Commonwealth of Kentucky
Finance and Administration Cabinet
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April 2, 2010

No. 10-06

William E. Smithwick
President & CEO
Sunrise Children's Services
300 Hope Street
P.O. Box 1429
Mt. Washington, KY 40047-1429

RE: Determination of Protest: RFP 736 1000000010 (Intensive In-Home Grant/Eastern Mountain Region).

Dear Mr. Smithwick:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Sunrise Children's Services ("Sunrise") relating to RFP 736 1000000010 for Intensive In-Home Grant/Eastern Mountain Region (the "RFP"). For the reasons stated herein, this protest is denied.

FACTUAL BACKGROUND

The Cabinet for Health and Family Services ("CHFS") issued the RFP on September 10, 2009. According to the RFP:

> It is the intent of the Cabinet for Health and Family Services, Department for Community Based Services (DCBS) to issue an RFP for the provision of intensive and comprehensive home-based services that will be utilized to either divert youth (age 5 and enrolled in school up to age 17) from an out-of-home care (OOHC) placement or reunify youth currently in out-of-home care with their family. The youth to be served have either been committed to DCBS and placed in OOHC or are at risk of commitment and placement outside the home. Through these in-home services, children will safely remain in or safely return to their homes, without additional abuse or neglect. Services are to be provided in the following

> five (5) Service Regions: Eastern Mountain, Northeastern, Cumberland, Two Rivers and the Lakes.
> Intensive In-Home Program services are to maintain children safely in their home, to prevent unnecessary placement and to facilitate the safe and timely return home for a child in placement. The services may be provided directly by the successful vendor and/or through appropriate community resources. The expected outcome for this project is that a minimum of 75% of youth served will remain safely at home with their family one year post-termination of intensive in-home services.

RFP, Section 1.00. The resulting contract "scope of work" was generally described as follows:

> The Cabinet for Health and Family Services, Department for Community Based Services has over seven thousand (7,000) children in Out-of-Home Care throughout Kentucky. The removal of children from their home due to family or caregiver abuse or neglect is disruptive and traumatic. DCBS recognizes the need for valuable assessment tools, intervention strategies, services and supports to assist families and children to meet the goal of remaining in the home. DCBS expects the successful respondent to work with local DCBS staff to assess the referred families and to design flexible family-focused service plans specifically to address keeping the child in their home, or to return the child to their home with those services and supports designed to provide a safe and stable environment.

RFP, Section 2.00. In the detailed "scope of work," the RFP laid out numerous vendor responsibilities. RFP, Section 2.04. Among these responsibilities, the "scope of work" included:

> Maintain an office in the Service Area where services are provided.

RFP, Section 2.04(5).

The RFP was to be scored based on: (1) a technical evaluation and (2) a cost proposal. RFP Section 5 (Technical Proposal) and Section 6 (Cost Proposal). The Technical Proposal scoring criteria were stated in RFP Section 5.01. Specifically, each proposer was required to describe "your agency's planned presence in the area for which you are bidding." RFP, Section 5.01(3).

The RFP closed on September 16, 2009. Sunrise submitted a proposal. KVC Behavioral HealthCare Kentucky, Inc. d.b.a. KVC/Croney and Clark was awarded the contract on January 8, 2010.

Sunrise filed a written protest to the award with the Secretary of the Finance Cabinet ("Secretary") on January 22, 2010. Sunrise objected to the award because the awarded vendor did not, at the time of proposal, have an office in the Eastern Mountain Service Region. By letter dated January 27, 2010, KVC Behavioral

HealthCare Kentucky, Inc. d.b.a. KVC/Croney and Clark responded to the protest. On March 9, 2010, CHFS 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 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. Sunrise submitted a proposal in response to the RFP. Therefore, Sunrise 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). Here, the award was made on January 8, 2010. Sunrise filed its written protest on January 22, 2010. The protest was filed within two calendar weeks and is, accordingly, timely.

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 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:

Sunrise protests the award because KVC Behavioral HealthCare Kentucky, Inc. d.b.a. KVC/Croney and Clark did not, at the time of proposal, have an office in the Eastern Mountain Service Region. Thus, Sunrise appears to argue that the awarded proposal was not "responsive" to the RFP. A competitive sealed bid is "responsive" if it conforms in all material respects to the invitation for bids. KRS 45A.070(7). However, a proposal to a RFP is not evaluated in terms of responsiveness. *Compare* KRS 45A.080 (sealed bid contract award to the responsive and responsible bidder which offers "best value") *with* KRS 45A.695(5) (PSC contract award to the "best qualified of all offerors based on the evaluation factors set forth in the request for proposals").

Here, the RFP evaluation factors included "your agency's ***planned presence*** in the area for which you are bidding." RFP, Section 5.01(3) (emphasis added). Thus, this evaluation factor allowed a proposer to be evaluated on planned offices. Moreover, the scope of work detailed in the RFP described the terms of the contract which were to govern upon contract award. Accordingly, the awardee need not have the required offices at the time a proposal was submitted. Sunrise has not alleged that the evaluation process itself was arbitrary, capricious, or contrary to law. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). This basis of protest is without merit.

In addition, Sunrise has not demonstrated prejudice. *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, upon review of the record, the protest of Sunrise lacks merit. Sunrise also has not established prejudice. Further, the presumption of correctness in KRS 45A.280 applies and Sunrise 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 by BJ

Robin Kinney
Executive Director
Office of Administrative Services

cc: Joan Graham, CHFS
Elizabeth L. Croney, KVC/Croney and Clark