



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

Jonathan Miller
Secretary

July 22, 2009

No. 09-11

M. L. Watts, President
Thoroughbred Consulting of Glasgow, Inc.
425 Indian Point Road
Glasgow, KY 42141

RE: Determination of Protest: RFP 605 0900001638.

Dear Mr. Watts:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Thoroughbred Consulting of Glasgow, Inc. ("Thoroughbred Consulting") relating to RFP 605 0900001638 ("RFP") for Appraisals for Hardin County.

FACTUAL BACKGROUND

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued the RFP on January 9, 2009. The RFP closed on January 20, 2009, at 2:00 p.m. A "bid tab," that is, a breakdown of the score results, was e-mailed to Thoroughbred Consulting on May 8, 2009.

On May 11, 2009, Thoroughbred Consulting filed a written protest. In its protest, Thoroughbred Consulting argued that, based upon oral discussions with a KYTC employee, its Technical Proposal had not been scored as it had been led to believe. On May 14, 2009, KYTC submitted a written response to the protest. On May 26, 2009, the intended awardee, TBE Group, submitted a written response. For the reasons stated herein, this protest is DENIED.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest, 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. Thoroughbred Consulting submitted a proposal in response to the RFP. Therefore, Thoroughbred Consulting has standing to protest the award of the RFP.

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person *knows or should have known* of the facts giving rise thereto. KRS 45A.285(2). Here, a "bid tab" was e-mailed to Thoroughbred Consulting on May 8, 2009. On May 11, 2009, Thoroughbred Consulting filed a written protest. The protest was filed within two calendar weeks and is, accordingly, timely.

In its written protest, Thoroughbred Consulting argues: that based upon oral discussions with a KYTC employee, its proposal was not scored as it had been led to believe in oral discussions..

This RFP was for a "Personal Service Contract." KRS 45A.695. A Personal Service Contract ("PSC") is a contract by which an individual or entity "is to perform certain services requiring professional skill or professional judgment for a specified period of time at a price agreed upon." KRS 45A.690 (1)(f). An award of a PSC is to be made to the "best qualified of all offerors based on the evaluation factors set forth in the request for proposals and the negotiation of fair and reasonable compensation." KRS 45A.695(5). The PSC RFP evaluation and award process involves agency *discretion*. As a result, a protest to an agency award of a PSC RFP will be reviewed by the arbitrary, capricious, or contrary to law standard. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

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).

Applying these general rules to the specific grounds of protest, the Secretary finds as follows:

Thoroughbred Consulting contends that, based upon oral discussions with a KYTC employee, its Technical Proposal had not been scored as it had been led to believe.

Questions concerning the RFP were to be addressed as follows:

Questions regarding this RFP - Questions must be submitted in writing to the Division of Purchases contact named in this RFP. The Commonwealth will respond to salient questions in writing by issuing an Addendum to the Solicitation. The Addendum shall be posted to the Commonwealth's E-Procurement page.

RFP, VI. General Information (p. 14 of 23).

The RFP placed restrictions on communications between the Commonwealth and potential offerors:

The Contract Contact named below shall be the sole point of contact throughout the procurement process. All communications, oral and written (regular mail, express mail, electronic mail, or fax), concerning this procurement shall be addressed to:

Earl Gresham
Personal Services Contracts/MOA Agreements Division of
Purchases
200 Mero Street
Frankfort, KY 40622
502-564-4630, Ext. 3703 Earl.Gresham@ky.gov

From the issue date of this RFP until a Contractor(s) is selected and the selection is announced, Offerors are not allowed to communicate with any Commonwealth Staff concerning this RFP except:

- ~ The Contract Contact cited in this RFP; or
- ~ Via written questions submitted to the Contract Contact

For violation of this provision, the Commonwealth shall reserve the right to reject their proposal response.

RFP, VI. Restrictions On Communications (p. 16 of 23).

Thoroughbred Consulting sought clarification about the scoring of the RFP once it had submitted its proposal. This clarification was sought by oral communications with state employees. Such informal oral communications are often mis-understood or mis-remembered and subject to later dispute. Unilateral communications between an offeror and the Commonwealth are unfair to other potential or actual offerors. Therefore, informal or oral communications with state employees outside of the process required by the RFP are not binding on the Commonwealth.

The Commonwealth procurement process must be fair and equitable to all bidders and offerors. Bidders and offerors must comply with the processes for asking questions or seeking clarification stated in the solicitation. Thoroughbred Consulting has not offered any evidence that the evaluation of its proposal on the RFP criteria was arbitrary or capricious. The presumption of correctness, therefore, applies. KRS 45A.280.

Accordingly, upon review of the record, the protest of Thoroughbred Consulting lacks merit. Further, the presumption of correctness in KRS 45A.280 applies and Thoroughbred Consulting 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



Robin Kinney
Executive Director
Office of Administrative Services

cc: KYTC, Div. of Purchases