



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

January 15, 2010

**No. 09-37**

Daniel J. Adams, P.E.  
Chief Executive Officer  
Thermal Equipment Sales, Inc.  
680 Bizzell Drive  
Lexington, KY 40510

RE: Determination of Protest: RFP 17-10 (New Science Bldg., ECU, Custom Air Handling System).

Dear Mr. Adams:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Thermal Equipment Sales, Inc. ("TES") to the award of RFP 17-10 - New Science Bldg., ECU, Custom Air Handling System (the "RFP"). In the protest you contend that the proposal of Trane was non-responsive and that the proposals were improperly evaluated. For the reasons stated herein, this protest is denied.

#### **FACTUAL BACKGROUND**

The Division of Engineering and Contract Administration, Department for Facilities and Support Services ("DECA") issued the RFP on August 17, 2009. The RFP closed on August 24, 2009. On October 22, 2009, DECA awarded Trane a contract based on the RFP.

By letter dated October 31, 2009 (and filed on November 3, 2009), Thermal Equipment Sales, Inc. ("TES") protested the award to Trane. In its written protest, TES contends (1) that the proposal of Trane was non-responsive because Trane added a notation "See Clarification" to two items on the "Air Handler And Energy Recovery System Evaluation Form" and (2) the proposals were evaluated in an inconsistent manner for proposal submissions concerning "Number of jobs manufactured with similar size and number of fans." On November 24, 2009, counsel for Trane submitted a written response. On December 10, 2009, DECA provided 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 (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. KRS 45A.285. TES was an actual offeror to the RFP so TES 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 award was announced on October 22, 2009. The protest was filed on November 3, 2009, within two (2) calendar weeks. The protest, accordingly, is timely.

This procurement was conducted under 45A.085 as a "competitive negotiation." 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 competitive negotiation process is intended to offer the buying agency more flexibility in drafting the content of the solicitation document and more flexibility in evaluating the resulting offerors. See, e.g., *Matter of: A & C Building and Industrial Maintenance Corporation* 88-1 CPD ¶451 (Comp.Gen. 1988). As such, a response to an RFP is not initially evaluated in terms of "responsiveness" since subsequent negotiations allow an offeror to revise its proposal to comply with RFP requirements. See *Matter of: The EC Corporation*, 90-1 CPD ¶23 (Comp.Gen. 1990).

While competitive negotiation does not strictly utilize the concept of "responsiveness," an RFP proposal is subject to an analogous but more flexible concept of "RFP conformance." Unlike "responsiveness" which is determined at bid opening, "RFP conformance" is measured at award. At that time, the proposal must conform to the mandatory requirements of the solicitation or it will not be deemed acceptable. *Mangi Environmental Group, Inc. v. United States*, 47 Fed.Cl. 10, 16 (Fed.Cl. 2000); *Protest of Telos Field Engineering*, 92-1 BCA ¶24,676 (GSBCA 1992).

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). 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). Yet, agency decisions are entitled to a presumption of correctness. KRS 45A.280.

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 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).

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.

TES has asserted two separate grounds of protest:

1. Trane's Proposal Was Non-Responsive.

In its letter of protest, TES states:

First, there is a well established precedent that clarifications to bid documents on the form of proposal are grounds for that proposal to be immediately deemed unresponsive. The form of proposal clearly states on item #2, page 9 of 10, that "no exceptions can be taken to the following." The Trane Proposal, attached RFP page 9 of 10, includes the text "see clarification" with respect to its ability to meet the sound performance. A closer review of the Trane proposal under open records reveals that in fact it does **not** meet the sound performance required. The 'clarification' is in fact an exception. Factually the Trane proposal fails to meet the sound performance as required by the bid documents and is therefore invalid and nonresponsive.

