



Commonwealth of Kentucky  
Finance and Administration Cabinet  
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February 27, 2009

**No. 09-01**

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RE: Determination of Protest: RFB 758 0800005901 (KREC E & O Insurance).

Dear Ms. Craig:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of the January 12, 2009, letter of protest on behalf of Rice Insurance Services Company, LLC ("RISC") relating to RFB 758 0800005901 (the "RFB") for Kentucky Real Estate Commission Errors and Omissions Policy. In the January 12<sup>th</sup> letter of protest, RISC asserts that its bid should not have been determined to be non-responsive since: (1) there was no RFB requirement for pre-filing insurance policy forms and (2) its policy form's "premium fully earned upon inception of policy" has been used for this type of policy since 1991 and is consistent with the RFB.

On January 28, 2009, Williams Underwriting Group ("WUG"), the intended awardee, provided a written response to the protest. On February 6, 2009, the Finance Cabinet, Office of the Controller, Office of Procurement Services ("OPS") also provided a written response to the protest. Counsel for RISC filed two "Supplements" to the protest: the first on January 20<sup>th</sup>, the second on January 26<sup>th</sup>. On February 11, 2009, OPS submitted a written response to RISC's January 26<sup>th</sup> "Supplement."

## **FACTUAL BACKGROUND**

OPS issued the RFB on November 20, 2008 on behalf of the Kentucky Real Estate Commission. The RFB called for bids to be submitted by December 19, 2008. OPS received two bids: one from

RISC and one from WUG. Upon review of these two bids, OPS issued a written Determination and Finding which found that RISC's bid was non-responsive since: (1) the insurance policy forms were not approved for use in Kentucky as required by KRS 304.14-120 and (2) the submitted policy form # G-135184-A stated that a full year's premium was considered fully earned upon issuance of the policy which violated KRS 304.12-190(2). Since OPS determined that RISC's bid was non-responsive, OPS awarded the contract to WUG on January 5, 2009.

## **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:

### **1. Standing.**

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 and Administration Cabinet ("Secretary"). KRS 45A.285. RISC was an actual bidder to the RFB so it has standing to protest the award.

### **2. Timeliness.**

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. Here, the award was made on January 5, 2009. The January 12, 2009, protest letter was filed within fourteen days and is therefore timely. The January 20, 2009, "Supplemental" protest letter does not contain a showing to rebut the presumption of 200 KAR 5:380(1)(1)(b) and is therefore untimely. The January 26, 2009, "Supplemental" protest letter evidences that it is based upon information received from Open Records Requests after the date of award but within fourteen days of the filing of the letter. The January 26, 2009, "Supplemental" protest letter accordingly is timely.

### **3. The Protest.**

#### **a. The Legal Standard for Reviewing The Agency's Action.**

The protester bears the burden of proof. *See Matter of: American Identification Products, Inc.*, 87-2 CPD ¶42 (Comp.Gen 1987) ("protester has burden of demonstrating the merits of its case."); *GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 782-83 (Fed.Cl. 1997); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998). This burden is not met by the protester's mere disagreement with the agency's determination. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). Moreover, a determination by an agency is entitled to a presumption of correctness. KRS

45A.280. The protestor must demonstrate the agency's action was arbitrary, capricious, or contrary to law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). The Secretary will only intervene only when it is clear that the agency's determination was irrational or unreasonable. *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). An "alternative interpretation" of the terms of the solicitation will not establish an arbitrary or capricious determination. *Laboratory Corporation of America v. Rudolph*, 184 S.W.3d 68, 74 (Ky. App. 2006). The Secretary will not substitute his judgment on such matters reserved to the discretion of the agency. See *Laboratory Corp. of America Holdings v. Rudolph*, 4 S.W.3d 68, 75 (Ky.App. 2005) (award of a negotiated procurement is a discretionary act by an agency); *Hensley v. City of Russell*, 2006 WL 2988174 (award of a public contract is a purely discretionary act).

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with the 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.

