Commonwealth of Kentucky
Finance and Administration Cabinet
Office of Administrative Services
Room 183, Capitol Annex
702 Capital Avenue
Frankfort, KY 40601
(502) 564-5781
Fax (502) 564-4279

Steven L. Beshear
Governor

Jonathan Miller
Secretary

Robin Fields Kinney
Executive Director

December 7, 2009

No. 09-26

Greg S. Utterback
Chief Development Officer
Satellite Tracking of People, LLC
1212 North Post Oak Road, Suite 100
Houston, TX 77055

RE: Determination of Protest: RFP 758 0900001647 (Home Incarceration Program – Electronic Monitoring).

Dear Mr. Utterback:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest to the award of RFP 758 0900001647 for Home Incarceration Program – Electronic Monitoring. Based on Determination 09-29 (attached), which is incorporated herein by reference, this protest is moot. 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 Finance Cabinet shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation

Robin Kinney

Robin Kinney
Executive Director
Office of Administrative Services

cc: Amy Monroe, OPS

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December 8, 2009

No. 09-29

Leo Carson
Vice President of Strategic Sales
G4S Justice Services, Inc.
2000 RiverEdge Parkway NW GL-100
Atlanta, GA 30328

RE: Determination of Protest: RFP 758 0900001647 (Home Incarceration Program – Electronic Monitoring).

Dear Mr. Carson:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest to the award of RFP 758 0900001647 for Home Incarceration Program – Electronic Monitoring (the "RFP"). In the protest you contend that the proposal of G4S Justice Services, Inc. ("G4S") was not properly considered. For the reasons stated herein, this protest is sustained.

FACTUAL BACKGROUND

The Finance Cabinet Office of Procurement Services ("OPS") issued the RFP on March 2, 2009, on behalf of the Kentucky Department of Corrections. The RFP consisted of two sections; (1) the Technical Proposal and (2) the Cost Proposal. 910 points were available for the Technical Proposal. RFP, Section 60. The Technical Proposal was scored according to eight specific categories. RFP Section 60.010. 360 points were available for the Cost Proposal. RFP, Section 70. The Price scoring was to be calculated as follows:

> **Price (360 Points)** - The bidder with the lowest Price receives the maximum score. The bidder with the next lowest Price receives points by dividing the lowest Price by the next lowest price and multiplying that percentage by the available points. For example, 360 points is allocated to the lowest Price criteria for this procurement,

> Bidder "A" bids $3.00 as the lowest bidder and receives the maximum 360 points ($3.00 / $3.00 = 1.00 x 360 = 360). Assume Bidder "B" is the next lowest bidder at $4.00, then "B" receives 270 points ($3.00/ $4.00) = 0.75 x 360 = 270). RFP, Section 70.010.

The three highest ranked vendors would be invited to give oral presentations. RFP, Section 80.020. The RFP closed on March 9, 2009. Seven vendors submitted proposals: Midwest Monitoring and Surveillance; BI, Inc.; G4S; Premier Integrity Solutions, Inc.; Leimac Contracting ("Leimac") ; Elmo Tech, Inc. ("Elmo Tech"); and Satellite Tracking of People LLC ("STOP LLC").

After the evaluation of the Cost Proposals, Elmo Tech was determined to have the lowest price ($2.08 for RF monitoring; $2.12 for Cellular Radio frequency; $1.25 for Voice Recognition; $5.45 for GPS Active; $4.25 for GPS Passive; and $4.45 for GPS Hybrid). Elmo Tech accordingly was awarded the total of 360 points. The other offerors were awarded points for their Cost Proposals scaled in comparison to Elmo Tech (Elmo Tech – 360 points; Leimac – 348.44 points; G4S – 270.24 points; Premier Integrity Solutions, Inc. – 247.15 points; STOP LLC – 243.73 points; BI, Inc. 228.57 points; and Midwest Monitoring and Surveillance – 225.79 points). The top three total scores after Technical Proposal and Cost Proposal scoring were: Elmo Tech, STOP LLC, and Leimac. After the oral presentations, Leimac was awarded the highest total score. OPS issued an intent to award to Leimac on August 24, 2009.

