



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

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Secretary

October 10, 2008

No. 08-37

Carol Poe
Kentucky Alternative Programs
241 East Tenth Street
Newport, KY 41071

RE: Determination of Protest: RFP 729 0800001116.

Dear Ms. Poe:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Kentucky Alternative Programs ("KAP") relating to RFP 729 0800001116 ("RFP") for state-wide drug testing for MH/MR facility personnel.

FACTUAL BACKGROUND

The Cabinet for Health and Family Services, Office of Contract Oversight ("CHFS-OCO") issued the RFP, as amended, on May 2, 2008. The RFP closed on May 9, 2008. KAP submitted a proposal in response to the RFP. On July 1, 2008, a contract was awarded to National Toxicology, Inc. ("NTI").

By letter dated and received on July 15, 2008, KAP protested the award to NTI. On September 12, 2008, CHFS-OCO provided the Buyer's response to the 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. KAP submitted a proposal in response to the RFP. Therefore, KAP has standing to protest the RFP.

A protest to a solicitation 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 July 1, 2008, a contract was awarded to National Toxicology, Inc. KAP's protest was received on July 15, 2008 and was timely.

A determination by an agency is entitled to a presumption of correctness. KRS 45A.280. A 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 its protest letter, KAP raises numerous issues. CHFS-OCO has provided a detailed response. The individual protest issues and the responses are as follows:

1. KAP states at the end of Paragraph 1 "Although the cabinet reserved the right to request a best and final offer, KAP believes that providing such an option to some but not all bidders was in error."

Pursuant to the RFP (Section 4.09 - Best and Final Offers ("BAFO")) and the Finance and Administration Cabinet's Manual of Policies and Procedure, specifically FAP 111-43-00 1(c), the Cabinet extended a BAFO to the three offerors with the highest evaluation scores making those offerors the most susceptible for award. FAP 111-43-00 1 (c) permits the agency to negotiate a fair and reasonable compensation with the offeror of the best evaluated proposal received. The BAFO is a standard process used after evaluations are completed and a "short list" developed of offerors receiving the highest evaluated is score based on RFP evaluation criteria.

2. KAP states at the beginning of Paragraph 2 that they "clearly stated that all costs per initial drug test were \$55/test (and as we now know, also the lowest bid), however our Cost Proposal was deemed non-responsive to this criterion." KAP further states "KAP reasonably assumed that the cabinet would interpret all initial tests conducted by KAP, unless otherwise specified (i.e., at employee's worksite) to be charged at a rate of \$55/test."

KAP's Cost Proposal does not clearly state that all costs per initial drug test were \$55/test. Item A of their Cost Proposal is titled "Cost Per Initial Drug Test at KAP Collection Sites," with a proposed cost of \$55/test. However, Item B is labeled "Cost Per Initial Drug Test at Employee's Work Site" with a proposed cost of \$100/test. The labels of the cost categories included in KAP's cost proposal were inconsistent with the labels of the cost categories listed in the RFP. The RFP (Section 4.17, Format of Cost Proposal) cautions offerors to label their cost proposals in the prescribed manner set forth in the RFP. Because KAP did not utilize the cost pricing schedule form provided in the RFP, when preparing their proposal, the evaluation committee considered the proposal as it was submitted and did not speculate as to the intent of KAP.

3. KAP asserts that, in scoring the quarterly on site fee per facility on the Cost Proposal, the cabinet has deviated from the established scoring methodology by not awarding points to other Bidders. KAP asserts that it would have gained points, as the third lowest bidder, pursuant to this criterion. They claim that no mention was made in the RFP that this criterion would be scored differently. They claim that the RFP indicates that "scoring for each line will be based on the following formula $(n/x)*z=y$ " and that formula was not followed in scoring the final criterion of the Cost Proposal.

The Cabinet awarded points in the Quarterly On-Site Fee per facility category according to section 6.01, Cost Scoring Formula. Two of the seven offerors proposed "no charge" for the Quarterly On-Site Fee category. The formula as stated in section 6.01 of the RFP is $(n/x)*z = y$ with the variables defined as follows:

n = lowest test cost
x = bid price per test
z = maximum possible points
y = cost criteria points (that the bidder would be awarded)

By inserting \$0.00 as the lowest test cost, any bidder who stated a cost higher than \$0.00 would receive no points due to the mathematical rule that any number divided by zero is zero. For example, KAP stated a proposed cost of \$250 for the quarterly on-site fee. Using the formula, KAP was scored $(\$0.00/\$250)*100 = 0$. Because there were two offerors who proposed "no charge" for the quarterly on-site fee they were awarded maximum points.

