



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

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Secretary

November 19, 2008

No. 08-46

Richard M. Terlecki
Area Senior Vice President
Arthur J. Gallagher Risk Management Services, Inc.
7380 West San Lake Road, Suite 390
Orlando, FL 32819

RE: Determination of Protest: RFB 758 0800003131.

Dear Mr. Terlecki:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest, on behalf of Arthur J. Gallagher Risk Management Services, Inc. ("Gallagher"), to the award of a contract based upon the above-referenced solicitation. In the protest you contend that the Solicitation does not forbid multiple offers and, in fact, suggests that multiple offers are permitted. For the reasons stated herein, this protest is denied.

FACTUAL BACKGROUND

The Office of Procurement Services ("OPS") issued RFB 758 0800003131 (the "RFB") on August 22, 2008 for Boiler Breakdown Insurance. The RFB closed on September 15, 2008 at 1:30 p.m. Gallagher submitted a bid. OPS determined that Gallagher's bid was non-responsive because it contained multiple offers. A contract was awarded to J. Smith Lanier & Co. ("Lanier"). By letter received September 25, 2008, Gallagher filed a written protest. On September 26, 2008, OPS provided its comments to the protest. Lanier was invited to comment on the protest but did not provide a response.

DETERMINATION

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. Gallagher 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 RFB closed on September 15, 2008. The protest was filed on September 25, 2008. The protest was filed within fourteen (14) days after the contract award and, therefore, is timely.

Gallagher protests OPS' determination that it was a non-responsive bidder. Gallagher alleges that the Solicitation did not forbid multiple offers and, in fact, suggested that multiple offers are permitted.

After a review of the solicitation of RFB, the applicable statutes, and other relevant information, the Secretary finds and determines as follows:

The RFB contained, by incorporation, the Finance Cabinet's standard General Conditions.

FAP 110-10-00

GENERAL CONDITIONS AND INSTRUCTIONS FOR SOLICITATIONS AND CONTRACTS

The following general conditions shall be incorporated by reference in each Solicitation and resulting contract for commodities or services issued by the Commonwealth of Kentucky.

By submitting a bid to the Commonwealth, a bidder agrees to these conditions.

...

5. BID SUBMISSION COMPLIANCE AND PROVISIONS: A bidder shall:

...

- e. Offer only one price for each item bid and offer only one product for each item of the Solicitation, unless the Solicitation specifically states that more than one product may be bid for a single item of the contract. Offering more than one product for any item of the Solicitation shall constitute multiple bidding and shall automatically disqualify the entire bid, unless multiple bids are requested by the Solicitation.

While the FAP states the general rule, Gallagher argues that this RFB does call for multiple bids. Gallagher notes the language on RFB, p. 5, which states: "Agents submitting proposals shall disclose the identity of all markets they have approached and provide each market's response." Gallagher argues that the word "proposal" is plural which suggests that multiple offers are requested. In addition, Gallagher observes that the word "Bids" is used at RFB, p. 6, p. 8, and p. 9.

A determination by an agency is entitled to a presumption of correctness. KRS 45A.280. Gallagher must show that OPS' determination that its bid was non-responsive was arbitrary, capricious, or contrary to law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). After reviewing the language in the RFB, the use of the plural in Gallagher's examples refers to the bid process as a whole, not to the specific bids. For example, the solicitation language "Agents submitting proposals shall disclose the identity of all markets they have approached and provide each market's response" refers to both "agents" and "bids" and is a generic statement referring to all potential submitted bids. The word "bids" can not be read separately from the matching plural "agents." Accordingly, the cited language does not reasonably support the argument that multiple bids were being solicited from a single agent. The language of the bid forms stating "optional bids" are not allowed supports this conclusion. In sum, the language of the FAP expressly excludes multiple bids and the language of the specific RFP does not reasonably contradict this. Gallagher has not shown that the agency's determination was irrational or contrary to law. This ground for protest, therefore, is without merit.

Accordingly, upon review of the record, the protest of Gallagher 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: Richard Mize, OPS