Commonwealth of Kentucky
Finance and Administration Cabinet
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Steven L. Beshear
Governor

Jonathan Miller
Secretary

March 6, 2008

No. 08-08

Cindy Rice Grissom
Chief Executive Officer
Rice Insurance Services Company, LLC
4211 Norbourne Blvd.
Louisville, KY 40601

RE: Determination of Protest: RFB 758-0700002330

Dear Ms. Grissom:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Rice Insurance Services Company, LLC ("RISC") relating to RFB 758-0700002330 ("RFB") for Kentucky Real Estate Commission Errors and Omissions Insurance.

FACTUAL BACKGROUND

The Office of Material and Procurement Services ("OMPS") issued the RFB on December 18, 2007. The RFB was subsequently modified five times to provide answers to bidders' questions. Bids were due on January 15, 2008. The only bidders were RISC and Williams Underwriting Group ("Williams"). The bids were reviewed by the Kentucky Office of Insurance, State Risk and Insurance Services Division. On January 28, 2008, OMPS issued a written Determination and Finding that (1) both bids were responsive and (2) Williams was the best, low offeror meeting all the requirements of the RFB. Consequently, OMPS awarded a Master Agreement Contract, MA 758 0700002554, to Williams.

By letter dated and received on February 6, 2008, RISC protested the above-referenced award. RISC alleged that Williams' bid was non-responsive. In specific, RISC contended that 1) the Williams' policy ("Policy") changed the definition of "claim"; 2) the Policy provided restricted "territory" coverage; 3) the Policy required extra premium for firm coverage; 4) the Policy contained additional exclusions; 5) the Policy's aggregate limit was unclear; 6) the Policy restricted legal actions against the insurer; 7) the Policy limited "supplementary payments"; and 8) the Policy misrepresented conformity to other state's mandatory programs.

On February 29, 2008, RISC submitted a "supplementary" protest letter concerning the consideration of certain "enhancements" allegedly offered by the Williams' Policy. Then , on March 4, RISC submitted a "Supplement 2" to its protest which responded to a memorandum prepared by OMPS concerning its February 6th letter. In addition, the Finance Cabinet asked for and received comments from the buyer, OMPS, and the contract awardee, Williams. For the reasons stated herein, this protest is DENIED.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest and responses thereto, and other relevant information, the Secretary of the Finance Cabinet 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. RISC submitted a bid in response to the RFB. RISC has standing to protest under KRS 45A.285.

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 issued on January 28 2008; the protest was received on February 6, 2008. The protest was filed within two (2) calendar weeks after the award and, therefore, is timely. On February 29, 2008, RISC submitted a "supplementary" protest letter. This letter does not present sufficient evidence to overcome the presumption created by 200 KAR 5:380(1). The February 29, 2008 letter is, therefore, untimely. On March 4, 2008, RISC submitted "Supplement 2" protest letter. This letter does not present sufficient evidence to overcome the presumption created by 200 KAR 5:380(1). The March 4, 2008 letter is, therefore, untimely.

RISC's protest contends that the Williams' bid was non-responsive. This procurement was by competitive sealed bidding. KRS 45A.080. Under this scheme, the contract is to be awarded to the responsive and responsible bidder whose bid offers "best value." KRS 45A.080(5). A bid is responsive if it conforms to the essential requirements of the solicitation. *See* 200 KAR 5:306(4)(2)(a); Federal Acquisition Regulation §§ 14.301(a), 14.404-2(a). However, a minor irregularity in a bid may be waived. 200 KAR 5:306(4)(1). An irregularity is minor if it does not provide that bidder with a competitive advantage by affecting price, quality, or delivery. 200 KAR 5:306(5).

In its protest, RISC focuses on language in the Bidder Information Sheet which states "the coverage quoted shall be at least as broad as the current policy." RFB, page 29. Throughout its protest, RISC compares the coverage offered by the Williams Policy to the "current policy."

The goal of this procurement was to obtain Errors and Omissions insurance coverage. To this end, the RFB contained a detailed description of the "Desired Coverage" at RFP, pages 17 through 21. Also specified were the "Limit of Insurance," "Coverage Provisions," "Retroactive Date," and "Required and Optional policy Endorsements" at RFB pages 21 through 22. The essential requirements of this solicitation were to obtain Errors and Omissions coverage as described in the RFP, pages 17 to 21.

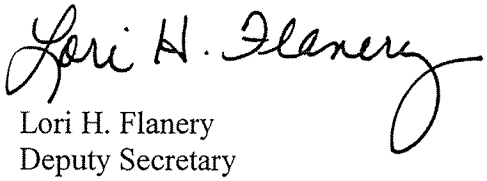
It is clear that the policy offered by Williams is not identical to the present policy (which is, in fact, offered by RISC). Nevertheless, the Williams Policy meets the essentials requirements of the RFB and the Williams' bid is responsive. The alleged policy deviations are, at most, minor and technical in nature. In fact, some of the alleged deviations appear to offer broader coverage. To the extent that the Williams Policy contains deviations from the RFB, such deviations are minor and could be waived by the Commonwealth. RISC has not presented substantive and compelling evidence that these alleged deviations provided Williams with a competitive advantage or that these alleged deviations were more than minor irregularities not affecting the substance of the bid. RISC has not provided evidence to overcome a presumption of correctness or that the January 28, 2008 Determination and Finding was arbitrary, capricious, or contrary to law.

Accordingly, upon review of the record, the protest of RISC is without merit. Further, the presumption of correctness in KRS 45A.280 applies and RISC 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



Lori H. Flanery
Deputy Secretary

cc: Richard Mize, OMPS
Richard Williams, Williams Underwriting Group