4. KAP asserts that, regarding RFP Section 5.01, Item A, the cabinet erroneously deducted up to one half of the possible points (or 40 points) for not having a collection site in Hopkinsville and Glasgow. KAP claims it provided an "Attachment 13," listing its collection site in Hopkinsville is the Trover Clinic Occucare and its collection site in Glasgow is Southern Medical Lab.

Page 1 of the Attachment 13 that was provided by KAP merely consisted of a list of names, addresses, and telephone numbers of certain individuals. This Page 1 appeared to be individuals who would be contacted to conduct *random* testing, *at the Mental Health facility sites*, instead of actual, physical sites that would be used for collection. Conversely, Page 2 of the Attachment 13 appeared to be a listing of the actual, physical sites that KAP intended to utilize for collection, as this list contained the

names of businesses as well as hours of operation. The entries for Hopkinsville and Glasgow were the last two entries on Page 1 of the Attachment 13, not Page 2; therefore, the evaluation committee considered the individuals listed as contacts for random testing rather than physical sites for collection.

5. Regarding RFP Section 5.01, Item B, KAP disagrees that the procedures for filling out Chain of Custody forms and the procedures for submitting specimens were not provided. KAP asserts that they utilize a detailed system of procedures (known as the e-Chain Requisition System, a Web-based electronic chain of custody and collections process) that allows secure tracking of tests status, from test request to test completion. KAP asserts that the Home Page and directions to gain access to the system were provided in Attachment 16.

The KAP technical proposal does reference the E-chain Requisition System and it does provide a screen-cap of the E-chain Intake Form. However, the specific procedures for the chain of custody process were not included in the copies of the KAP response. KAP merely provided a reference to their computer system. The KAP technical proposal specifically did not provide procedures for persons signing-in for tests nor did it provide the procedures for ensuring patient confidentiality, as required by Section 5.01, B, Items 1 and 2 of the RFP.

The Chain of Custody form provided by KAP in the original technical proposal was a perforated, three-part form, which contained pre-printed instructions for completion on the back of the form. The copies of the technical proposal submitted by KAP (as required by section 4.05 of the RFP, Proposal Submission Requirements) did not contain actual forms but only incomplete copies of the front of the Chain of Custody form. The KAP proposals did not contain a copy of the back of the form; therefore, the members of the evaluation committee did not receive this information from KAP.

KAP's mere reference to the computer system did not provide the Committee with information that specifically detailed the process to be used to ensure that the drug test results would be valuable and admissible in any necessary administrative or judicial proceedings. A mere reference to the electronic monitoring system does not sufficiently detail or document matters such as security, or preservation and actual custody of samples.

6. Regarding RFP Section 5.01, Item C, KAP states that the instructions for the Chain of Custody Forms were provided online and directions to gain access to the system was provided in Attachment 16.

As stated in response to Issue #5 above, KAP's response did not identify specific procedures. Attachment 16 is a screen-capture of the E-chain Intake Form and the E-chain Home Page; however, instructions to gain access to the system were not identified.

7. Regarding RFP Section 5.01, Item D, KAP asserts that the Review Committee's Technical score comment – that they, “stated that all test results will be sent to multiple parties prior to an MRO determination which is a breach of confidentiality” – is untrue. They assert that their Technical Proposal stated “KAP will test all specimens within 24 hours after arrival in the laboratory, and all test results shall be sent to KAP for review by the Medical Review Officer”.

The second sentence of KAP's bid response (Section D-Reporting of Results and Confidentiality) actually states "All test results shall be sent to KAP for review by the Medical Review Officer, and to the commissioner of the Department of Mental Health/ Mental Retardation Services and to the department's appointed authority." As written this statement indicates that the test results are sent to all three parties simultaneously. Pursuant to section 2.06, H, of the RFP, the Medical Review Officer is responsible for "Reviewing and interpreting all test results *before* reported to the appropriate Commonwealth contact person" (Emphasis added). KAP did not indicate that a determination is made by the Medical Review Officer *prior to* the results being sent to other parties. Such a practice indicates a breach of confidentiality.

8. Regarding RFP Section 5.01, Item E, KAP states that they provided an extensive examination of their database and a detailed Forensic Urine Drug Testing Flow Chart; however, written procedures may have been lacking and will be included in their next proposal.

CHFS-OCO concurs with KAP's assessment that the written procedures were lacking.

9. Regarding RFP Section 5.01, Item F, KAP states that they incorporated, by reference, the procedures for collection sites and chain of custody listed in Sections B and C (which is the e-Chain Requisition System previously referred to above). The procedures for collecting quarterly random testing at each facility would be the same as on site collections.

As stated in response to Issue #5 above KAP's response did not identify specific procedures.

