



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

August 21, 2009

No. 09-12

William M. Pascucci, President
AMTEC
124 LaSalle Road
West Hartford, CT 06107

RE: Determination of Protest: RFP 750 0900001727.

Dear Mr. Pascucci:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of AMTEC relating to RFB 750 0900001727 ("RFP") for Arbitrage Assistance and Technical Assistance.

FACTUAL BACKGROUND

The Kentucky Finance and Administration Cabinet, Office of Administrative Services ("OAS") issued the RFP on March 17, 2009. The RFP sought proposals for a Personal Services Contract (KRS 45A.695 *et seq.*) for arbitrage and technical services required by the Office of Financial Management. RFP, II (Description Of Services Requested). Section IV of the RFP stated information and data required of each offeror:

Each response to this RFP must specifically include and address the following items. Failure to comply with the requirements of the RFP will result in the firm's response not being evaluated by the Evaluation Committee.

Submit six (6) copies of the proposal addressing the following items in the order indicated. The proposal must be accompanied by a cover letter or a sheet bearing the signature of the firm's authorized individual.

1. Previous Experience. Include the firm's experience in performing arbitrage calculations for similar universities or large governmental entities using bond financing. Please provide a contact name and phone number for each engagement.
2. Qualifications, Education and Expertise. Include resumes for all proposed personnel to be assigned to the project detailing professional education, experience with arbitrage calculations and prior university or government engagement experience. Describe any special assistance that staff can offer the State Universities and OFM. OFM reserves the right to be notified and have approval of any change in assigned personnel.
3. Location and Availability. Include the location of principal place of business and any branch offices, if applicable. Contact person(s) must be readily available to meet with the State Universities and OFM staff upon request and respond in a timely manner.
4. Pricing. The respondent must complete the attached Price Sheet and submit the Price Sheet in a separate, sealed envelope as part of the proposal.
5. Contact. Include the name and telephone number of the individual who is to be the principal contact with the State Universities and OFM.
6. Schedule. Specify that you can commence services within 30 days of the date of engagement and that personnel will be available to perform arbitrage calculations and deliver all reports and forms within the time frame established by the' bond indentures.
7. Payment for Services. Contractor must provide a statement acknowledging and accepting the fact that:

Re: Arbitrage: Payment, not to exceed the amount entered on the Pricing Schedule (Attachment C) will be acceptable, and disbursement will follow an evaluation of the service rendered and verification of invoice submitted by the contractor as service is provided. Maximum billable hours: 600

Re: Technical Assistance: Payment, not to exceed the amount entered on the Pricing Schedule (Attachment C) will be acceptable, and disbursement will be made quarterly upon verification of invoice submitted by the contractor. Maximum billable hours: 160

Each proposal was to be evaluated on a 100 point basis. RFP Section V (Relative Importance Of Selection Criteria). For the Technical score, 70 total points were available (Completeness of Submission - 5 points; Qualifications & Experience of Firm - 20 points; Qualifications, Education & Experience of Personnel - 25 points; Work Plan - 10 points; Location & Availability - 10 points). For the Price score, 30 points were available (Arbitrage Services - 20 points; Technical Assistance -10 points).

In an internal written determination and finding by the procurement officer dated April 30, 2009, it was stated that:

The Commonwealth of Kentucky, Finance and Administration Cabinet ("FAC") issued a Request for Proposal for Arbitrage Services and Technical Assistance (RFP 750 0900001727). Proposals were due March 31, 2009. Nine proposals were received in a timely manner from the following:

1. Amtec
2. BLX
3. Bond Resource Partners
4. Hawkins Delafield & Wood, LLP
5. Kutak Rock Arbitrage Consulting LLC
6. Peck, Shaffer & Williams, LLP
7. Pinnacle Arbitrage Compliance
8. Potter & Company, LLP
9. The PFM Group

The scoring team, which was composed of six team members (3 from the Commonwealth of Kentucky & 3 from State Universities). See attached score sheets in procurement file.

