



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

Jonathan Miller
Secretary

April 22, 2009

No. 09-02

David B. Wicker
Wicker Law Office
406 Leawood Drive
Frankfort, KY 40601

RE: Determination of Protest: RFB 605 0800003497.

Dear Mr. Wicker:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Tailored Services, LLC ("Tailored Services") relating to RFB 605 0800003497-2 ("RFB") for Janitorial Services – Franklin Co.

FACTUAL BACKGROUND

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC" or the "Agency") issued RFB 605 0800003497-2 on January 8, 2009. According to the terms of the solicitation, the RFB was to be scored as follows: 90 points (out of a total of 100) for price, 7 points for references, and 3 points for months of experience. The RFB closed on January 15, 2009 at which time bids were to be submitted.

Twelve vendors submitted bids, including Tailored Services and BBD Cleaning Services and Solutions, LLC ("BBD"). After an evaluation, KYTC issued a written determination. KYTC awarded BBD the maximum 100 points; Tailored Services was awarded the second highest total with 80.74 points. KYTC issued a contract based upon the RFB to BBD on February 12, 2009.

On February 2, 2009, counsel for Tailored Services filed a written protest. Four separate grounds of protest were stated: (1) the solicitation's allocation of ninety percent of the score to price effectively made the other two categories (references and months of service) irrelevant which violated the spirit of Best Value procurement; (2) the evaluation of references was subjective which violated the statutory requirement for objective criteria; (3) BBD was not a responsible bidder since it could not have had the required 24 months of

experience since the records of the Secretary of State indicate that BBD had only been formed 23 months before it submitted its bid; and (4) BBD is not a responsible bidder since it is delinquent on payment of its 2008 City of Frankfort payroll taxes. For the reasons stated herein, this protest is DENIED.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest, 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. Tailored Services submitted a bid in response to the RFB. Therefore, Tailored Services has standing to protest the award of the RFB.

A protest to an award of contract must be made within two (2) calendar weeks after the award. KRS 45A.285. Here, protest was received on February 2, 2009, which was *before* an award was officially posted on the eProcurement website. Although the protest was filed prematurely, it was filed *after* the public bid opening of an RFB and *after* a final written determination was made by the Agency in which BBD was determined to have the highest score. Accordingly, given these facts, the Secretary finds that the protest will be treated as timely filed and not premature.

Tailored Services has raised four grounds of protest: (1) the solicitation’s allocation of ninety percent of the score to price effectively made the other two categories (references and months of service) irrelevant which violated the spirit of Best Value procurement; (2) the evaluation of references was subjective which violated the statutory requirement for objective criteria; (3) BBD was not a responsible bidder since it could not have had the required 24 months of experience since the records of the Secretary of State indicate that BBD had only been formed 23 months before it submitted its bid; and (4) BBD is not a responsible bidder since it is delinquent on payment of its 2008 City of Frankfort payroll taxes. After reviewing these grounds of protest, the Secretary finds as follows:

This procurement was conducted under “competitive sealed bidding” procedures at KRS 45A.080. Under this process, the contract is to be awarded to the responsive, responsible bidder which offers “best value.”

A protest to a competitive sealed bid solicitation should be filed *before* the protestor actually submits a bid. Once a party submits a bid 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.”)

A protest to a competitive sealed bid award must show that the award was arbitrary, capricious, or contrary to law. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). Agency decisions are entitled to a presumption of correctness. KRS 45A.280. The protestor, therefore, has the burden to show that the award violates the arbitrary, capricious, or contrary to law standard. In addition, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) (“[T]o prevail in a protest the protestor must show not only a significant error in the procurement process, but also that the error prejudiced it.”). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

A competitive sealed bid is “responsive” if it conforms in all material respects to the invitation for bids. KRS 45A.070(7). Responsiveness is determined at bid opening. *Interstate Rock Products v. U.S.*, 50 Fed.Cl. 349, 360 (Fed.Cl. 2001). A non-responsive bid cannot be cured after bid opening. *Id.* A determination of responsiveness must be made with information contained in the bid document only. *Firth Const. Co., Inc. v. U.S.*, 36 Fed.Cl. 268, 272 (Fed.Cl. 1996).

