, the Secretary finds and determines as follows:

CRS participated in the RFP process and manifestly evidenced an interest in the award. CRS acted with promptness in filing its protest which was filed within two calendar weeks of the issuance of the RFP. Accordingly, CRS has standing to file a protest and the protest was filed in a timely manner.

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.

In its protest, CRS alleges (1) unfairness in the RFP process and (2) possible "bid rigging and collusion." With respect to each of CRS' grounds of protest, the Secretary finds and determines:

(1) Unfairness in the RFP process.

CRS states that LAA declared the procurement to be “an emergency” and gave bidders only seven days to prepare bids. There is nothing in the record which indicates this was an Emergency Procurement pursuant to KRS 45A.095(3). A seven day advertising period for competitive negotiation procurement is reasonable. See KRS 45A.080(3).

CRS argues that the issuance of Addendum 2 which required a 24 hour notice to inspect the site hindered its ability to prepare a proposal. The RFP required a site visit for bidders. RFP, Item 3(B)(1). Addendum 2 was issued on June 2, 2008 at 3:49 p.m. which imposed a 24 hour notice requirement for a site visit. Proposals were due on June 4, 2008 at 4:30 p.m. On June 3rd, CRS viewed the site. The LAA contends that CRS had the opportunity to conduct a meaningful site visit.

This matter is made more difficult because of the conflicting evidence presented by the parties regarding the site visit. The Cabinet has reviewed these documents and finds it difficult to make a definitive determination on this issue as salient points and their subsequent effect are apparently in dispute. CRS maintains that meaningful access was denied while the LAA disputes that characterization and states that meaningful access was provided and that CRS was only denied entry to an “active” asbestos site. This situation is unlike the prior protest filed by CRS where the Cabinet determined that there was a procedural flaw in the process which was undisputed as evidenced by the documentation reviewed by the Cabinet.

In this situation, it is the burden of the protestor to provide evidence to overcome the statutory presumption of correctness. *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.”). The Cabinet does not completely understand why the time limits regarding the 24 hour notice period could have either been reduced or the time for bidders’ responses extended thus giving prospective bidders more time to formulate their bid. While O’Rourke apparently remained in control of the site, CRS has not provided definitive evidence showing that it was denied a meaningful site visit or how it was definitively prejudiced by this RFP process. Thus, in the judgment of the Cabinet and given the circumstances presented, CRS has not presented sufficient evidence to overturn the procurement.

(2) Possible “bid rigging and collusion.”

CRS states that a newspaper article reported that O’Rourke had been paid over 50% of its initial contract value. Based on this hearsay evidence and its own experience with limited site access, CRS infers that there may have been “bid rigging and collusion.”

Again, CRS’ inference is not sufficient evidence to overcome the presumption of correctness in this procurement. Accordingly, this basis for protest is without merit and the presumption of correctness still applies.

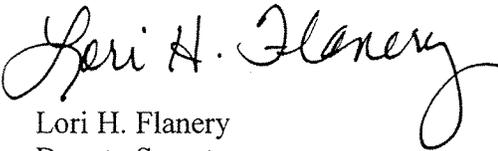
Accordingly, upon review of the record, CRS has standing, the protest of CRS is timely, but CRS has failed to overcome the presumption of correctness. The protest, therefore, must be **DENIED**.

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

A handwritten signature in cursive script that reads "Lori H. Flanery". The signature is written in black ink and is positioned to the right of the typed name.

Lori H. Flanery
Deputy Secretary

cc: Mark F. Sommer
Counsel for Louisville Area Authority