Commonwealth of Kentucky
Finance and Administration Cabinet
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October 5, 2009

No. 09-15

Ronald Leaders
Law Offices of Ronald Leaders
9330 SW 216 St.
Vashon, WA 98070

RE: Determination of Protest: RFB 605 0900003775.

Dear Mr. Leaders:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Beck Disaster Recovery, Inc. ("BDR") relating to RFB 605 0900003775 ("RFB") for Debris Management for Areas 1, 2, and 3.

FACTUAL BACKGROUND

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued the RFB on March 25, 2009. According to the RFB:

> The Kentucky Transportation Cabinet (KYTC) is seeking proposals to establish a Master Agreement(s) for monitoring the removal, reduction and disposal of vegetative debris generated as a result of the January 2009 Ice and Snow Storm in Commonwealth of Kentucky. Several areas have been declared as disaster areas by the President of the United States because of the effects of Federal Emergency Management Agency (FEMA) Major Disaster Declaration # 1818-DR-Kentucky.
>
> > The Vendor shall monitor and properly document the debris removal and disposal activities. The Vendor shall be knowledgeable and have experience in the provision of services for reimbursement through the FEMA Public Assistance Program. The Vendor shall be required to interact with Debris Removal and Debris Disposal Contractor(s) hired by KYTC to remove vegetative debris from the Public Right-of-Way and taking the cleared debris to Cabinet approved Debris Management Sites (OMS) for quality control and disposal.

KYTC estimates Vendor will need to provide 3-15 monitors per county awarded depending on the work being performed in each county. The actual number of monitors needed will be determined by KYTC on a daily basis and will be based on the number of crews working in each county.

The Vendor and its employees shall not have a vested interest in the Debris Removal or Debris Disposal Contract(s) or Contractor(s). The Vendor with a vested interest in the aforementioned shall be excluded from bidding on this solicitation because this situation creates a conflict of interest as the Vendor can not monitor their own work.
Vegetative debris is defined as whole trees, uprooted tree stumps, tree branches, tree trunks, and other leafy material.

RFB, Section 1.01 (Overview).

For evaluation and scoring, the RFB provided:

Each vendor is responsible for submitting all relevant, factual and correct information with their offer to enable the evaluator(s) to afford each vendor the maximum score based on the available data submitted by the vendor. The information will be furnished in the spaces provided below.

The maximum score assigned to the RFB is one hundred (100) points. Vendors responding with the minimum Best Value requirements in this Solicitation will not be credited with Best Value points. Vendors responding with greater than the minimum requirement will receive a Best Value score. Failure to provide adequate information will impact the evaluated points awarded to a bidder.

Grading Criteria	**Total Possible Points**
1. Three (3) References (see Attachment D)	15
2. Maximum number of staff per Area	15
3. Hourly Cost of Roadside/DMS debris monitor	65
4. Headquarters within the boundaries of the Commonwealth of Kentucky	05

Total Possible Points 100

References- The bidder will receive 5 points, up to a maximum of 15 points, for each reference questionnaire that is completed and returned by the references identified on Attachment D. If the reference fails to return a completed evaluation form within the timeline specified, the bidder will receive a score of O.

Maximum number of staff per Area- The bidder with the highest number of available staff will receive the maximum score. The bidder with the next highest number of available staff receives points based on dividing their offer by the maximum offer and multiplying that percentage by the available points, Le., assume 50 staff members is the highest number of staff offered, then 50/50 = 1.00 x 15 points =15 points and assume 45 is the next highest number of staff offered, then 45/50 =.90 x 15 points =13.5 points.

Price- The bidder with the lowest price receives the maximum score. The awarded vendor(s) will be paid at the unit price multiplied by those quantities used. The bidder with the next lowest price receives points based on dividing his price into the lowest price and multiplying that percentage by the available points, Le. assume $50,000 is the low offer, then $50,000/$50,000 =1.00 x 65 available points =65 points and assume $55,000 is the next low offer, then $50,000/$55,000 =.91 x 65 =59 points).

