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Finance and Administration Cabinet  
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December 7, 2009

**No. 09-34**

Jim D. Hisle  
Director of Operations  
TheraCare Alliance  
13218 Tucker Lake Drive  
Louisville, KY 40299

RE: Determination of Protest: RFP 758 0900001711 (CS/ICF Occupational Therapy Services).

Dear Mr. Hisle:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of TheraCare Alliance ("TheraCare") relating to RFP 758 0900001711 for CS/ICF Occupational Therapy Services (the "RFP").

**FACTUAL BACKGROUND**

The Cabinet for Health and Family Services ("CHFS") initially issued the RFP on April 28, 2009. The RFP was modified twice to answer questions and to change the closing date. The RFP closed on May 15, 2009. The RFP required a two-part submission: a Technical Proposal and a Cost Proposal. The RFP was scored on a 200 point basis. The Technical Proposal was scored on a 100 point basis, which included 40 points for experience and qualifications, 40 points for past performance, and 20 points for location and availability. RFP, Section 5. The Price Proposal was scored on a 100 point basis with the lowest Price Proposal (the "baseline proposal") receiving 100 points and other Price Proposals receiving fewer points based upon the individual Price Proposal's relationship to the baseline proposal. RFP, Section 6. Two offerors submitted proposals: TheraCare and Guardian Healthcare Providers, Inc. ("Guardian").

TheraCare submitted the lowest Price Proposal and received 100 points. The higher Guardian Cost Proposal was awarded 89 points. The evaluation committee awarded TheraCare's Technical Proposal 67 points and Guardian's Technical Proposal 83 points. The cumulative scores were: TheraCare - 167 points and Guardian - 182 points.

A contract based on the RFP was awarded to Guardian on September 1, 2009. Pursuant to an Open Records request, TheraCare received the evaluation sheets on September 18, 2009.

TheraCare filed a written protest to the award with the Secretary of the Finance Cabinet ("Secretary") on October 1, 2009. TheraCare objects to a term in the RFP which allowed a Facility manager to refuse any candidate. TheraCare also contends that the scoring of four sections in its Technical Proposal was in error. By letter dated October 19, 2009, Guardian responded to the protest. On November 18, 2009, CHFS submitted 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 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. TheraCare submitted a proposal in response to the RFP. Therefore, TheraCare 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 September 1, 2009. The protest was received on October 1, 2009. If the presumptions were to apply, the protest would be untimely. CHFS, however, provided the evaluation sheets to TheraCare on September 18, 2009. This protest is based upon the scoring of TheraCare's Technical

Proposal as revealed by the evaluation sheets. The protest was filed fourteen days after TheraCare's receipt of this information. The Secretary finds that TheraCare has overcome the presumption of 200 KAR 5:380(1)(a) since it could not have known of the alleged scoring errors before receipt of the evaluation sheets. The protest was filed within two calendar weeks and is, accordingly, timely.

In its written protest, TheraCare objects to a term in the RFP which allowed a Facility Manager to refuse any candidate. TheraCare also contends that the scoring of four sections in its Technical Proposal was in error.

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).

Thus, 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:

1. The protest to the terms of the RFP.

The RFP terms were evident in the text of the solicitation when the RFP was issued. TheraCare submitted a proposal. 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. 4 C.F.R §21.2(a)(1); *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579, 583 (Ky. 2003) (federal statutes and decisions to be persuasive in the procurement context). TheraCare's protest to the contents of a solicitation has been waived by the submission of its proposal .

2. Protest to the scoring of "Experience and Qualifications" Section A.

TheraCare asserts there was a scoring error in this section and it should have been awarded 11 points instead of 10. CHFS concedes that it made a scoring error. This basis for protest has merit.

3. Protest to the scoring of "Experience and Qualifications" Section B

For its third ground of protest, TheraCare asserts:

We were only given 10 points for evidence which supports experience: Comments refer to us failing to supply EEO forms, however; according to section 4.06 "EEO requirement", it specifically states that the requirement only applies to contracts that exceed \$500,000. This current contract is less than \$250,000; therefore this was not applicable to us. In addition, comments state that we provided a "form" for verification of experience for our company and for our OT candidate. Our form contains the **exact required information specified** in the RFP (see pages 26, 31).

