

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-001678-MR

SOFTWARE TECHNOLOGY, INC.

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 06-CI-00898

JOHN FARRIS (IN HIS OFFICIAL  
CAPACITY AS SECRETARY OF THE  
KENTUCKY FINANCE & ADMINISTRATIVE  
CABINET); KAY KENNEDY; AND  
INFINITE CAMPUS, INC.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: MOORE AND WINE, JUDGES; HENRY, SENIOR JUDGE.

MOORE, JUDGE: This matter originated from the award of contract for a Student Identification System (SIS), which is a computerized system to track student records for the 174 public school districts in Kentucky. The SIS was procured by the Commonwealth of Kentucky, Finance and Administrative Cabinet's Office of

Material and Procurement Systems (Cabinet), on the behalf of the Kentucky Department of Education (KDE), under the Kentucky Model Procurement Code (KMPC) pursuant to Kentucky Revised Statute (KRS) 45A.085.

Prior to the procurement that is the subject of this appeal, Software Technology, Inc. (STI) had been the provider of the SIS for the KDE since 1999. A Request for Proposals (the first RFP) for the SIS was issued, which was based on a server-based computer technology. STI submitted a proposal in response to the RFP.

The evaluation of the proposals was to be completed as follows: (1) a technical evaluation; (2) a cost evaluation; and (3) an oral presentation, at the discretion of the Cabinet. The technical evaluation was completed and under the consensus method that was used by the group of scorers, STI scored the highest. Prior to the additional evaluations, the first RFP was cancelled. The record supports that the responses to the first RFP were low in quantity and quality and that the KDE learned that the technology had advanced to a web-based, rather than server-based, system. Evidence in the record also supports that the web-based system would result in monetary savings to the Commonwealth.

A second RFP was issued, which specifically required a web-based system, rather than the server-based system. STI again presented a proposal, as did other vendors including Infinite Campus, Inc. The full evaluation took place under consensus scoring, and Infinite Campus was awarded the bid.

STI contends that input from Jefferson County Public Schools (JCPS) into the procurement process resulted in the cancellation of the first RFP and the award to Infinite Campus of the contract under the second RFP in violation of the KMPC. According to STI there was a “secret unlawful deal” made between the KDE and the JCPS that prevented STI from being awarded the contract. In essence, STI maintains that JCPS blackballed it from receiving the contract and that KDE’s allowance of JCPS’s “unfettered discretion” over the process violated the KMPC and gave arbitrary authority to JCPS over the procurement process.

Pursuant to the KMPC, STI filed bid protests with the Cabinet regarding the cancellation of the first RFP and then the award to Infinite Campus. Both of the protests were denied.

STI filed a complaint in Franklin Circuit Court challenging the cancellation of the first RFP and the SIS procurement process. Extensive discovery was taken and thereafter the circuit court, in granting summary judgment to the appellees, noted that the primary issue before it was “whether JCPS’s role in the evaluation process constituted an arbitrary exercise of power by the agency.” Finding that “STI has made no showing, after extensive pretrial discovery, of any . . . improper or illegal influences on the purchasing decisions of the Cabinet and KDE” and that the “allegation of nefarious conspiracies and clandestine bid-rigging are unsupported by the record,” the court granted summary judgment. STI appealed.

Turning to our standard of review, we have researched numerous cases, each recognizing that appellate review of an award or decision under the KMPC is limited to whether the award or decision was arbitrary and capricious or contrary to law. *See e.g., Commonwealth v. Yamaha Motor Mfg. Corp.*, 237 S.W.3d 203, 206 (Ky. 2007); *Laboratory Corporation of America Holdings v. Rudolph*, 184 S.W.3d 68, 73 (Ky. 2005), *rehearing denied* (2006); *Pendleton Brothers Vending, Inc. v. Commonwealth, Finance and Admin. Cabinet*, 758 S.W.2d 24, 25 (Ky. 1988). “[A]bsent fraud or collusion, the courts will not interfere with power to accept or reject bids by a governmental agency.” *Ohio River Conversions, Inc. v. City of Owensboro*, 663 S.W.2d 759, 761 (Ky. App. 1984); *see also, Pendleton Bros. Vending*, 758 S.W.2d at 30; KRS 45A.280. We are required by statute and binding case law to

take it as a given that the presumption is [that governmental] officials are honest, have performed with integrity, and have carried out their statutory duties to the best of their ability as required by law. Indeed, the statute provides a “presumption of correctness,” KRS 45A.280. . . .

*Pendleton Bros. Vending*, 758 S.W.2d at 30. Of course, this presumption is not conclusive. *Id.* But the statute and case law make clear that to invalidate the procurement process, the aggrieved bidder must present evidence of fraud or collusion such that the award of the contract is not factually supported. In reviewing cases under the KMPC, “it must be kept in mind that its primary

function is to benefit the citizens, as is the real purpose of government itself and the laws pertinent thereto.” *Ohio River Conversion*, 663 S.W.2d at 760.

As STI did in the circuit court, STI’s brief before this Court is filled with assertions of secret dealings, secret agreements and a plot by JCPS to derail it from being awarded the SIS contract. Basically, STI argues that the procurement process was a sham to give JCPS what it wanted, which was not the product or services offered by STI. The appellees respond with numerous arguments going to the merits of STI’s claims of violation of the KMPC, as well as arguments as to whether STI has standing to bring this cause of action.

We have reviewed the circuit court’s well-reasoned opinion and agree with it. After extensive discovery, STI failed to produce evidence of fraud or collusion to show that the decision of the appellees was arbitrary or capricious, despite STI’s assertions to the contrary.

