



Commonwealth of Kentucky
Finance and Administration Cabinet
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January 5, 2010

No. 09-32

Mike Bennof
Executive Vice President
SXC Health Solutions, Inc.
2441 Warrenville Road, Suite 610
Lisle, IL 60532

RE: Determination of Protest: RFP 758 0800001361 (Medicaid Rx Benefits Administrator).

Dear Mr. Bennof:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of SXC Health Solutions, Inc. ("SXC") relating to RFP 758 0800001361 - Medicaid Rx Benefits Administrator (the "RFP").

FACTUAL BACKGROUND

The Finance Cabinet Office of Procurement Services ("OPS") issued the RFP on behalf of the Cabinet for Health & Family Services, Department for Medicaid Services, Pharmacy Benefits Administration on September 19, 2008, for a "Medicaid Rx Benefits Administrator." The RFP closed on September 30, 2008. Five offerors submitted proposals. After an initial evaluation of the Technical Proposals, two offerors, SXC and First Health Services Corporation ("First Health") were determined to have met the threshold requirement of 1,400 points required for the Technical Proposals. Accordingly, OPS invited both offerors to make oral presentations and to submit Best and Final Offers. First Health was evaluated with the final highest score; SXC was evaluated with the second highest score. A contract award was issued to First Health on August 17, 2009. SXC made an Open Records request to the Finance Cabinet and received documents in response on September 16, 2009.

By letter dated September 28, 2009 (and received September 29, 2009), SXC filed a protest to the award to First Health. SXC alleged: (1) First Health failed to provide required corporate information; (2) First Health's Technical Proposal was not consistent with RFP requirements; and (3) First Health's Cost Proposal presented a risk to the Commonwealth. On October 21, 2009, OPS provided a written response to the protest. 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. SXC submitted a proposal in response to the RFP. Therefore, SXC 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). For purposes of computing the fourteen (14) calendar day deadline for the submission of a protest, the following legal presumptions apply:

(a) For protests based upon alleged improprieties in a solicitation for bids or proposals which relate to the solicitation documents themselves, the facts giving rise to the protest shall be presumed to have been known to the protester on the date the solicitation, or a modification to it, was posted to the Commonwealth of Kentucky's eProcurement web site. 200 KAR 5:380 (1) (a).

(b) For protests based upon alleged improprieties in the award of a contract, the facts giving rise to the protest shall be presumed to have been known to the protester on the date the contract award was posted to the Commonwealth of Kentucky's eProcurement web site. 200 KAR 5:380 (1).

A legal presumption is a fact assumed from the specific circumstances. The legal presumption in this case may be overcome upon presentation of evidence showing that the facts giving rise to the protest were not and could not have been known to the protester on the date presumed by the regulation. 200 KAR 5:380 (1).

Here, the award was posted on the eProcurement website on August 17, 2009. The protest was received on September 29, 2009. If the presumptions were to apply, the protest would be untimely. SXC, however, received documents relating to the procurement requested pursuant to an Open Records request on September 16, 2009. This protest is based upon the information revealed in First Health's proposal. The protest was filed thirteen days after SXC's receipt of this information. The Secretary finds that SXC has overcome the presumption of 200 KAR 5:380(1)(a) since it could not have known of the alleged errors before receipt of First Health's proposal. The protest was filed within two calendar weeks and is, accordingly, timely.

In its written protest, SXC objects that (1) First Health failed to provide required corporate information; (2) First Health's Technical Proposal was not consistent with RFP requirements; and (3) First Health's Cost Proposal presented a risk to the Commonwealth.

This procurement was conducted under "competitive negotiation" procedures at KRS 45A.085. The hallmark of "competitive negotiation" is discretion. A Request for Proposals or RFP is utilized for "competitive negotiation" under KRS 45A.085. Under the "competitive negotiation" scheme, a contract may be awarded "to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Commonwealth, taking into consideration price and the evaluation factors set forth in the request for proposals." KRS 45A.085(6).

The award of a negotiated procurement is a discretionary act by an agency. See *Laboratory Corp. of America Holdings v. Rudolph*, 4 S.W.3d 68, 75 (Ky.App. 2005); *Hensley v. City of Russell*, 2006 WL 2988174 (the award of a public contract is a purely discretionary act). In addition, the Kentucky Model Procurement Code creates a presumption of correctness for agency decisions. KRS45A.280. The limits of "discretion" are not boundless, however; agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law will be overturned. See *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Therefore, 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).

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.

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

(1) First Health failed to provide required corporate information.

In its first ground of protest, SXC has alleged:

Upon information and belief, FHSC's proposal does not accurately represent merger and acquisition activities that it and its corporate parent were undertaking throughout the procurement process. The awardee's proposal thus does not contain all "relevant, factual and correct" information as required by the RFP. To the contrary, the awardee's response includes the statement:

First Health Services anticipates no change in ownership or control of the company.

FHSC Technical Proposal at 8.3-5. See Exhibit 2 (contains cited excerpts from FHSC's proposal).

