



Commonwealth of Kentucky  
Finance and Administration Cabinet  
**OFFICE OF THE SECRETARY**  
Room 383, Capitol Annex  
702 Capital Avenue  
Frankfort, KY 40601-3462  
(502) 564-4240  
Fax (502) 564-6785

**Steven L. Beshear**  
Governor

**Jonathan Miller**  
Secretary

June 11, 2009

**No. 09-13**

Kevin Kowallic, Sales Representative  
Morbark, Inc.  
8507 S. Winn Road  
P.O. Box 1000  
Winn, Michigan 48896

RE: Determination of Protest: RFB 605 0900003829.

Dear Mr. Kowallic:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Morbark, Inc. ("Morbark") relating to RFB 605 0900003829 ("RFB") for Brush Chippers.

### **FACTUAL BACKGROUND**

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued the RFB on April 7, 2009 for Brush Clippers. The RFB was to be scored on a 100 point basis: 95 points were available for the lowest price; 5 points were available for the earliest delivery. The RFB closed on April 23, 2009 at 10:00 a.m.

Five vendors submitted bids: Midwest Equipment & Supply Co., Morbark, Altec Environmental Products LLC, Powertech Equipment, Inc., and Vermeer Sales and Service. In a written Determination and Finding, KYTC found that:

"Award of contract made to Altec as the responsible, responsive bidder with the highest evaluated score.

Midwest Equipment's bid was determined incomplete and therefore non-responsive. They failed to submit a bid on the official bid form. The quote submitted did not specify whether the bid price was per unit or a total bid. This determination was made in accordance with FAP-11 0-1 0-00 Section 2 (e).

Morbark's bid was also determined non-responsive. Vendor added the following qualifications to their bid:

(a) Terms of Purchase - Net 30 Days Conflicts with KRS 45.453 and KRS 45.454 as referenced in Section 2.16 of the solicitation.

(b) This is a quotation only and not an offer subject to acceptance. Conflicts with FAP 110-10-00 Section 5 (n) as referenced in the KYTC Solicitation Instructions and Conditions Section XVII (Pg 27 of 30).

(c) All Prices are subject to any applicable sales tax and are shipped F.O.B. Winn, MI. Conflicts with FAP 110-10-00 Section 5 (g) and Solicitation Section 2.11.

(d) If awarded, they would need to do a cost to sales for the electrical system. Conflicts with the firm pricing requirement of FAP 110-10-00 Section 5 (k) and KYTC Solicitation Instructions and Conditions Section II (e).”

On May 20, 2009, Morbark filed a written protest. Morbark alleged that its bid was responsive. In its protest, Morbark argued: (1) its terms of delivery were “boiler plate” and it will agree to alter the terms to comply with the Commonwealth’s requirements; (2) the language stating its price was a “quotation only and not an offer subject to acceptance” was boilerplate and it now confirms its price offer; (3) the language stating shipment was F.O.B. from Morbark’s Michigan office and that the Commonwealth is responsible for sales tax was “boiler plate” and it will conform to the terms of the solicitation; and (4) its reference to “cost to sales” was an internal reminder and the bid clearly priced these items. Further, Morbark contends that any bid variations should have been excused under RFB Section 4.05 which allows the Commonwealth to waive “minor irregularities.” On June 1, 2009, KYTC submitted a written response to the protest. 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. Morbark submitted a bid in response to the RFB. Therefore, Morbark 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 award was made on May 12, 2009. The protest was received on May 20, 2009. The protest was filed within two calendar weeks and is, accordingly, timely.