Business Headquarters located within Kentucky- The bidder will receive the maximum of 5 points if their business located within the Commonwealth of Kentucky's boundaries. A score of owill be awarded to businesses located outside of Kentucky.

The Commonwealth reserves the right to negotiate all aspects of the solicitation with the evaluated best value vendor.

RFB, Section 5.03 (Evaluation Weighting and Scoring).

The RFB closed on April 2, 2009 at 10:00 a.m. Nine vendors submitted bids. Solid Resources, Inc. was evaluated at 91.3 points (15 points for staffing) and was awarded the contract; BDR was evaluated with the second highest score at 88.4 points (6.6 points for staffing).

By letter dated May 22, 2009 (received May 26, 2009), counsel for BDR filed a written protest. In its protest, BDR argued that the RFB stated that a maximum 15 staff would be required for each area and that BDR offered the maximum staff per area. Accordingly, BDR contends that it should have received the maximum points available for this item. On September 3, 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. BDR submitted a bid in response to the RFB. Therefore, BDR has standing to protest the award of the RFB.

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 award was posted on April 24, 2009. Under 5 KAR 5:380 Section 1 1(b) "For protests based upon alleged improprieties in the award of a contract, the facts giving rise to the protest shall be presumed to have been known to the protester on the date the notice of award of a contract was posted to the Commonwealth of Kentucky's eProcurement Web site, www.eprocurement.ky.gov." If this presumption were to apply, the protest would be untimely. However, "the presumption may be overcome by a showing that the facts giving rise to the protest were not and should not have been known to the protester on the date established by subsection (1)(a) or (b) of this section." 200 KAR 5:380 Section 1 (1)(b)(2).

In this case, the basis for BDR's protest was only apparent upon review of the bid evaluation. BDR received this information pursuant to an Open Records request on May 18th. The written protest was received on May 26th. 200 KAR 5:380 Section 3 (2) (For the purposes of KRS 45A.285, "filed" shall mean actual receipt by the Office of the Secretary of the Finance and Administration Cabinet). The Secretary finds that the protestor has overcome the presumption created by regulation and that the protest was filed within 2 calendar weeks of the date the protestor knew or should have known of the grounds for protest. This protest, accordingly, is timely.

In its written protest, BDR argued that the RFB stated that a maximum 15 staff would be required for each area and that BDR offered the maximum staff per area. Accordingly, BDR contends that it should have received the maximum points available for this item.

This procurement was conducted under "competitive sealed bidding" procedures found at KRS 45A.080. Under this process, the contract is to be awarded to the responsive, responsible bidder which offers "best value." In addition, "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). 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).

Moreover, a protest to a solicitation should be filed *before* the protestor actually submits a bid or proposal. Once a party submits a bid or proposal to a solicitation and the bids are opened, the protestor then has waived all objections to the solicitation document not previously raised. *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.")

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

BDR contends that the RFB was improperly evaluated. Citing RFB, Section 1.01, BDR asserts that KYTC provided that a maximum of 15 staff per county were required. BDR proposed staff which exceeded this maximum requirement. BDR, accordingly, should have been awarded the maximum 15 points for this item. With the full 15 point award, BDR would have been the highest evaluated bidder,

Yet, the RFB stated in an overview:

> KYTC *estimates* Vendor will need to provide 3-15 monitors per county awarded depending on the work being performed in each county. RFB, Section 1.01 (Overview) (Emphasis added).

And in the section on evaluation and scoring, the RFB provided:

> The bidder with the highest number of available staff will receive the maximum score. RFB, Section 5.03 (Evaluation Weighting and Scoring).

Nowhere did the RFB state that the maximum number of staff required was 15 per county. To the contrary, the RFB stated that three to fifteen staff was an estimate. The actual provision on scoring contained no reference to a maximum number of staff. Further, to the extent that BDR felt that the solicitation contained contradictory or ambiguous terms, it waived that objection by submitting a bid. BDR's protest is without merit.

Accordingly, upon review of the record, the protest of BDR lacks merit. Further, the presumption of correctness in KRS 45A.280 applies and BDR 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: KYTC, Div. of Purchases