G4S submitted Open Records Request to the Finance Cabinet on August 25, 2009. G4S received a response on September 9, 2009. G4S submitted a second Open Records request on September 11, 2009.

By letter dated September 14, 2009 (received September 17, 2009), G4S filed a written protest with the Secretary of the Finance Cabinet. On October 5, 2009, Leimac submitted a written response to the protest. On October 30, 2009, OPS submitted a written response to the protest.

DETERMINATION

After a review of the solicitation, the solicitation responses, the official findings, the applicable statutes and regulations, and other relevant information, the Secretary of the Finance and Administration 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. KRS 45A.285. G4S was an actual offerior to the RFP so it has standing to protest the award.

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. In this case, the basis for G4S's protest was only apparent upon review of the official scoring. This material was received pursuant to an Open Records request on September 9th. The written protest was received on September 17th. The Secretary finds that the protest was filed within 2 calendar weeks of the date the protestor knew or should have known of the grounds for protest. This protest, accordingly, is timely.

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). The 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). In sum, 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 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).

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 examines whether the error was prejudicial to the protestor.

In its letter of protest, G4S asserts that both the Cost Proposals and the Technical Proposals were mistakenly evaluated. G4S raises numerous grounds of error. In specific, G4S argues:

b. The Commonwealth's calculations on the *"Cost'* tab of the *"Score Sheet'* reflects numerous mistakes in recording Cost Proposal prices:

i. The Committee recorded the wrong prices for Elmo Tech. Elmo Tech's Cost Proposal (attached) reflects an additional cost line item of "$1.65" for both *"Radio Frequency Installation/Billing"* and *"Global Positioning Installation/Billing."* Per the RFP *"Installation/Billing"* was to be included in all unit prices. The Commonwealth failed to add this Elmo Tech cost correctly and, properly calculated, this would *have* resulted in a *vendor* other than Elmo Tech to be selected as a *vendor* finalist for the final *evaluation* phase of *"Oral Presentations/Demonstrations"* thus *vendor* rankings were skewed by this error as well as the potential award.

ii. The Committee recorded G4S' price for *"Voice Recognition"* incorrectly as "$145.00" when in actuality it was "$1.45." Please refer to the G4S Cost Proposal Form (attached).

In its written response, OPS conceded:

> The Evaluation Committee made an error when calculating the pricing proposals.

A review of the OPS scoring sheets indicates that an only a partial price from Elmo Tech. was used to establish the base score of 360 which was then used to scale score the other offerors. The error was apparently caused by the fact that Elmo Tech divided its cost into two separate components: (1) monitoring and (2) installation and billing. Only the monitoring cost was used to calculate a base price. The pricing should have been calculated with $3.73 for RF monitoring (not $2.08); $5.85 for Cellular Radio frequency (not $2.12); $1.25 for Voice Recognition; $7.10 for GPS Active (not $5.45); $5.90 for GPS Passive (not $4.25); and $5.10 for GPS Hybrid (not $4.45). The determination of the scoring of the Cost Proposals was erroneously calculated. This constitutes an arbitrary and capricious determination. The protest of G4S has merit. Since the entire Cost Proposal scoring was in error, this establishes prejudice to all the offerors, including G4S.

Accordingly, upon review of the record, G4S has demonstrated an error in the procurement and prejudice. The protest, therefore, must be **SUSTAINED**. The Finance Cabinet Office of Procurement Services is directed to rescind the award to Leimac. Since the error potentially affected which offerors were "short listed" for oral presentations, OPS is directed to re-issue the RFP or to cancel the RFP and issue a new RFP or to implement some other action 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 Finance Cabinet shall be final and conclusive.

For the Secretary
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