A bidder is “responsible” if “it has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.” KRS 45A.070(6). A determination of “responsibility” is made after bid opening but before award. *Honeywell, Inc. v. U.S.*, 870 F.2d 644, 649 (Fed.Cir. 1989). Further, this determination of “responsibility” may consider extrinsic matters, that is, information obtained outside the bid document. *Precision Standard, Inc. v. U.S.*, 69 Fed. Cl. 738, 752 (2006), *judgment aff'd*, 228 Fed. Appx. 980 (Fed. Cir. 2007) (citing FAR 9.105-2(b)). A responsibility determination is a discretionary determination by the agency. *See Ryan Co. v. U.S.*, 43 Fed.Cl. 646, 651 (Fed.Cl. 1999).

A bid offers “best value” if, based upon objective and quantifiable criteria including price, it meets the specific business requirements and best interests of the Commonwealth. KRS 45A.070(3). The evaluation factors must be stated in the solicitation document. *Id.*

Applying these general rules to the specific grounds of protest, the Secretary finds as follows:

1. The solicitation's allocation of ninety percent of the score to price effectively made the other two categories (references and months of service) irrelevant which violated the spirit of Best Value procurement.

The scoring criteria were evident in the terms and in the text of the solicitation when the RFB was issued. Tailored Services submitted a bid. 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. 4 C.F.R §21.2(a)(1); *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579, 583 (Ky. 2003) (federal statutes and decisions to be persuasive in the procurement context). This protest to the contents of a solicitation has been waived by the submission of a bid.

2. The evaluation of references was subjective which violated the statutory requirement for objective criteria.

The RFB stated that bids would be scored by the stated criteria on a maximum scale of 100 points. Of these 100 points, 7 points were allocated to “reference responses.” The Agency’s written Determination and Finding states that “References were checked on BBD Cleaning Services and Tailored Services as they were the bidders with the 2 highest scores.” The Determination and Finding awarded each responsive bidder the full 7 points for this category.

“Best value” scoring criteria must be based upon objective and quantifiable criteria. KRS 45A.070(3). In addition, the best value criteria must be judged based upon information submitted with the bid. *See Firth Const. Co., Inc. v. U.S.*, 36 Fed.Cl. 268, 272 (Fed.Cl. 1996).

A protestor must show that the agency’s action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) (“[T]o prevail in a protest the protestor must show not only a significant error in the procurement process, but also that the error prejudiced it.”). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

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. 4 C.F.R. §21.2(a)(1); *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579, 583 (Ky. 2003) (federal statutes and decisions to be persuasive in the procurement context).

It is unclear from the record whether these “reference responses” were objectively ascertainable at bid opening or whether the “reference responses” were obtained after bid opening and were subjective in nature. The Secretary will not presume or infer error. The presumption of correctness applies. The protestor, moreover, has not shown that the error, if there was an error, was prejudicial since each responsive bidder was awarded the maximum points for this item. Further, if the error were ascertainable from the terms of the RFB, the protestor waived this ground by submitting a bid to the RFB.

Accordingly, this ground of protest is without merit or has been waived.

3. BBD was not a responsible bidder since it could not have had the required 24 months of experience since the records of the Secretary of State indicate that BBD had only been formed 23 months before it submitted its bid.

A responsibility determination is a discretionary determination by the agency. *See Ryan Co. v. U.S.*, 43 Fed.Cl. 646, 651 (Fed.Cl. 1999). Agency decisions are entitled to a presumption of correctness. KRS 45A.280. A protest must show that the determination was arbitrary, capricious, or contrary to law. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

The Agency has provided information that the owners of BBD had at least 24 months of experience. The owners had such experience with another business entity before the formation of BBD. As a result, the Agency determination was not arbitrary or capricious. This ground of protest is without merit.

4. BBD is not a responsible bidder since it is delinquent on payment of its 2008 City of Frankfort payroll taxes.

A responsibility determination is a discretionary determination by the agency. *See Ryan Co. v. U.S.*, 43 Fed.Cl. 646, 651 (Fed.Cl. 1999). Agency decisions are entitled to a presumption of correctness. KRS 45A.280. A protest must show that the determination was arbitrary, capricious, or contrary to law. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

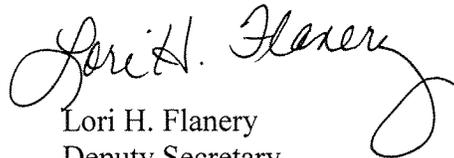
The Agency has provided information that BBD is current in its City of Frankfort payroll taxes. As a result, the Agency determination is not arbitrary or capricious. This ground of protest is without merit.

Accordingly, upon review of the record, the protest of Tailored Services has been waived or lacks merit. Further, the presumption of correctness in KRS 45A.280 applies and Tailored Services 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: Peggy Stratton, KYTC