



Commonwealth of Kentucky
Finance and Administration Cabinet
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February 8, 2008

No. 08-03

Doyle H. Caffee, Jr.
President
Sweep All, Inc.
P.O. Box 436051
Louisville, KY 40253

RE: Determination of Protest: RFB 605 0700002117.

Dear Mr. Caffee:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest to the award of a contract based upon the above-referenced solicitation. In the protest you contend that (1) the awarded vendor failed to properly complete the bid form and (2) the ambiguity in the Solicitation concerning delivery of services should not have been removed after bid opening. For the reasons stated herein, this protest is sustained; the Kentucky Transportation Cabinet, Division of Purchases is directed to rescind the current award and to re-bid a revised Solicitation.

FACTUAL BACKGROUND

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued RFB 605 0700002117 (the "RFB") on October 16, 2007 for Street Sweeping Services. The RFB was to be evaluated as follows: 90 points for price; 10 points for delivery. The RFB closed on October 23, 2007. Sweeping Corporation of America, Inc. ("Sweeping Corp.") and Sweep All, Inc (Sweep All") submitted bids. At the bid opening, the bids were publicly read. It appeared that Sweeping Corp. had not provided a response time as required by the RFB. In fact, Sweeping Corp. had provided a response time in an accompanying letter. After bid opening, Sweeping Corp. confirmed in an e-mail that it intended to meet the guaranteed response time. It responded affirmatively. Initially, KYTC intended to award the contract to Sweep All. KYTC issued a Determination and Finding which observed that there were conflicting provisions with respect to delivery and awarded no points for delivery. Sweeping Corp. had the highest number of points on price and was awarded the contract on November 13, 2007. Sweep All filed a protest which was received on November 26, 2007. KYTC provided a written response to the protest on December 4, 2007. Sweeping Corp. provided a written response on January 10, 2008.

DETERMINATION

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 and Administration Cabinet ("Secretary"). KRS 45A.285. Sweep All was an actual bidder to the RFB so it 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. Here, the award was made on November 13, 2007; the protest was received on November 26, 2007. The protest was filed within fourteen (14) days after the contract award and, therefore, is timely.

Sweep All contends that (1) the awarded vendor failed to properly complete the bid form and (2) the ambiguity in the Solicitation concerning delivery of services should not have been removed after bid opening.

After a review of the solicitation of RFB, the applicable statutes, and other relevant information, the Secretary finds and determines as follows:

1. The awarded vendor failed to properly complete the bid form.

One of the key factors distinguishing sealed bidding and negotiated acquisition is the requirement for the public opening of all bids at the time and place stated in the Request for Bids. *Compare* 200 KAR 5:306(2) and KRS 17.080(2) (Competitive Sealed Bidding) *with* 200 KAR 5:307 (Competitive Negotiation). The purpose of the public bid opening requirement is to protect the public and the interest of the bidders against fraud, favoritism or partiality in the letting of contracts, and to enable competing bidders to verify whether other bids are responsive. *Bartomeli Co., Inc.*, Comp Gen Dec B-246060, 92-1 CPD 170 (Comp. Gen. Feb. 10, 1992). The General Accounting Office has observed: "When bids are not so opened, there is a serious question as to the propriety of the transaction, and ordinarily all bids should be rejected and the matter readvertised." *Id.* In this case, KRS 17.080(2) required bids to be opened publicly. In this case, there appears to be some irregularity in the process. The bid forms are read; but attachments are not. The attachments then may or may not be considered.

KYTC itself appears to have been confused about the process. Initially, KYTC ignored Sweeping Corp.'s attachment and was prepared to award Sweep All the contract. Then, after RFB provisions were deemed to be conflicting, KYTC considered the attachment, and Sweeping Corp. was awarded the contract. Sweeping Corp.'s "confirmation" is troubling in this context. If the attachments were considered, there was no ambiguity requiring confirmation. 200 KAR 5:306(3). Rather, Sweeping Corp. had the opportunity either to confirm or to deny its bid. Upon reviewing the entire context, it appears the bid opening process was confusing and could create the appearance of partiality. Therefore, the protest on this ground is sustained.

2. The ambiguity in the Solicitation concerning delivery of services should not have been removed after bid opening.

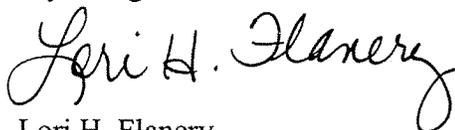
The RFB had the following evaluation scheme: price 90 points; delivery 10 points. RFB, page 4 Of 34. According the Determination and Finding, the response time provisions were found to be in conflict and *no* points were awarded for delivery. However, "it is a well-settled rule that the solicitation should inform all offerors of the basis for evaluation of proposals and the evaluation must, in fact, be based on the scheme set forth in the solicitation. *Human Resources Research Organization*, B-203302, 82-2 CPD P31 (Comp. Gen. July 8, 1982) (considering competitive negotiation, but the principle is even more applicable to competitive sealed bidding). If, after bid opening, the RFB were found to contain conflicting provisions, the RFB should have been cancelled. Therefore, the protest on this ground is sustained.

Accordingly, upon review of the record, the protest of Sweep All has merit. The protest, therefore, must be **SUSTAINED**. The Kentucky Transportation Cabinet, Division of Purchases is directed to rescind the current award and to re-bid the RFB revised to eliminate the conflicting provisions. 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



Lori H. Flanery
Deputy Secretary

cc: Kathryn Lyles,
Kentucky Transportation Cabinet,
Division of Purchases