In response, CHFS contends:

The ten (10) points awarded were based on the evidence submitted which supports experience of:

1. The agency providing OT services
2. Proposed individuals assigned to provide OT services
3. Resume for all persons providing services

The Cabinet awards points, up to the maximum. The Cabinet does not start with the maximum points and deduct points from the maximum. The documentation presented by Theracare met the minimal requirements. Theracare proposed one individual with 17 years of experience and submitted a resume for that individual. Theracare submitted three (3) references that included the information detailed in section 4.15, number 3, minus required addresses. No additional information was presented as evidence, therefore meeting minimum requirements.

TheraCare must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the 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 CHFS 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).

The Secretary finds that there was a reasoned basis for CHFS's evaluation in this case. TheraCare has failed to show that the evaluation was irrational. Accordingly, this basis for protest is without merit.

4. Protest to the scoring of "Past Performance" Section A.

For its fourth ground of protest, TheraCare argues:

We were only given 7 points for submitting past performance records for OT in MR/DD setting. Please review the past performance record provided for us by the Medical Director at CS/ICF/MR, Dr. John Kiesel, who is the direct supervisor of the contract therapy positions that we have provided for over 14 years at CS-ICF/MR. Why were points deducted? In addition, we provided the form references for our company and our candidate that contain the exact information require in the RFP and serve as a past performance records.

In response, CHFS states:

The reviewers awarded seven (7) points based upon Theracare's response to these criteria. Theracare submitted a Memorandum from John L. Kiesel, MD (Central State Medical Director/Director of Clinical Services) that provided a positive reference for the company, and provided written statements of past performance records: Points awarded were largely based on the memorandum from Dr. Kiesel as points were based on *evidence* which supports positive past performance. Additional statements, such as creating and maintaining the OT Department policies and procedures, were responsive but did not include supporting evidence. Theracare's response simply met minimal requirements and did not contain backup documentation, nor written evidence to support these statements.

As noted above, the protester must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protester's mere disagreement with the

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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).

Here, the Secretary finds that there was a reasoned basis for CHFS's evaluation. TheraCare has failed to show that the evaluation was irrational. Accordingly, this basis for protest is without merit.

5. Protest to the scoring of "Past Performance" Section B.

For its fifth ground of protest, TheraCare asserts:

Page (2), section B. of the scoring of the bid, we were only given 5 points, and again questioned our utilization of the "form" to verify reference; however, it contains the **exact required information specified** in the RFP.

CHFS responds:

The reviewers awarded five (5) points to Theracare based upon documentation received in response to the evaluation criteria. Theracare submitted one reference for Laurie Mulroony, and three for Theracare Alliance on a "form" that did not contain the exact information required in the RFP. No addresses were included with the references for Theracare Alliance. This "form" was utilized as back up documentation for both references and evidence of past performance. The documentation submitted by Theracare Alliance was responsive but again only met the minimal requirements.

It is important to note that Theracare Alliance included a sample copy of a "form" titled "Theracare Alliance LLC Provider References" with their letter of protest. This is not the exact form utilized when submitting their references in response to RFP. The form submitted with vendor response was titled "Theracare Alliance Reference" and did not include a line for provider address. (Please see attachments for clarification.) Submission of this document in error again demonstrates Theracare's lack of attention to detail which ultimately resulted in loss of this contract award.

Once again, 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).

The Secretary finds that there was a reasoned basis for CHFS's evaluation in this case. TheraCare has failed to show that the evaluation was irrational. Accordingly, this basis for protest is without merit.

TheraCare was evaluated with a total score of 167 points. Guardian was awarded 182 points. TheraCare has established that it was entitled to an evaluated score one point higher, or 168. TheraCare has not questioned the evaluation of Guardian's score. TheraCare, accordingly, has failed to establish any prejudice in the evaluation. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996).

Accordingly, upon review of the record, the protest of TheraCare has been waived or lacks merit. TheraCare has not established prejudice. Further, the presumption of correctness in KRS 45A.280 applies and TheraCare 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: Joan Graham, CHFS  
Guardian Healthcare Providers, Inc.