In fact, on June 5, 2009, Coventry Healthcare (the awardee's parent organization) publicly announced the sale of FHSC to Magellan Health Services. See Exhibit 3. FHSC executed the Master Agreement on June 26, 2009, three weeks after public announcement of the sale. This partial execution of the agreement was signed by the Commonwealth on August 3, 2009 by Ms. Elizabeth Johnson and further executed on August 6, 2009 by Mr. Don Speer. Because such transactions require considerable time to develop, FHSC reasonably could anticipate a sale of the company prior to issuance of the announcement on June 5, 2009. Moreover, although more than 2 months passed between the announcement of the acquisition and execution of the Master Agreement by the Commonwealth, FHSC did not modify its proposal to address the matter as required. FHSC thus failed to update pertinent and clearly required information with new information regarding the entity with which the Commonwealth was contracting.

Because the sale was not disclosed to the Commonwealth as required, the Commonwealth could not reasonably assess the type of risks that the RFP contemplated when it required offerors to address anticipated ownership changes. Through their lack of mention of any anticipated ownership change, the evaluation scoring sheets confirm that the Commonwealth did not assess such risks for FHSC.

The RFP closed on September 30, 2008. The alleged sale of First Health occurred in June 2009, approximately nine months later. SXC has not alleged that First Health made any misrepresentation in its actual response to the RFP; rather, SXC contends that First Health should have disclosed the alleged sale after its RFP submission but before the date of contract. SXC states that First Health's sale did not allow the Commonwealth to properly assess the risk of contracting with First Health.

This contention is based upon "information and belief" and nowhere does SXC explain how an alleged sale of First Health altered the risk to the Commonwealth. The mere fact of a sale of a corporation does not itself prove that there was a material increase in risk. The offeror, First Health, remained responsible for the performance of its contractual duties.

SXC has failed to overcome the presumption of correctness. KRS 45A.280. Further, SXC has failed to show that the decision to contract with First Health was arbitrary, capricious, or contrary to law. For these reasons, this ground of protest is without merit.

(2) First Health's Technical Proposal was not consistent with RFP requirements.

For its second ground of protest, SXC contends:

Upon information and belief, under FHSC's proposed pooling initiative, in fact, the awardee can not (or will not) provide:

- 1) "annual opportunities for manufacturers to amend supplemental rebate agreements;"
- 2) The opportunity for DMS to have "final approval on all supplemental rebate agreements and amendments;"
- 3) "provide DMS with access to all contracts which have been negotiated in the State of Kentucky for supplemental rebates and related documentation;"
- 4) "coordinat(ion) of drug purchasing negotiations with drug manufacturers based upon other State Medicaid contracts and, potentially, other state - funded programs;" or
- 5) "propose a plan for securing and maintaining the supplemental rebate contracts and related confidential information in a format agreed to by DMS. DMS must approve confidentiality agreements."

FHSC's proposal does not address these RFP requirements as they affect multi-state pooling. For example, the FHSC proposal does not assure the Commonwealth that it will have "final approval on all supplemental rebate agreements and amendments" or a right to approve confidentiality agreements. As such, the proposal is noncompliant with the RFP. At a minimum, the awardee's scores should have been lower in light of the failure to address the relevant RFP requirements.

SXC makes the allegations in its second basis for protest "on information and belief." These allegations appear to be based upon speculation. SXC has failed to provide any evidence to support its claims. Therefore, SXC has failed to overcome the presumption of correctness. KRS 45A.280. Further, SXC has failed to show that the decision to contract with First Health was arbitrary, capricious, or contrary to law. For these reasons, this ground of protest is without merit.

(3) First Health's Cost Proposal presented a risk to the Commonwealth.

For its third basis of protest, SXC alleges:

Upon information and belief: the Commonwealth and FHSC have had previous contractual disputes regarding services to be considered within scope and the pricing around disputed services. In fact, FHSC's proposal identifies such a dispute. See FHSC Technical Proposal at 8.3-9. In evaluating the cost proposal, SXC contends that FHSC's apparent cost reduction (as compared to current contract with the Commonwealth) defies logic given the fact that this RFP required **additional** services beyond those of FHSC's current contract. At a minimum, this increased risk should have been assessed. FHSC's TennCare experience which was not disclosed in its proposal as required - illustrates the problems that can be expected when the awardee offers unrealistic pricing. By contrast, SXC proposed fair and reasonable pricing which took into account all services required by the RFP.

Once again, SXC makes the allegations "on information and belief." These allegations are based upon speculation. SXC has not explained and shown how the risk to the Commonwealth has increased. Accordingly, SXC has failed to overcome the presumption of correctness. KRS 45A.280. Further, SXC has failed to show that the decision to contract with First Health was arbitrary, capricious, or contrary to law. For these reasons, this ground of protest is without merit.

Accordingly, upon review of the record, the protest of SXC lacks merit. Further, the presumption of correctness in KRS 45A.280 applies and SXC 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: Amy Richardson, OPS