**b. RISC's First Basis Of Protest.**

As its first basis of protest, RISC asserts that there was no RFB requirement for pre-filing insurance policy forms. RISC points out that a bid must be evaluated in accordance with the RFB. The RFB, RISC urges, is silent about whether policy forms must be pre-approved. Accordingly, RISC contends there was no requirement that policy forms be pre-filed. Moreover, RISC urges that the pre-approval of policy forms would disclose confidential information. Finally, RISC argues that the policy forms contained in its bid were not meant to be the delivery of the final policy form. RISC clearly indicated that its policy would comply with the law.

The RFB required each bidder to submit "sample copies of coverage terms and conditions as well as any relative endorsements." Further, the RFB provided under "Legal Requirements:"

The vendor is required to comply with all applicable federal, state and local rules, regulations, and statutes, including but not limited to the insurance code in Chapter 304 of the Kentucky Revised Statutes, during the contract term.

The RFB also made reference to and incorporated the Finance and Administration Cabinet's "General Conditions and Instructions for Solicitations and Contracts" (FAP 110-10-00). Section 2(b) of this provision provides;

An offer shall set forth full, accurate, and complete information as required by the solicitation. *An offer that contains terms and conditions in conflict with* the terms of the solicitation or *Commonwealth statutes and regulations may be rejected*. (Emphasis added).

KRS 304.14-120 provides:

(1) No basic insurance policy or annuity contract form, or application form where written application is required and is to be made a part of the policy or contract, or printed rider or endorsement form or form of renewal certificate, shall be delivered, or issued for delivery in this state, unless the form has been filed with and approved by the executive director. This provision shall not apply to any rates filed under Subtitle 17A of this chapter, surety bonds, or to specially rated inland marine risks, or to policies, riders, endorsements, or forms of unique character designed for and used with relation to insurance upon a particular subject, or which relate to the manner or distribution of benefits or to the reservation of rights and benefits under life or health insurance policies and are used at the request of the individual policyholder, contract holder, or certificate holder. As to group insurance policies issued and delivered to an association outside this state but covering persons resident in this state, all or substantially all of the premiums for which are payable by the insured members, the group certificates to be delivered or issued for delivery in this state shall be filed with and approved by the executive director.

(a) As to forms for use in property, marine (other than wet marine and transportation insurance), casualty and surety insurance coverages (other than accident and health) the filing required by this subsection may be made by advisory organizations or form providers on behalf of their members and subscribers; but this provision shall not be deemed to prohibit any such member or subscriber from filing any such forms on its own behalf.

(b) Every advisory organization and form provider shall file with the executive director for approval every property and casualty policy form and endorsement before distribution to members, subscribers, customers, or others.

(c) Every property and casualty insurer shall file with the executive director notice of adoption before use of any approved form filed by an advisory organization or form provider or filed by the insurer pursuant to paragraph (a) of this subsection.

(2) Every such filing shall be made not less than sixty (60) days in advance of any such delivery. At the expiration of such sixty (60) days the form so filed shall be deemed approved unless prior thereto it has been affirmatively approved or disapproved by order of the executive director. Approval of any such form by the executive director shall constitute a waiver of any unexpired portion of such waiting period. The executive director may extend by not more than a thirty (30) day period within which he may so affirmatively approve or disapprove any such form, by giving notice to the insurer of such extension before expiration of the initial sixty (60) day period. At the expiration of any such period as so extended, and in the absence of such prior affirmative approval or

disapproval, any such form shall be deemed approved. The executive director may at any time, after notice and for cause shown, withdraw any such approval.

(3) Any order of the executive director disapproving any such form or any notice of the executive director withdrawing a previous approval shall state the grounds therefore and the particulars thereof in such detail as reasonably to inform the insurer thereof. Any such withdrawal of a previously approved form shall be effective at expiration of such period, not less than thirty (30) days after the giving of the notice of withdrawal, as the executive director shall in such notice prescribe.

(4) The executive director may, by order, exempt from the requirements of this section for so long as he deems proper any insurance document or form or type thereof as specified in such order to which, in his opinion, this section may not practicably be applied, or the filing and approval of which are, in his opinion, not desirable or necessary for the protection of the public.

(5) Appeals from orders of the executive director disapproving any such form or withdrawing a previous approval shall be taken as provided in Subtitle 2 of this chapter.

(6) For the purposes of this section, unless the context requires otherwise:

(a) "Advisory organization" has the meaning provided in KRS 304.13-011; and

(b) "Form provider" has the meaning provided in KRS 304.13-011.

