



Commonwealth of Kentucky  
Finance and Administration Cabinet  
**OFFICE OF THE SECRETARY**  
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Steven L. Beshear  
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April 8, 2009

No. 09-06

Catherine Steger  
Senior Counsel, Public Sector  
Hewlett Packard Company  
11445 Compaq Center Drive West  
MS 060701  
Houston, TX 77070-1433

RE: Determination of Protest: RFB 758 0800003349 (KETS Intel File Servers).

Dear Ms. Steger:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest to the award of Master Agreements based upon RFB 758 0800003349 (KETS Intel File Servers) (the "RFB"). In the protest you contend that the bid of Hewlett-Packard Company ("HP") was improperly declared to be non-responsive because HP submitted a Non Disclosure Agreement executed by HP's intended subcontractor. For the reasons stated herein, this protest is sustained; the Finance Cabinet Office of Procurement Services ("OPS") is directed to award to HP a Master Agreement based on the RFB.

### **FACTUAL BACKGROUND**

OPS issued the RFB on January 16, 2009 for KETS Intel File Servers on behalf of Kentucky Department of Education. The RFB closed on January 22, 2009. Four companies submitted bids: Apple Computer, Dell Computer Corporation, Hewlett-Packard Company, and IBM Corporation. OPS issued a written Determination and Finding on February 9, 2009, which found that: (1) Apple Computer was non-responsive since it failed to agree to the RFB's terms and conditions and (2) HP was non-responsive since HP failed to execute the mandatory Non Disclosure Agreement. Accordingly, IBM Corporation and Dell Computer Corporation were awarded Master Agreements based upon the RFB.

On February 23, 2009, HP filed with the Office of the Secretary a written protest. In its protest, HP states that it provided the mandatory Non Disclosure Agreement. The agreement was executed by Pomeroy IT Solutions which HP intended to use as a subcontractor. HP alleges that the Non Disclosure Agreement

provided that it was to be executed by the “subcontractor.” Since HP provided the form executed by its subcontractor, HP asserts that it was improperly determined to be non-responsive.

## **DETERMINATION**

After a review of the solicitation, the solicitation responses, the official findings, the applicable statutes and regulations, and other relevant information, the Secretary of the Finance and Administration 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. KRS 45A.285. HP 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 Determination and Finding was made on February 9, 2009; the protest was received on February 23, 2009. The protest was filed within fourteen (14) days after the contract award and, therefore, is timely.

This RFP was conducted under KRS 45A.080 (competitive sealed bidding). The hallmark of “competitive sealed bidding” is the general mechanical (that is non-discretionary) nature of the award.

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); *but compare* 200 KAR 5:306(3) (purchasing officer may seek post bid-opening “clarification” of matter contained in bid) *with Central States Bridge Co.*, 85-2 CPD ¶ 154 (Comp.Gen. 1985) (“A bid which is non-responsive on its face may not be changed, corrected, or explained by the bidder after bid opening.”).

Further, the solicitation should clearly inform a bidder what the bidder must do to be responsive to the solicitation. Thus, “it is a well-settled rule that the solicitation should inform all offerors of the basis for evaluation of proposals and the evaluation must, in fact, be based on the scheme set forth in the solicitation. *Human Resources Research Organization*, B-203302, 82-2 CPD P31 (Comp. Gen. July 8, 1982) (considering competitive negotiation, but the principle is even more applicable to competitive sealed bidding).

In its protest, HP states that it provided the mandatory Non-Disclosure Agreement. The agreement, however, was executed by Pomeroy IT Solutions which HP intended to use as a subcontractor. HP alleges that the RFB, in fact, provided that the Non-Disclosure Agreement was to be executed by a subcontractor. Since HP provided the form executed by its subcontractor, HP contends that its bid was improperly determined to be non-responsive.

The RFB required that bidders provide a "Non Disclosure Agreement" which was contained in Appendix B. RFB, Sections 10 and 30. This agreement provided, in part,

THIS THIRD-PARTY NON-DISCLOSURE AGREEMENT (heretofore, this "*Agreement*"), is entered into on [date], between The Kentucky Department of Education (KDE), a Kentucky State Agency with offices located at Frankfort, KY and [name of your partner], with offices located at [name of your partner] (henceforth, "*the Subcontractor*").

The RFP described the party submitting the bid as a "vendor" or "contractor." *See, e.g.*, RFB, Section 1 ("vendor"), Section 16 ("contractor"). The RFB also made a distinction between "vendor" and "subcontractor". RFB, Section 3 ("The Vendor and any subcontractors shall be required to adhere to and sign all applicable Commonwealth policies and standards related to technology use and security.") According to the RFB, the Non-Disclosure Agreement was to be executed by a "subcontractor."

Therefore, the RFB was ambiguous. The requirement that the "contractor" or "vendor" as opposed to a "subcontractor" sign the "Non-Disclosure Agreement" was not clear given the uses of the terms "vendor," "contractor," and "subcontractor" throughout the RFB. HP reasonably submitted the Non Disclosure Agreement executed by its intended subcontractor. On this basis, OPS should not have determined that HP's bid was non-responsive.

Accordingly, upon review of the record, the protest of HP has merit. The protest, therefore, must be **SUSTAINED**. The Finance Cabinet Office of Procurement Services is directed to award to HP a Master Agreement based on the RFB. 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: Amy Monroe Richardson, OPS  
Mike L. Leadingham, Director, KETS Engineering & Management