In its written protest, Morbark contends that its bid should not have been declared non-responsive. Morbark alleges that: (1) the terms of delivery were “boiler plate” and it will alter the terms to comply with the Commonwealth’s requirements; (2) the language stating that its price was a “quotation only and not an offer subject to acceptance” was boilerplate and it confirms its price offer; (3) the language stating shipment was

F.O.B. Morbark's Michigan office and that the Commonwealth was responsible for sales tax was "boiler plate" and it will conform to the terms of the solicitation; and (4) its reference to "cost to sales" was an internal reminder and its bid clearly prices these items. Morbark contends that these bid variations should have been excused under RFB Section 4.05 which allows the Commonwealth to waive minor irregularities.

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 protester 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:

1. Delivery Term.

Morbark concedes that its delivery term was not responsive. It argues that its delivery term was merely "boiler plate" and now agrees to be bound by the delivery term of the RFB.

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); *Central States Bridge Co.*, 85-2 CPD ¶ 154 (Comp.Gen. 1985) ("A bid which is nonresponsive on its face may not be changed, corrected, or explained by the bidder after bid opening.").

Morbark's bid was non-responsive at bid opening. Its subsequent agreement to comply with the RFB does not change that. KYTC correctly determined that Morbark's bid was non-responsive.

2. Intent To Be Bound.

Morbark argues that the language stating that its price was a "quotation only and not an offer subject to acceptance" was boilerplate. Morbark, further, now confirms its price offer.

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); *Central States Bridge Co.*, 85-2 CPD ¶ 154 (Comp.Gen. 1985) (“A bid which is nonresponsive on its face may not be changed, corrected, or explained by the bidder after bid opening.”).

Morbark’s bid was non-responsive at bid opening. Its subsequent agreement to comply with the RFB does not change that. KYTC correctly determined that Morbark’s bid was non-responsive.

3. Tax and Shipment Terms.

Morbark argues that the language stating shipment was F.O.B. its office and that the Commonwealth is responsible for sales tax was “boiler plate.” Morbark now agrees to conform to the terms of the solicitation;

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); *Central States Bridge Co.*, 85-2 CPD ¶ 154 (Comp.Gen. 1985) (“A bid which is nonresponsive on its face may not be changed, corrected, or explained by the bidder after bid opening.”).

Morbark’s bid was non-responsive at bid opening. Its subsequent agreement to comply with the RFB does not change that. KYTC correctly determined that Morbark’s bid was non-responsive.

4. Firm Price.

Morbark’s asserts that the reference to “cost to sales” was an internal reminder. Morbark argues that its offer clearly prices these items.

Agency decisions are entitled to a presumption of correctness. KRS 45A.280. 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). The protestor, therefore, has the burden to show that the award violates the arbitrary, capricious, or contrary to law standard.

Here, at best, Morbark created an ambiguity in its bid. KYTC determined that Morbank did not offer a firm price and, therefore, that its bid was non-responsive. KYTC’s determination is entitled to a presumption of correctness. KRS 45A.280. Morbark has not shown that this decision was arbitrary, capricious, or contrary to law.

Morbark also argues that KYTC should have waived these bid variations as minor irregularities. An agency may waive minor irregularities in a bid. 200 KAR 5:306(4). Minor irregularities “are mere matters of form not affecting the material substance of a bid or an immaterial deviation from or variation in the precise requirements of the solicitation having no or a trivial or negligible effect on price, quality, quantity, delivery of supplies, or performance of the services being procured . . .” 200 KAR 5:306(4)(3). Here, Morbark’s failure to agree to the price and the delivery terms of the RFB would have provided it with a competitive advantage.

These variations were not "minor irregularities" which could have been waived under 200 KAR 5:306 and RFB Section 4.05. KYTC did not abuse its discretion in not waiving the variations in Morbark's bid.

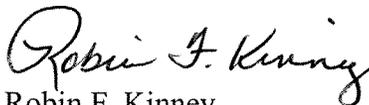
Finally, Morbark has not established prejudice in the award. Morbark has not shown that, but for the alleged error, it would have been awarded the contract. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996).

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



Robin F. Kinney  
Executive Director  
Office of Administrative Services

cc: KYTC, Div. of Purchases