



Commonwealth of Kentucky
Finance and Administration Cabinet
OFFICE OF THE SECRETARY
Room 383, Capitol Annex
702 Capital Avenue
Frankfort, KY 40601-3462
(502) 564-4240
Fax (502) 564-6785

Steven L. Beshear
Governor

Jonathan Miller
Secretary

August 11, 2008

No. 08-32

John Toma, MBA
Contracts Supervisor
Pharmatech, Inc.
10151 Barnes Canyon Road
San Diego, CA 92121

RE: Determination of Protest: RFP 527-0700000989.

Dear Mr. Toma:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Pharmatech, Inc. ("Pharmatech") relating to RFP 527-0700000989 (the "RFP") for Drug Testing services.

FACTUAL BACKGROUND

The Department of Corrections ("DOC") issued the RFP on March 19, 2008. The RFP had been modified three times to respond to vendor questions. The RFP was to be evaluated on the following basis: price – 80 points; references – 20 points. The RFP closed on April 2, 2008. There were eight bidders: AccuDiagnostics; ASAP Consulting; Drug & Alcohol Concentration Specialists, Inc.; Pharmatech, Inc.; PIS; MC Consultant Services Co., Inc.; Aegis Services Corporation; and Kroll Laboratory, Inc.

The DOC issued a written Determination and Finding on April 30, 2008. The Determination and Finding stated that the proposals of AccuDiagnostics; ASAP Consulting; Drug & Alcohol Concentration Specialists, Inc.; Pharmatech, Inc.; PIS; MC Consultant Services Co., Inc. were "non-responsive." Aegis Services Corporation was awarded 84 points; Kroll Laboratory, Inc. was awarded 98 points. Kroll Laboratory, Inc. was determined to be the highest ranked vendor.

On June 6, 2008, Pharmatech filed a protest. Pharmatech contends that (1) it should not have been determined to be “non-responsive” since it provided the CLIA Certificate number and (2) it should have been awarded the contract since it was the “lowest bidder.” On June 16, 2008, Dennis P. Ritz, Director of Clinical Toxicology, provided a supplemental letter on behalf of Pharmatech and urged that the RFP specifications were ambiguous or otherwise impossible to satisfy since the RFP required CLIA “accreditation” and the CLIA only provides “certification.” 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. Pharmatech submitted a proposal in response to the RFP. Pharmatech, 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 award was made on May 28, 2008. The Pharmatech protest was filed on June 6, 2008. Thus, the protest was filed within two (2) calendar weeks of the date of the award. The protest, accordingly, is timely. The supplemental letter was filed on June 16, 2008. This letter was more than two (2) calendar weeks after the date of award is untimely.

In its June 6th protest letter, Pharmatech contends that it should not have been determined to be “non-responsive” since it provided a CLIA Certificate number and should have been awarded the contract since it was the “lowest bidder.”

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 Pharmatech’ protest, the Secretary finds and determines:

The RFP, II (p. 4 of 27) required:

Vendor must provide accreditation by the Clinic Laboratory Improvement Amendment of 1988, (CLIA).

The April 30, 2008, Determination and Finding recited:

Pharmatech, Inc. was deemed non-responsive for failure to comply with the following requirements of the RFP:

- Pharmatech did not provide a copy of the accreditation by the Clinical Laboratory Improvement of 1988 (CLIA).

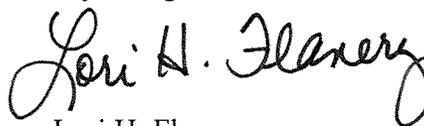
Pharmatech did provide its CLIA registration number. Pharmatech argues that California, where it is located, does not issue a copy of an accreditation but rather issues a license which contains the CLIA number.¹ DOC determined that the failure to provide a CLIA certificate rendered the proposal to be non-responsive. Pharmatech did not provide a copy of its California license; rather, it provided a statement that it had received the CLIA accreditation and the certification number on company letterhead. DOC's determination that the provision of a statement concerning CLIA registration on company letterhead in lieu of an official document rendered Pharmatech's proposal to be non-responsive is not arbitrary or irrational. There is no basis to overturn the DOC's determination. This protest is without merit.

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

¹ The RFP process allowed potential offerors to submit questions or requests for clarification. RFP, IV (p. 9 of 47). The RFP anticipated two rounds of offeror questions. RFP, VI (p. 12 of 27). One question was specifically directed at the CLIA accreditation. RFP, 2nd Set of Vendor's Written questions and Answers, Question 2 (p. 45 of 47). Pharmatech did not ask any questions about the requirements of the RFP.

cc: Mark D. Robinson, Director, Administrative Services DOC