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

Jonathan Miller
Secretary

July 24, 2009

No. 09-05

Larry C. Ethridge
Ackerson & Yann
One Riverfront Plaza
401 West Main Street, Suite 1200
Louisville, Kentucky 40202

RE: Determination of Protest: RFB 758 0900003600.

Dear Mr. Ethridge:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Grubbs Emergency Services, LLC ("Grubbs") relating to RFB 758 0900003600 ("RFB") for Emergency Debris Removal.

FACTUAL BACKGROUND

The Finance Cabinet, Office of the Controller, Office of Procurement Services ("OPS") issued RFB 758 0900003600 on February 9, 2009. The RFB sought bids for emergency debris removal The RFB closed on February 11, 2009 at 10:00 a.m. at which time bids were to be submitted. Grubbs submitted a bid which was determined to be non-responsive since it lacked an original signature.

On February 18, 2009, Grubbs filed a written protest. Grubbs argues that its proposal should not have been deemed non-responsive. Grubbs contends that (1) an OPS employee led Grubbs to believe that a signature was not required thereby creating an ambiguity in the solicitation and (2) Grubbs manifested its intention to be bound to the terms of the solicitation (that is, the bid was a *bona fide* "offer") by the fact that the Commonwealth was named as an "additional named insured" on a submitted insurance certificate. On March 10, 2009, OPS submitted a written response. 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 (the "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. Grubbs submitted a bid in response to the RFB. Therefore, Grubbs 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, the protest was received on February 19, 2009. The contracts based on the RFB were entered into as of February 13, 2009. The protest was filed within two calendar weeks and is, accordingly, timely.

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." All solicitations issued by the Commonwealth are governed by Finance Administrative Policy ("FAP") 110-10-00, entitled "General Terms and Instructions for Solicitations and Contracts." FAP 110-10-00 is incorporated by reference into regulation 200 KAR 5:021, and thus has the force and effect of law in the Commonwealth of Kentucky. Page 4 of the solicitation itself also notes that the General Terms and Conditions are incorporated by reference into the solicitation.

> FAP 111-00-10-00, number 5 c. specifically states that a bidder shall ensure the hard copy of the bid is signed by a proper agent of the firm prior to the bid opening. No hard copy bid shall be considered valid unless filled out in ink or typewritten and signed in ink in the space provided on the Solicitation.

Accordingly, under the laws of the Commonwealth governing this procurement, the bid had to be signed in writing, or it would be rejected.

However, in its written protest, Grubbs contends that it was not necessary to sign its bid because an employee of OPS advised Grubbs that the pages requiring notarized signatures could be submitted electronically without the notary seal. Grubbs then submitted a bid without any signatures.

As an initial matter, the e-mail correspondence shows that Grubbs asked whether signatures on a bid submitted electronically had to have a notary seal. Grubbs *did not ask* whether a bid submitted electronically with no signatures was acceptable. In any event, Grubbs contends that the solicitation was ambiguous about whether signatures were required for bids submitted electronically.

This argument is not persuasive. First, the question asked by Grubbs clearly indicated that it understood that some sort of signature was required. Second, Grubbs waived its objection to facial defects in the solicitation by submitting a bid. *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.").

It is also important to recognize that KRS 45A.280 clearly states:

> 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.

Accordingly, based on the foregoing, the procurement officer acted in accordance with the laws governing purchasing, by disqualifying this bid. The presumption of correctness in KRS 45A.280 applies and Grubbs has failed to provide adequate or sufficient evidence to overcome this presumption. Grubb also further contends that its bid manifested intent to be bound by including an insurance certificate which named the Commonwealth as an "additional insured." However, this is irrelevant, since FAP 111-00-10-00 clearly indicates that a signature is required to be considered a valid bid. This protest is **DENIED**. 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

Robin Kinney

Robin Kinney
Executive Director
Office of Administrative Services

cc: Richard Mize, OPS