



Commonwealth of Kentucky  
Finance and Administration Cabinet  
**OFFICE OF THE SECRETARY**  
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Steven L. Beshear  
Governor

Jonathan Miller  
Secretary

October 10, 2008

No. 08-39

Pierce Whites  
Whites & Whites  
2374 Switzer Road  
Frankfort, KY 40601

RE: Determination of Protest: RFP 736 0800001079 (Lake Cumberland CCC Service Area).

Dear Mr. Whites:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest received July 14 2008, on behalf of Lake Cumberland Community Action Agency ("LCCCA") relating to award of RFP 736 0800001079 ("RFP") for the Community Collaboration for Children ("CCC") Program for the Lake Cumberland Service Area.

### **FACTUAL BACKGROUND**

The Cabinet for Health and Family Services, Office of Contract Oversight ("CHFS-OCO") issued the RFP, as amended, on April 11, 2008. The RFP closed on April 18, 2008. LCCAA submitted a proposal for the Lake Cumberland Service Area. ENA, Inc. d/b/a NECCO ("ENA") was the best evaluated proposer for this Service Area. An award was posted on the Commonwealth's eProcurement site on or about July 2, 2008.

By letter received July 14, 2008, LCCAA protested the award of the Lake Cumberland CCC Service Area to ENA. On July 30, 2008, LCCAA filed a "Supplemental Protest." On September 17, 2008, LCCAA filed an "Addendum" to its protest. On August 25, 2008, ENA provided a detailed response to the protest. On August 21, 2008, ENA provided a response to the "Supplemental Protest." LCCAA has alleged numerous errors in the evaluation process. In particular, LCCAA contends that ENA was not an eligible bidder. For the reasons stated herein, the protest is sustained.

## 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:

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 ("Secretary"). KRS 45A.285. LCCAA submitted a proposal in response to the RFP. Hence, LCCAA has standing under KRS 45A.285.

A protest to a solicitation (an RFP or RFB) 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. This protest concerns the award of an RFP. The July 14, 2008 protest was filed within two weeks of the notice of award and is timely. Both the "Supplemental Protest" and "Addendum" have failed to overcome the presumption of untimeliness provided by 200 KAR 5:380 and are therefore deemed untimely.

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).

LCCAA's protest raises numerous issues. The threshold issue is whether ENA is an "Eligible Applicant" under RFP, Section 1.10. The RFP requires:

Applicants must have a physical office located in the CCC Service Area for which they are proposing to deliver services and have at least six (6) years experience providing prevention based human services to high-risk families in the CCC Service Area for which they are proposing, OR, at least 10 years experience in providing prevention based human services to high-risk families in the CCC Service Area for which they are proposing. In all cases, it is preferred that potential vendors have experience providing human services to high-risk families that focus on the prevention of child abuse/neglect prior to any Cabinet involvement.

The RFP, Section 2.00, Scope of Work, Item E defines the Lake Cumberland "CCC Service Area" as Green, Taylor, Casey, Adair, Russell, Pulaski, Cumberland, Clinton, Wayne, and McCreary Counties.

This procurement was for a personal service contract ("PSC") pursuant to KRS 45A.690 and following. This process uses a Request for Proposals or RFP. Under this process, a contract may be awarded "to the offeror determined by the head of the contracting body, or his designee, to be the best qualified of all offerors based on the evaluation factors set forth in the request for proposals..." KRS 45A.695(5). The PSC solicitation

process is similar to competitive negotiation. *See* 45A.085. The competitive negotiation process is intended to offer the buying agency more flexibility in drafting the content of the solicitation document and more flexibility in evaluating the resulting offerors. *See, e.g., Matter of: A & C Building and Industrial Maintenance Corporation* 88-1 CPD ¶451 (Comp.Gen. 1988). Yet, the proposal must conform to the mandatory requirements of the solicitation or it will not be deemed acceptable. *Mangi Environmental Group, Inc. v. United States*, 47 Fed.Cl. 10, 16 (Fed.Cl. 2000); *Protest of Telos Field Engineering*, 92-1 BCA ¶24,676 (GSBCA 1992). Accordingly,

It is a fundamental principle of federal procurement that offerors must be treated equally and provided with a common basis for the preparation of their proposals. In negotiated procurements such as this, any proposal which ultimately fails to conform with the material terms of the solicitation should be considered unacceptable and should not form the basis of award. If an agency wishes to accept such a proposal, it must place the other offerors on notice of the specific changes and provide an equal opportunity for all offerors to compete for the requirement.

*Matter of: Arthur Young & Company*, 85-1 CPD ¶598 (Comp.Gen 1985). Thus, “[i]t is axiomatic in protest law that the contract awarded must conform to the mandatory requirements of the solicitation. Otherwise, offerors would not be competing on the same basis, and full and open competition would not be obtained.” *Protest of Stellar Computer, Inc.*, 90-1 BCA ¶22,584 (GSBCA 1990). And one of the fundamental policies of the KMPC is to foster effective competition. KRS 45A.010(f).

In its technical proposal, A. 1.g (p. 3 of 43), ENA addresses its facilities and history of providing services in the CCC Service Area. ENA states that it opened an office in Somerset, KY, within the CCC Service Area, in the summer of 2007. Thus, ENA has established that it has an office in the CCC Service Area. Further, “Applicants must . . . have at least six (6) years experience providing prevention based human services to high-risk families in the CCC Service Area for which they are proposing.” ENA’s technical proposal is silent whether ENA itself has six (6) years experience providing prevention based human services to high-risk families in this particular CCC Service Area. ENA has provided a response to the protest that elaborates on ENA’s experience. This information, however, was not contained in its technical proposal.

ENA’s technical proposal does reference two individuals presently located in the Somerset, KY office. Even if these individuals’ experience were to qualify as experience of the Applicant (ENA), it is not clear whether or how long these individuals provided “prevention based human services to high risk families” in the Service Area.

Therefore, a determination by CHFS-OCO that ENA was an “Eligible Applicant” under the RFP, Section 1.10, is not supported by ENA’s technical proposal. Thus, the determination is without a reasoned basis and was arbitrary and capricious. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Accordingly, upon review of the record, the protest of LCCAA is timely and has merit. The protest, therefore, must be **SUSTAINED**. CHFS-OCO is directed to rescind the award of the contract to ENA. The CHFS should determine whether, it is in the best interest of the Commonwealth: (1) to re-score the existing responses to the RFP; (2) to cancel the RFP with respect to the Lake Cumberland CCC Service Area and re-

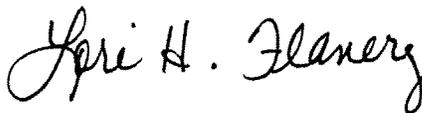
issue an identical or an amended RFP for the Lake Cumberland CCC Service Area; or (3) any other resolution consistent with this determination.

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".

Lori H. Flanery  
Deputy Secretary

cc: Joan Graham, CPPB