10. Regarding RFP Section 5.01, Item H, KAP states that they did not address the issue of availability of the urine collection kits and that, suffice it to say, that KAP would have supplied all supplies required.

The RFP Section 5.01 of the RFP, Item H required "Procedures for making sure that each collection site has all needed supplies, Chain-of-Custody Forms, etc." KAP's response stated that they supply complete urine collection kits; however, it did not identify any specific procedures to ensure availability.

11. Regarding RFP Section 5.01, Item I, KAP states that a comment noted on their score sheet stated "Provided assurance but no documentation that they are SAMHSA certified." Comments on score sheets for National Toxicology (NTS) and Premier Integrity Services in the same line read "SAMHSA certified". Did NTS and Premier provide this documentation?

The KAP technical proposal provided inadequate assurance that the test labs were indeed performed by SAMSHA certified labs. Their technical proposal did not even document the laboratories that KAP intended to use for testing or if those labs were SAMSHA certified. Further, in section I of the KAP technical proposal, they indicated that the laboratories not under their control would provide written assurance of adequate security measures; yet, the proposal does not document that those labs are SAMSHA certified. The NTS and Premier technical proposals identified the labs to be used and

documented that the testing laboratories had a SAMSHA certification. The Premier technical proposal even provided a copy of the relevant portions of the Federal Register, designating their laboratory.

12. Regarding RFP Section 5.01, Item J, KAP disagrees with the Evaluation Committee comment that the accuracy of their tests and the test results were not addressed. KAP states that Section K of their Technical Proposal examines in detail the quality assurance/quality control, and accuracy of tests. They disagree with the score that they received and ask for a review of the scoring of Premier Integrity Services v. KAP and to compare the scoring discrepancy.

The procedures provided by the KAP technical proposal explained how the tests were to be performed; however, they do not describe how the determination of accuracy was or would be achieved. The technical proposal lacked information explaining accuracy validation. Additionally, the technical proposal did not address monthly reports on the accuracy of tests and test results as required by Section 5.01 Item J.

13. Regarding RFP Section 5.01, Item K, KAP disagrees with the Evaluation Committee comment that their Technical Proposal did not address the issue of court appearance (referencing Section L of their Technical Proposal) and asks for a review of the scoring of Premier Integrity Services v. KAP and to compare the scoring discrepancy.

Section 5.01, K of the RFP required offerors to provide "Procedures that the contractor will follow to provide testimony in court to describe the Drug Testing Program, the types of collection kits and/or tests being used, and the accuracy of those tests".

KAP's response stated their willingness and competency to provide expert testimony, for an additional fee, but did not address the procedures utilized in providing testimony. Therefore, no points were awarded to KAP for this category.

In response to Section 5.01, K of the RFP, Premier Integrity Solutions submitted a 59 page Sample Litigation Package, which contains samples of affidavits, reports and chain of custody documentation, analytical data, specific personnel and their curriculum vitae, the laboratory qualifications, and a glossary of terms. The evaluation scores are appropriately reflective of the responses submitted by each offeror in this category.

14. KAP believes that the unusually short window of opportunity for responding to the RFP (10 business days), the extensiveness of the RFP (78 pages), the specificity of the criteria, and the meticulousness of the scoring unreasonably favors the existing vendor, National Toxicology Specialists, Inc. KAP requests reconsideration in, and review of the award of Solicitation Number 0800001116.

The Finance and Administration Cabinet Manual for Policies and Procedures ("FAP"), specifically FAP 111-43-03 1 (a), states that an agency shall post the RFP to the Commonwealth's eProcurement web site for a minimum of seven (7) days. This procurement was posted for 10 business days; therefore, by law, there was sufficient notice. Moreover, budget issues delayed the determination of the available funding for this contract, thereby delaying the issuance of the RFP. Further, the then

existing contract expired on June 30, 2008 and a new contract was necessary by July 1, 2008, to avoid a disruption of service. Additionally, the RFP was significantly different from the previous RFP, issued in February 2006, as services for the Department for Community Based Services were eliminated from the RFP. This required the incumbent vendor to develop a notably different offer than was submitted in 2006. And, finally, while the RFP was posted, there were no requests received from potential offerors seeking to extend the closing date of the RFP.

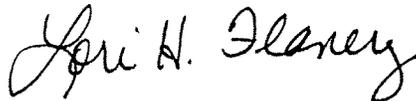
The determination by CHFS-OCO that KAP's technical proposal was not susceptible to award has a reasoned basis. KAP has not shown that the agency's determination was arbitrary, capricious, or contrary to law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Accordingly, upon review of the record, the protest of KAP is without merit. Further, the presumption of correctness in KRS 45A.280 applies and KAP 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: Joan Graham, CPPB