It is undisputed that RISC's policy forms were not approved for use in Kentucky as required by KRS 304.14-120. Under FAP 110-10-00(2)(b) the Commonwealth could consequently reject RISC's bid. RISC could not cure this non-responsiveness by submitting approved policy forms after bid opening. A bid's responsiveness is determined at the time of bid opening. *Interstate Rock Products v. U.S.*, 50 Fed.Cl. 349, 360 (Fed.Cl. 2001). A non-responsive bid cannot be cured after bid opening. *Id.* A determination of responsiveness must be made with information contained in the bid document only. *Firth Const. Co., Inc. v. U.S.*, 36 Fed.Cl. 268, 272 (Fed.Cl. 1996).

Although RISC has not explained how disclosure of an approved form would disclose confidential information and be improper, RISC's remedy would be to protest the solicitation or to not submit a bid. It may not submit a bid and then assert the requirements of the solicitation were unfair. See 4 C.F.R. §21.2(a)(1) ("Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."); *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.")

Although the Commonwealth may waive minor technicalities in bids (200 KAR 5:306), the inclusion of a form contrary to the Insurance Code is not a minor technicality. The purpose of the requirements of the Insurance Code is to protect the public. See, e.g., *Minor v. Stephens*, 898 S.W.2d 71, 78 (Ky. 1995). OPS may not waive the requirements of a statute where those requirements are meant for the protection of the public. *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 820 (Ky.App. 2008).

As a consequence, the determination by OPS that (1) RISC's bid was non-responsive and (2) OPS would not waive the non-responsiveness as a minor technicality was not arbitrary, capricious, or contrary to law. As a result, RISC's first basis of protest is without merit.

**c. RISC's Second Basis Of Protest.**

As its second basis for protest, RISC asserts that its policy form's "premium fully earned upon inception of policy" has been used for this type of policy since 1991 and is consistent with the RFB.

The RFB provided under "Legal Requirements:"

The vendor is required to comply with all applicable federal, state and local rules, regulations, and statutes, including but not limited to the insurance code in Chapter 304 of the Kentucky Revised Statutes, during the contract term.

The RFB made reference to an incorporated the Finance and Administration Cabinet's "General Conditions and Instructions for Solicitations and Contracts" (FAP 110-10-00). Section 2(b) provides;

An offer shall set forth full, accurate, and complete information as required by the solicitation. *An offer that contains terms and conditions in conflict with the terms of the solicitation or Commonwealth statutes and regulations may be rejected.* (Emphasis added).

KRS 304.12-190 provides:

(1) No person shall willfully collect any sum as premium or charge for insurance, which insurance is not then provided or is not in due course to be provided (subject to acceptance of the risk by the insurer) by an insurance policy issued by an insurer as authorized by this code.

(2) No person shall willfully collect as premium or charge for insurance any sum in excess of the amount actually expended or in due course to be expended for insurance applicable to the subject on account of which the premium was collected or charged.

(3) No person shall willfully or knowingly fail to return to the person entitled thereto within a reasonable time any sum collected as premium or charge for insurance in excess of the amount actually expended for insurance, or for medical examination in the case of life insurance, applicable to the subject on account of which the premium or charge was collected.

(4) Each violation of this section shall be punishable as provided in Subtitle 99.

The inclusion of a provision which states that the premium is fully earned upon issuance of the policy violates KRS 304.12-190(2). The fact that such a provision may have been allowed in the past, does not change the fact that this provision is contrary to the law. As noted above, OPS may not waive a

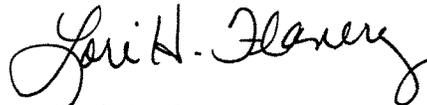
statute enacted for the protection of the public. The determination by OPS that (1) RISC's bid was non responsive and (2) OPS would not waive the non-responsiveness as a minor technicality was not arbitrary, capricious, or contrary to law. RISC's second basis of protest is without merit

Accordingly, upon review of the record, the protest of RISC is without merit. Further, the presumption of correctness in KRS 45A.280 applies and RISC 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, OPS  
Richard Williams, Williams Underwriting Group