



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

Jonathan Miller
Secretary

May 28, 2009

No. 09-09

John Jenkins
Bowe Bell + Howell Company
12072 Flagstone Drive
Fishers, IN 46037

RE: Determination of Protest: RFB 758 0800003662.

Dear Mr. Jenkins:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Bowe Bell + Howell Company ("Bowe") relating to RFB 758 0800003662 ("RFB") for Mail Inserters.

FACTUAL BACKGROUND

The Finance Cabinet, Office of the Controller, Office of Procurement Services ("OPS") issued RFB 758 0800003662 on February 18, 2009. The RFB sought bids for "a modular six station inserting system with an adjustable cycle speed and a maximum cycle speed of 11,000 finished envelopes per hour." The RFB was scored on a one thousand point basis: 900 points were available for best price; 50 points for best delivery; and 50 points for best warranty. The RFB closed on March 6, 2009 at 1:30 p.m. at which time bids were to be submitted.

Three vendors submitted bids: Bowe, Pitney Bowes, and Scot Mailing & Shipping Systems, Inc. ("Scot"). In a written Determination and Finding, OPS determined that (1) the bid of Bowe was non-responsive since Bowe had submitted multiple offers in violation of Section 3.00 of the General Conditions; (2) Pitney Bowes was to be awarded 963 points; and (3) Scot was to be awarded 961 points. The Determination and Finding concluded, however, that the Pitney Bowes bid did not meet all the requirements of the RFB. Accordingly, the Determination and Finding awarded a contract based on the RFB to Bowe.

On April 21, 2009, Bowe filed a written protest. Bowe alleged that the proposal offered by Scot did not satisfy the requirements of the RFB. Bowe's protest letter stated that Bowe had sent an Open Records request to obtain further information about the award to Scot. As of this date, no supplemental protest from Bowe has been filed. On April 28, 2009, OPS and Scot submitted separate written responses. 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. Bowe submitted a bid in response to the RFB. Therefore, Bowe 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 April 22, 2009. Bowe learned of the award to Scott on April 15, 2009. The protest was filed within two calendar weeks and is, accordingly, timely.

In its written protest, Bowe alleges that the proposal offered by Scot did not satisfy the requirements of the RFB.

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 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).

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

OPS determined that Bowe's bid was non-responsive since Bowe had submitted multiple offers in violation of the RFB's General Conditions. Bowe has presented no argument that OPS's Determination that it was non-responsive was incorrect. Bowe remains ineligible for award. Bowe, therefore, has not shown how any error with respect to the award to Scot was prejudicial to Bowe. Moreover, Bowe's assertion that Scot's bid was non responsive are supported only by argument and conjecture; Bowe has not presented any *evidence*

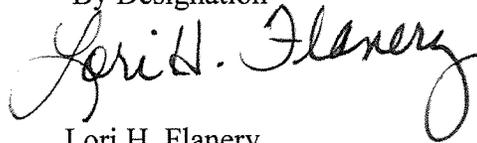
that Scot's bid was non-responsive. Bowe has failed to shown that OPS' Determination and Finding was arbitrary, capricious, or contrary to law.

Accordingly, upon review of the record, the protest of Bowe lacks merit. Further, the presumption of correctness in KRS 45A.280 applies and Bowe 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

A handwritten signature in cursive script that reads "Lori H. Flanery".

Lori H. Flanery
Deputy Secretary

Richard Mize, OPS
Len Altier. Scot