



Steven L. Beshear
Governor

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

Jonathan Miller
Secretary

July 22, 2009

No. 09-14

John Walsh
President
Walsh Industrial Piping
2362 Suite D, Irvine Road
Richmond, KY 40475

RE: Determination of Protest: RFB-184-09.

Dear Mr. Walsh:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest dated May 22, 2009, on behalf of Walsh Industrial Piping. ("Walsh") relating to RFB-184-09 ("RFB") for EKCC Boiler System Repairs.

FACTUAL BACKGROUND

The Division of Engineering and Contract Administration, Department for Facilities and Support Services ("DECA") opened bids for the RFB on March 26, 2009. There were two bidders: Walsh and Doyenne Constructors, LLC ("Doyenne"). Upon bid opening, Doyenne was the apparent low bidder. During bid review, DECA requested that Doyenne substitute certain listed subcontractors, at no cost to the Commonwealth, which were unacceptable to DECA. Doyenne complied. On May 15, an award to Doyenne was posted on the Commonwealth's eProcurement website.

On May 22, 2009, Walsh filed a written protest. In its protest, Walsh argued: (1) Doyenne had an unfair opportunity and advantage to procure subcontractors; (2) Doyenne provided a false statement that it had paid its fees and taxes; (3) Doyenne provided a false statement that it was duly registered to do business in Kentucky; and (4) Doyenne must have been delinquent on its taxes and fees at the time of its bid. On June 4, 2009, DECA 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. Walsh submitted a bid in response to the RFB. Therefore, Walsh has standing to protest the award of the RFB.

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person knows or should have known of the facts giving rise thereto. KRS 45A.285(2). Here, the award was posted on the eProcurement website on May 15, 2009. The protest was received on May 22, 2009. The protest was filed within two calendar weeks and is, accordingly, timely.

In its protest, Walsh argued: (1) Doyenne had an unfair opportunity and advantage to procure subcontractors; (2) Doyenne provided a false statement that it paid its fees and taxes; (3) Doyenne provided a false statement that it was duly registered to do business in Kentucky; and (4) Doyenne must have been delinquent on its taxes and fees at the time of its bid.

This procurement was conducted by “competitive sealed bidding.” KRS 45A.080. In competitive sealed bidding, the contract will be awarded to the responsible bidder whose bid is responsive and determined to be “best value.”

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 nonresponsive on its face may not be changed, corrected, or explained by the bidder after bid opening.”). However, an agency may waive minor irregularities in a bid. 200 KAR 5:306(4). This determination is discretionary, within limits. An irregularity is minor only if it does not provide the bidder with a competitive advantage. 200 KAR 5:306(4)(3).

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 also be stated in the solicitation document. *Id.*

In sum, the Secretary will review a sealed bid award to determine whether the bid is responsive, whether the bidder is responsible, and whether the best value criteria have been followed. The determination of responsiveness and “best value” are primarily objective analyses. However, the determination to waive minor irregularities and the determination of responsibility involve an exercise of agency discretion. Agency decisions are entitled to a presumption of correctness. KRS 45A.280. The protestor, therefore, has the burden to show that (1) the determination of responsiveness or the application of “best value” criteria was contrary to law or (2) the waiver of minor irregularities or the determination of responsibility was arbitrary or capricious, that is, irrational. See *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, 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:

(1) Doyenne had an unfair opportunity and advantage to procure subcontractors.

After bid opening, but before award, DECA rejected subcontractors listed by Doyenne. DECA required that Doyenne substitute other subcontractors without any change in contract price. Walsh contends that this provided Doyenne with an unfair advantage.

According to the express terms of the RFB, “All subcontractors are subject to approval by the Division of Engineering and Contract Administration, Department of Facilities and Support Services, Frankfort, Kentucky.” RFB, List of Proposed Subcontractors (Page 12 of 13). Further, the Finance and Administration Cabinet Manual of Policies and Procedures, at FAP 220-05-00, which govern this procurement, provide:

9. SUBCONTRACTOR, MATERIAL AND EQUIPMENT LISTING

a. A bidder shall, if requested in the solicitation, list the names of subcontractors proposed for each of the principal portions of the work, including those persons or entities who are to furnish material or equipment fabricated to a special design, in the designated place on the Bid Documents.

b. A bidder shall establish to the satisfaction of the purchasing officer, the reliability and responsibility of the listed subcontractors. The bidder may be required by the purchasing officer to provide additional information regarding listed subcontractors.

- c. If, after due investigation, there is reasonable objection to the qualifications of a listed subcontractor, the bidder shall, upon written direction of the purchasing officer, submit the name of an acceptable substitute subcontractor with no change in bid price. The failure of the bidder to promptly comply with this requirement may be grounds for rejection of the bid.
- d. Any listed subcontractor to whom the purchasing officer does not make written objection prior to the giving of the Notice of Intent to Award shall be deemed acceptable to the owner.
- e. A bidder shall make no other substitution for any listed subcontractor without first receiving the approval of the purchasing officer in writing of the intended substitution and the specific reason for the substitution. A substitution may be disapproved if the purchasing officer has reasonable objection.
- f. Nothing contained in the bidding documents shall be deemed to create a contractual relationship between the owner and any subcontractor.

Thus, the process by which Doyenne was required to change subcontractors was expressly provided for by the RFB and by the applicable regulations. During this process, Doyenne was not allowed to change the amount of its bid. Moreover, Walsh has not shown how this action provided Doyenne with an unfair advantage. Further, the presumption of correctness in KRS 45A.280 applies. As a result, the action of DECA to require Doyenne to provide substitute subcontractors was proper and this basis for protest is without merit.

(2) Doyenne provided a false statement that it paid its fees and taxes.

Walsh contends that Doyenne falsely represented that it had paid all fees and taxes due to the Commonwealth. This allegation is apparently based only upon an inference created by the fact that Doyenne, in the past, had performed work in Kentucky and by the fact that Doyenne was not properly registered at the time it submitted its bid.

According to DECA, however, Doyenne has provided to DECA a statement of the fees and taxes Doyenne paid to the Commonwealth for the year 2007. Doyenne further stated that it performed no business in the Commonwealth during 2008. Therefore, DECA's determination that Doyenne was a responsible bidder was not arbitrary or capricious. Further, the presumption of correctness in KRS 45A.280 applies. As a result, this basis for protest is without merit.

(3) Doyenne provided a false statement that it was duly registered to do business in Kentucky.

Walsh argues that an affidavit supplied by Doyenne that it was registered to conduct business in the Commonwealth was false and, accordingly, Doyenne should not have been awarded the contract.

DECA points out that Doyenne provided a statement that it had registered "to the extent required by law." DECA did not consider this a false statement since Doyenne was not required to be registered to submit a bid. At the time, Doyenne was not performing other work in the

Commonwealth. DECA required that Doyenne register prior to issuance of the contract and Doyenne did. DECA's determination that Doyenne was a responsible bidder was not arbitrary or capricious. Further, the presumption of correctness in KRS 45A.280 applies. As a result, this basis for protest is without merit.

(4) Doyenne must have been delinquent on its taxes and fees at the time of its bid.

This issue duplicates (2), above.

Accordingly, upon review of the record, the protest of Walsh lacks merit. Further, the presumption of correctness in KRS 45A.280 applies and Walsh 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 Kinney
Executive Director
Office of Administrative Services

cc: Amanda Greer, DECA