We turn first to the issue of standing and conclude that based on the allegations in its complaint, STI had standing to bring this cause of action. From any vantage point, it is clear that STI realizes that to have standing, it needed to allege fraud or collusion in its complaint. Certainly its complaint so alleges, and its brief is filled with allegations of backroom deals and secret meetings. However, when the actions it relies on are reviewed after extensive discovery, in context of the KMPC, and under the proper standard of review giving proper deference to the agency’s decision, we agree with the trial court that STI’s allegations fall flat.

STI is obviously dissatisfied that the first RFP was cancelled after the first of three rounds of scoring. When the first round of scoring was completed, it had the highest score. Reviewing the reasons given by the appellees for cancelling the first RFP under the standard by which we are bound -- both by statute and precedent -- we find no error in this decision.

Pursuant to KRS 45A.105:

An invitation for bids, a request for proposals, or other solicitation may be canceled, or all bids or proposals may be rejected, if it is determined in writing that such action is taken in the best interest of the Commonwealth and approved by the purchasing officer.

The reasons given by the Cabinet, which are supported in the record, include that the bids it received from the first RFP were of low quality and quantity; only five proposals were submitted in response to the RFP. The first RFP was also based on a server-based computer system. After it put out the first RFP, the Cabinet learned that it was better to implement a web-based SIS system, which it believed to be state of the art. Had it stayed with the first RFP, the Cabinet would have been bound to buy a service that it no longer believed was the best. This certainly would not be in the best interest of the Commonwealth. Rather, the new RFP sought a “web-based system with a centralized enterprise database, without the need to install client software” and a “design consistent with current industry best practices.” Although STI argues that the first RFP was cancelled to exclude it, we cannot say that the Cabinet’s reasons to cancel it was not “in the best

interest of the Commonwealth” or that the decision was arbitrary or a product of fraud or collusion.

Like the circuit court, we are not troubled by the input of the JCPS in the process. Nothing in the statute or case law leads us to conclude that it was arbitrary for the Cabinet to receive input from the largest consumer of the SIS services. Certainly it must be difficult to buy technological services, or any services or products for that matter, meant to function statewide and that will serve the needs of all school districts from the very small ones to larger ones. To the contrary, it would appear to be that the Cabinet is being responsive to the needs of the consumer, in this case the school systems, to take into account the input from the largest district. Moreover, although STI claims that JCPS “blackballed it,” the evidence in the record includes that it was not STI as a company to which JCPS objected. Rather, it was the server-based system STI had used in the past, which caused many problems in the JCPS system, including losing thousands of student records. Accordingly, we do not find the cancellation of the first RFP to be in violation of the KMPC and agree with the circuit court that “the Cabinet has shown a valid public policy reason for the cancellation, regardless of allegations of secret plans or bias against STI . . . .”

STI also claims that allowing input from JCPS into the formation of the second RFP was in violation of the KMPC. Like the circuit court, we disagree. Input from a consumer of the procurement of goods or services under the KMPC alone is not akin to fraud or collusion and does not on its face amount to capricious

or arbitrary conduct on behalf of the Cabinet. Certainly if legitimate reasons did not support the involvement of a consumer and evidence of fraud or collusion existed, the outcome might be otherwise. Here, there are only unfounded allegations of fraud in the involvement of individuals from JCPS. For the reasons cited above, we find no violation of the KMPC based on this allegation.

Regarding the selection of Infinite Campus under the second RFP, the primary argument presented by STI is that this was a continuation of the violation occurring under the cancellation of the first RFP. It does not present evidence that the award to Infinite Campus was not correct. Rather, STI argues that the first RFP should not have been canceled and that JCPS should not have had input into the procurement process. We find neither argument to have merit for many of the same reasons articulated above including that STI has not made a showing of fraud or collusion in the cancellation of the first RFP or that the cancellation was a result of arbitrary or capricious conduct by the Cabinet. Also, like the circuit court and for the reasons stated *supra*, we do not find that input from JCPS into the second RFP resulted in an arbitrary or capricious procurement process. And while STI may challenge how Infinite Campus performed during the scoring process, it does not present evidence to rebut the presumption in KRS 45A.280. This was STI's burden, and it has failed to produce evidence to overcome the presumption that the award of the contract to Infinite Campus was correct such that we should now question the Cabinet's decision.



Additionally, STI has not shown that it would have been awarded the contract under the second RFP. This is apparently why STI so sternly fights the cancellation of the first RFP. “[A] notice inviting bids does not constitute an offer but merely a solicitation of offers, which does not impose any contractual obligations.” *Ohio River Conversions*, 663 S.W.2d at 761 (citing 72 C.J.S. Supplement *Public Contracts* §11 (1975); *Fosson v. Fiscal Court of Boyd County*, 369 S.W.2d 108 (Ky. 1963)). Finding no violation with the cancellation of the first RFP and considering STI’s failure to overcome the presumption of correctness, we discern no violation of KMPC that would grant STI any relief.

Having found that the Cabinet did not act arbitrarily or capriciously or with fraud and that it did not violate the KMPC in the cancellation of the first RFP, the development of the second RFP or the award to Infinite Campus of the contract under the second RFP, we decline to address other issues raised by STI because they are moot. And, there being no violation of the KMPC, STI’s claims against Kay Kennedy are also moot.

For the reasons as stated, we affirm the judgment entered by the Franklin Circuit Court.

ALL CONCUR.

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