



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

**Jonathan Miller**  
Secretary

June 26, 2008

**No. 08-29**

Mary Jo Ablor  
Business Director  
3M Traffic Safety Systems  
3M Center, Building 0225-05-S-08  
St. Paul, MN 55144-1000

RE: Determination of Protest: RFB 758-0700002050.

Dear Ms. Ablor:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of 3M Company Traffic Safety Systems Division ("3M") relating to RFB 758-0700002050 (the "RFB") for Reflective License Plate and Validation Sheeting.

### **FACTUAL BACKGROUND**

The Finance and Administration Cabinet, Office of Procurement Services ("OPS") issued the RFB on September 21, 2007. The RFP was modified seven times to add new bid item lines, to establish a site visit, and to respond to vendor questions. The RFB closed on December 12, 2007. 3M and Avery Dennison Corporation ("Avery Dennison") submitted bids.

On May 8, 2008, OPS issued a written Determination and Finding ("D & F"). The D & F recited that 3M and Avery Dennison had submitted bids to the RFB. 3M's bid was determined to be non-responsive since certain line items had not been bid to. Avery Dennison had submitted an "or equal" product per Section 13 of the RFB. The D & F recited "Samples were obtained and the Avery Dennison product was tested at the KCI production facilities and found to be acceptable by both KCI and their customer KYTC." Accordingly, the D & F recommended that an award be made to Avery Dennison.

On May 21, 2008, 3M sent a written protest of the award to Avery Dennison (received May 22, 2008). 3M requested that the Avery Dennison product be fully tested to ensure compliance with RFB requirements. Further, 3M stated that Avery Dennison had failed to bid a "dry roller coating machine" line item as required by the RFB. 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. 3M submitted a bid in response to the RFB. 3M, 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. The D & F was issued on May 8, 2008. 3M's protest was filed on May 22, 2008. Thus, the protest was filed within two (2) calendar weeks of the date of the D & F. The protest, accordingly, is timely.

In its letter of protest, 3M requests that the Avery Dennison product be fully tested to ensure compliance with RFB requirements. Further, 3M states that Avery Dennison failed to bid a "dry roller coating machine" as required by the RFB.

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 3M's grounds of protest, the Secretary finds and determines:

1. 3M requests that the Avery Dennison product be fully tested to ensure compliance with RFB requirements.

In its letter of protest, 3M requested that the Avery Dennison product be fully tested to ensure compliance with RFB requirements. This appears to be an allegation that the Avery Dennison products were not an "or equal" proposal as allowed by Section 13 of the RFB. An "or equal" product is acceptable if it is "determined by the State to meet or exceed the minimum essential requirements and salient characteristics referenced in the Solicitation." RFB, Section 13.

Here, the D & F recited "Samples were obtained and the Avery Dennison product was tested at the KCI production facilities and found to be acceptable by both KCI and their customer KYTC." 3M has not provided evidence that this finding was arbitrary or capricious. Accordingly, this ground of protest is without merit.

2. Avery Dennison failed to bid a "dry roller coating machine" as required by the RFB.

3M observes that Section III(B) of the RFB required the successful bidder to provide a dry roller coating machine on a bailment agreement and also to provide dry roller coat foil in various colors. Avery Dennison, 3M claims, did not bid these requirements.

The solicitation process allowed bidders to ask questions and to seek clarifications concerning the RFB. During this process, a bidder asked:

Our sheeting system does not require dry rollercoating machines and foils. RFB, Modification 7, Question 3

The RFB was then modified to include the following answer:

No change. If your system does not require the equipment or foils you will not be required to provide it. RFB, Modification 7, Answer 3

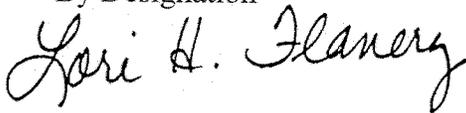
Since Avery Dennison's system did not require dry rollercoating machines and foils, per the modification to the RFB, Avery Dennison was not required to provide these items. This basis for protest, therefore, is without merit.

Accordingly, upon review of the record, the protest of 3M is without merit. Further, the presumption of correctness in KRS 45A.280 applies and 3M 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: Donald Robinson, OPS