Upon review of the technical proposals, Kutak did not meet the threshold of 50 to continue onto the cost scoring. After discussions with Finance Legal department, Amtec bid was not considered because the cost sheet was altered, rendering this bid non-responsive. Upon review of the remaining cost proposals, it was the unanimous decision of the scoring team that the proposal from BLX was the advantageous to the Commonwealth.

Accordingly, the Commonwealth entered into contract negotiations with BLX to establish a personal service contract for the arbitrage services identified in RFP 750 0900001727.

On May 15, 2009, AMTEC was notified on this Determination and Finding. On May 18, 2009, AMTEC filed a written protest. In its protest, AMTEC argues that its proposal should not have been declared non-responsive since it was necessary to modify the cost sheet to reflect its pricing proposal. On May 22, 2009, OAS submitted a written response to the protest.

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. AMTEC submitted a proposal in response to the RFP. Therefore, AMTEC has standing to protest the award of the RFP.

A protest to an award of contract must be made within two (2) calendar weeks after the award. KRS 45A.285. Here, AMTEC was notified of the award on May 15, 2009. The protest was received on May 18, 2009. The protest was filed within two calendar weeks and is, accordingly, timely.

In its written protest, AMTEC argues that its proposal should not have been declared non-responsive since it was necessary to modify the cost sheet to reflect its pricing proposal.

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 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 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 protester 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:

KRS 45A.695(5) provides, in part:

Award shall be made 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* and the negotiation of fair and reasonable compensation. If compensation cannot be agreed upon with the best qualified offeror and if proposals were submitted by one (1) or more other offerors determined to be qualified, negotiations may be conducted with the other offeror or offerors in the order of their respective qualification ranking. In this case, the contract may be awarded to the next best ranked offeror for a fair and reasonable compensation. All determinations of the qualification rankings of offerors by the head of the contracting body or a designee of the officer based on evaluation factors set forth in the request for proposals shall be made in writing. Written documentation shall be maintained concerning the final results of negotiation with each vendor and reasoning as to why each vendor was chosen. (Emphasis added).

The applicable regulation, FAP 111-43-00 (b) (PERSONAL SERVICE CONTRACTS), provides, in part:

- b. *The agency shall review the proposals received and record a determination of the qualification rankings of the offerors based on the evaluation factors set forth in the RFP.* The determination shall be documented in the Bid Evaluation of the state's procurement system by the contracting agency. (Emphasis added).

The RFP provided a enumeration of data and information which each offeror was required to provide. RFP, Section IV. ("Each response to this RFP must specifically include and address the following items. Failure to comply with the requirements of the RFP will result in the firm's response not being evaluated by the Evaluation Committee.") In particular, "The respondent must complete the attached Price Sheet and submit the Price Sheet in a separate, sealed envelope as part of the proposal." RFP, Section IV (4).

Page 23 of the solicitation contained Attachment "C", the Pricing Schedule, which forms the basis for a cost evaluation of each bidder's proposal. Attachment "C" specifically requested each bidder to fill in the hourly rate they would charge for (a) Arbitrage Rebate Services and (b) Technical Assistance, but the Attachment in the Solicitation already had the total number of hours required by the Commonwealth filled in as a sum certain. In other words, bidders did not have the discretion or ability to alter or unilaterally change the total hours of work required by the Commonwealth as part of their response. Since AMTEC submitted a modified price sheet which set out different hourly numbers than the sum certain hourly numbers set by the Commonwealth and contained in the RFP, the agency could not evaluate its proposal in accordance with the evaluation criteria set for in the RFP. KRS 45A.695(5); FAP 111-43-00 (b). AMTEC has failed to demonstrate

that the agency's action was arbitrary, capricious, or contrary to law. See *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

AMTEC, further, has argued that its proposal was the most advantageous in terms of price. However, price consisted of only 30 of 100 points available. AMTEC has made no showing that it would have otherwise been awarded the contract based upon the other factors. AMTAC has not shown prejudice. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

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

Secretary,
Finance and Administration Cabinet



Jonathan Miller

cc: Bob Roder, Director,
Division of Administrative Support