A bid on sealed bid procurement (an "RFB") conducted under KRS 45A.080 is initially evaluated for responsiveness. See *Bartomeli Co., Inc.*, Comp Gen Dec B-246060, 92-1 CPD 170 (Comp. Gen. Feb. 10, 1992). A bid is responsive if the bidder agrees to all of the material terms and conditions of the RFB. KRS 45A.070(7). This procurement, however, was a competitive negotiation (an "RFP") under KRS 45A.085. Accordingly, DECA issued an RFP seeking proposals. A proposal to an RFP is not evaluated for responsiveness. See *Matter of: The EC Corporation*, 90-1 CPD ¶23 (Comp.Gen. 1990). Rather, a proposal must meet the analogous standard of "RFP conformance" prior to award. *Id.* At award, a proposal must be in material conformance with the RFP. *Mangi Environmental Group, Inc. v. United States*, 47 Fed.Cl. 10, 16 (Fed.Cl. 2000).

In this case, the issue is whether the two Trane "clarifications" constitute material variations to the requirements of the RFP.

The RFP contained an "Air Handler And Energy Recovery System Evaluation Form." (RFP, p. 9 of 10). The form stated that "no exceptions can be taken" top the specified conditions. To two of these conditions (2.b. Acoustic levels at discharge of the unit and radiated through the cabinet and 2.e Electrical service single point connection provided for each fan motor and one single point connection for all of the lights & GFIs), Trane agreed to the requirements but added "See clarification."

Upon review of the Trane proposal, it is not clear whether these two clarifications are material. The question requires a technical understanding of DECA's requirements. Such an analysis is best performed by the agency. TES has not explained how Trane's clarifications were material. In this protest, TES has the burden of proof. The determination by DECA that Trane's proposal was acceptable is entitled to a presumption of correctness. KRS 45A.280. This presumption has not been overcome. Accordingly, this basis for protest is without merit.

2. The Proposals Were Evaluated In An Inconsistent Manner.

For its second ground of protest, TES asserts:

Secondly, A [sic] careful review of the scoring by Tony Yates and Marc Avery for evaluated conditions (f) and (g) will reveal numerically inconsistent scores for "Number of jobs manufactured with similar size and number of fans". Our proposal lists 611 projects including units with a fan array of 10 or more fans. The Trane proposal included references to only 8 projects of a similar size and quantity of fans. Inexplicably, our proposal was scored equal to(Yates), or lower than(Avery) Trane for that criteria. Our manufacturer developed this Fan Wall (array) technology 8 years ago and patented it, building hundreds of such projects before that patent was partially opened up earlier this year. (Huntair, a division of CES vs. ClimateCraft, US Federal Court, Chicago, March 2009) It is implausible that Trane could have built a substantial number of projects since March of this year. A more careful inspection of their bid will confirm that fact. There is a misleading statement equating projects with twin fans as equivalent to a vertical fan array containing 8 direct drive supply fans, which is a gross technical exaggeration.

Further, comparing how Criteria (g) was scored, vs. how criteria (f) was scored will confirm an obvious inconsistency. Specifically, the Trane proposal received 10 points for this criteria from Mr. Avery, while our proposal received only 7. Given that Trane listed 33 years with their representative, while we offered only 22, that seems to be a reasonable score. The Cabinet's failure to apply the same reasoning to criteria (f) demonstrates that mistakes were made in the application of the evaluation process.

DECA's response to this protest issue was:

Trane Company unquestionably has built Air Handling Units (AHUs) for many years and has built many units. Probably more than most of the other vendors combined. (The same can be said for The York Company - the scoring for this line item is consistent between York and Trane.) Giving this vendor the maximum score for number of jobs (units built and in service) is justified given their history. Other vendors are given somewhat lower scores, again based on their history; as we know it.

In this case, TES attacks the agency's determination concerning scoring. An agency's determination is reviewed under the "arbitrary, capricious, or contrary to law" standard. As noted above, 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 agency has demonstrated a reasoned basis for its decision. Further, the presumption of correctness applies and TES has not provided sufficient evidence to overcome that presumption. Accordingly, this basis for protest is without merit.

Accordingly, upon review of the record, TES has not demonstrated an error in the procurement and has not demonstrated prejudice. The protest, therefore, 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 Finance Cabinet shall be final and conclusive.

For the Secretary  
Finance and Administration Cabinet  
By Designation



Robin Kinney  
Executive Director  
Office of Administrative Services

cc: Amanda Greer, DECA  
Paul Gannoe, DECA  
James U. Smith, III, Smith & Smith