



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

Jonathan Miller
Secretary

June 19, 2008

No. 08-27

Joe Rice
Rice Services, Inc.
P.O. Box 458
506 West Main Street
Smithville, TN 37166

RE: Determination of Protest: RFB 758-0700002545.

Dear Mr. Rice:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Rice Services, Inc. ("Rice") relating to RFB 758-0700002545 (the "RFB") for Food Service Management – Western State Hospital.

FACTUAL BACKGROUND

The Finance and Administration cabinet, Office of Procurement Services ("OPS") issued the RFB on March 28, 2008. The RFP had been modified twice to respond to vendor questions. The RFB closed on April 4, 2008. This Sealed Bid procurement was evaluated on two "best value" criteria: Years in Business (5 points) and Price (lowest bidder receives 95 points).

On April 21, 2008, OPS notified Rice that Morrison Healthcare Food Service ("Morrison") had been awarded the contract based upon the RFB. On April 4th, Rice had requested a copy of Morrison's bid pursuant to an Open Records request. These documents were provided to Rice on April 28th. By letter dated May 1, 2008, Rice filed a written protest to the award of the RFB alleging five material defects in Morrison's bid: (1) Morrison had not signed the March 10th Addendum; (2) Morrison had taken exception to terms and conditions in the RFB; (3) Morrison failed to submit Equal Employment Opportunity ("EEO") forms; (4) Morrison had failed to submit the Workers' Compensation Affidavit Form; and (5) Morrison did not propose adequate staffing. 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 ("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. Rice submitted a bid in response to the RFB. Rice, therefore, has standing to protest the award 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. Rice received copies of documents relative to Morrison's bid on April 28, 2008. Rice then filed its written protest on May 1, 2008, within two (2) calendar weeks. The protest, accordingly, is timely.

In its letter of protest, Rice alleges that there were five material defects in Morrison's bid: (1) Morrison had not signed the March 10th Addendum; (2) Morrison had taken exception to terms and conditions in the RFB; (3) Morrison failed to submit Equal Employment Opportunity ("EEO") forms, (4) Morrison had failed to submit the Workers' Compensation Affidavit Form, and (5) Morrison did not propose adequate staffing.

There is a presumption of correctness in a procurement. KRS 45A.280. Accordingly, the protestor has the burden of proof to show that the action challenged is arbitrary, capricious, or contrary to law. *Commonwealth v. Yamaha Motor Manufacturing Corporation*, 237 S.W.3d 203, 206 (Ky. 2007) (citing *Pendleton Bros. v. Commonwealth*, 758 S.W.2d 24 (Ky. 1988)). With respect to each of Rice's grounds of protest, the Secretary finds and determines:

(1) Morrison had not signed the March 10th Addendum;

For its first basis of protest, Rice states that Morrison did not sign the March 10th Addendum. Rice argues that this failure should have resulted in Morrison's bid being deemed non-responsive. OPS responds that Morrison submitted its bid on the March 28th Addendum form which incorporated the earlier Addendum. Thus, Morrison was fully bound by the terms of the earlier Addendum. This ground for protest is without merit.

(2) Morrison had taken exception to terms and conditions in the RFB;

For its second basis of protest, Rice notes that Morrison took six exceptions to the terms and conditions of the RFB. Rice observes that RFB, Section 22 provides "The only terms and conditions acceptable to the Commonwealth of Kentucky are as outlined in the Solicitation. Bids not conforming will be considered non-responsive." As a result, Rice argues that the Morrison bid should have been rejected as non-responsive.

OPS responds that RFB, Section 16 expressly provides that a bidder may take exception to the RFB specifications. In this case, Morrison did state six exceptions in its bid. The Commonwealth rejected five of the

six exceptions and Morrison agreed to the remaining specifications. Accordingly, this basis for protest is without merit.

(3) Morrison failed to submit Equal Employment Opportunity (“EEO”) forms;

For a third basis for protest, Rice observes that Morrison did not submit EEO forms (“Affidavit of Intent to Comply” and “EEO-1 Report”) as required by RFB, Section 36. OPS notes that the EEO forms are only required for contracts in excess of \$500,000. The awarded contract did not have a value in excess of this amount. Pursuant to REB, Section 36, the Office of EEO and Contract Compliance reserves the right to request the documentation when the contract value exceed \$500,000. Accordingly, this basis for protest is without merit.

(4) Morrison had failed to submit the Workers’ Compensation Affidavit Form; and

For its fourth basis of protest, Rice argues that Morrison failed to submit the Workers Compensation Affidavit Form as required by RFB, Section 37. OPS states, however, that it did receive the required form with Morrison’s bid. As such, this basis for protest is without merit.

(5) Morrison did not propose adequate staffing.

For a fifth ground of protest, Rice observes that the RFB, Section 1E(3) required “(14) full time employees . . . These individuals shall consist of nine (9) hostesses.” Yet, Rice notes that Morrison had only six (6) full time employees. This variance, Rice contends, is a “substantial deficiency” in Morrison’s bid.

Morrison’s staffing plan indicates 48.5 FTE employees are to be assigned, including 7 FTE for the Hostess Tem (Hostesses and supervisor). OPS argues that this variance was a “minor irregularity” which did not render Morrison’s bid non-responsive.

200 KAR 5:306 provides:

Section 3. The bids shall be examined by the purchasing officer responsible for the procurement for any clerical or technical errors, reviewed for technical compliance with the terms of the solicitation, and the supplies or services bid evaluated for conformity with the specifications contained in the solicitation. . . .

Section 4. (1) The right to disqualify any bid and to waive technicalities and minor irregularities in bids shall be preserved in the case of all solicitations issued by purchasing agencies within the Finance and Administration Cabinet or pursuant to delegations of purchasing authority by the Finance and Administration Cabinet.

...

(3) Technicalities or minor irregularities in bids, which may be waived if the purchasing officer determines that it will be in the Commonwealth's best interest to do so, are mere

matters of form not affecting the material substance of a bid or an immaterial deviation from or variation in the precise requirements of the solicitation having no or a trivial or negligible effect on price, quality, quantity, delivery of supplies, or performance of the services being procured, the correction or waiver of which will not affect the relative standing of, or be otherwise prejudicial to other bidders. The purchasing officer may give a bidder an opportunity to cure any deficiency resulting from a technicality or minor irregularity in a bid, or waive the deficiency if it is advantageous to the Commonwealth to do so.

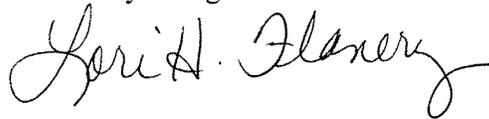
Rice has not provided any evidence that this variance had more than “a trivial or negligible effect on price, quality, quantity, delivery of supplies, or performance of the services being procured.” As a result, this basis for protest is without merit.

Accordingly, upon review of the record, the protest of Rice is without merit. Further, the presumption of correctness in KRS 45A.280 applies and Rice 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: Kay Morris-Ryan, OPS