



Commonwealth of Kentucky
Finance and Administration Cabinet
OFFICE OF THE SECRETARY
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Steven L. Beshear
Governor

Jonathan Miller
Secretary

March 13, 2008

No. 08-09

Steve Kessler
Director of Multi Unit Sales
SYSCO/LOUISVILLE Food Services Co.
P.O. Box 32470
Louisville, KY 40232

RE: Determination of Protest: RFB 758 0700002056.

Dear Mr. Kessler:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of SYSCO/LOUISVILLE Food Services Co. ("SYSCO") to the award of a contract based upon the above-referenced solicitation. In the protest you state two grounds for protest: (1) the scoring was in error and (2) the RFB did not require that the bidders' specific proposed food items be equivalent. For the reasons stated herein, this protest is denied.

FACTUAL BACKGROUND

The Office of Material and Procurement Services ("OMPS") issued RFB 758 0700002056 (the "RFB") on December 12, 2007 for state-wide Grocery & Meat supply. The RFB requested the bidders provide specific proposed items (e.g., "Brand Name" Vegetable Soup) for generic types (e.g., vegetable soup). Two contracts were to be awarded: one for the "Grocery Line"; a second for the "Meat Line." The RFB closed on December 17, 2007. SYSCO submitted a bid for the Grocery Line. Gordon Food Service ("GFS") also submitted a bid for the Grocery Line. After scoring the bids, on January 4, 2008, GFS was awarded the contract for the Grocery Line. SYSCO submitted a protest by a letter received February 7, 2008.

DETERMINATION

After a review of the solicitation of RFB, the applicable statutes and regulations, 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 and Administration Cabinet ("Secretary"). KRS 45A.285. SYSCO 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 January 4, 2008; the protest was received on February 7, 2008. The protest was filed more than fourteen (14) days after the contract award and, therefore, is untimely.

SYSCO states two grounds for protest: (1) the scoring was in error and (2) the RFB did not require that the bidders' specific proposed food items be equivalent.

1. The scoring was in error.

OMPS has verified the scoring of the items which were allegedly mis-scored. OMPS has reported that no miscalculations were found. SYSCO's calculations appear to be based upon an incorrect unit of measure. Further, SYSCO has failed to present sufficient evidence to overcome the presumption of correctness in the scoring. Based upon the presumption regarding the original scoring, the review by OMPS, and the failure to provide sufficient evidence to overcome the presumption, there is no basis to overturn the scoring. This ground for protest, therefore, is without merit.

2. The RFB did not require that the bidders' specific proposed food items be equivalent.

The ground for protest is directed at the contents of the RFB. A protest to a solicitation should be filed *before* the protestor actually submits a bid or proposal. Once a party submits a bid or proposal to a solicitation and the bids are opened, the protestor then has waived all objections to the solicitation document not previously raised. *See* 4 C.F.R. §21.2(a)(1) ("Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."); *Parsons Precision Products, Inc.*, Comp. Gen. B-249940, 92-2 CPD 431 ("a bidder who participates in a procurement through the point of bid opening without objection is deemed to have acquiesced in the agency's statement of the terms and conditions.")

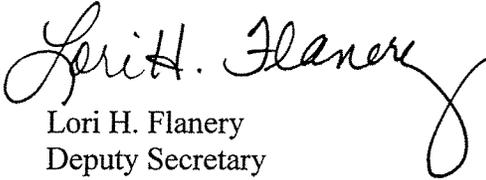
SYSCO submitted a bid in response to the RFB. Therefore, it has waived objections to the content of the RFB. This ground for protest, therefore, has been waived.

Accordingly, upon review of the record, the protest of SYSCO is untimely, has been waived, and is without merit. 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


Lori H. Flanery
Deputy Secretary

cc: Kay Morris-Ryan