



Commonwealth of Kentucky
Finance and Administration Cabinet
OFFICE OF THE SECRETARY
Room 183, Capitol Annex
702 Capital Avenue
Frankfort, KY 40601-3462
(502) 564-8644
Fax (502) 564-4279

Steven L. Beshear
Governor

Jonathan Miller
Secretary

Robin Kinney
Executive Director

September 21, 2009

No. 09-21

Michael T. Hartney
Corday & Hartney
The Lake View Building
11665 Avena Place, Suite 202
San Diego, CA 92128

RE: Determination of Protest: RFB 758 1000003800 (Portable Two Way Radios).

Dear Ms. Hartney:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest to the award of RFB 758 1000003800 for portable two way radios and accessories (the "RFB"). In the protest you contend that the bid of Klein Electronics, Inc. ("Klein") was not properly considered. For the reasons stated herein, this protest is sustained.

FACTUAL BACKGROUND

The Finance Cabinet Office of Procurement Services ("OPS") issued the RFB on March 30, 2009 for "Portable Two Way Radios and Accessories" on behalf of Kentucky Transportation Cabinet. After modifications, the RFB closed on April 23, 2009. The RFB sought a brand name product and accessories or equivalent. The RFB was to be evaluated by the following 100 point Best Value criteria: price – 95 points; delivery – 5 points. RFB, Evaluation Criteria (page 8 of 29). In a written Determination and Finding ("D & F") dated July 7, 2009, the Commonwealth Buyer found:

Responses were received from bidders in response to the above RFB. Best value scoring on responsive bidders in indicated below.

BEST VALUE SCORING*
 See attached XML Best Value Score sheet

Best Value Criteria	Bear Communications	ICOM America. Inc
Price 95 points	81.7 pts	95.0 pts
Delivery 5 points	10 days - 5 pts	30 days- 1.6 pts
Total pts	86.7 pts	96.6 pts
RANK	2	1

INTRO- 15 offers were received of various brands and configs. 4 bids were for the specified parts and equipment. Responsive to the required bid documents, there were two of the four offers selected for further evaluation, Bear Communications and Icom America, Inc. The highest score for total unit price was 95 points to ICOM America. Bear Comm. Ranked second in price with 81.7 pts. Bear had the best delivery of 10 days ARO and rec. 5 pts. ICOM offered 30 day delivery and received 1.6 points. Best value total points scored for unit pricing

DETAILS OF BEST VALUE SCORING OF BEAR COMMUNICATIONS & ICOM AMERICA Inc

ICOM did not bid line 4. Upon investigation from the bidder and consulting the ICOM parts catalog, it was learned that the 1150 mAh battery is discontinued. Additionally, per the bid and the offers, line 6 is the same as line 4 on both bids and the identical part number for line 6 was offered by ICOM and Bear. It was determined that for the cost efficiency of the agency and due to the fact that lines 4 and 6 were identical on both bids that line 4 would not be scored in either offer. The total for Bear for line 4 was deducted from the unit price totals. As ICOM had no entry for line 4 citing line 6 as the same item, the ICOM total price was not altered. The ICOM total still would have earned more of the best value points if prices had been subtracted from the total.

Other bidders were Klein, Florida Corp. SAT Radio Comm. Diversified Comm., Holzberg Comm. Brewer and Assoc. RELM Wireless and Mobile Communications

Award MA 758100000010-1 to Icom America Inc

The attached "XML Best Value Score sheet" referred to in the D & F appears to be a line item recap of bid amounts or "bid tab" and not a Best Value scoring. According to the bid tab, Klein was the apparent low bidder.

On July 14, 2009, Klein learned that the Master Agreement contract was to be awarded to ICOM America, Inc. ("ICOM"). On July 14, 2009, Klein submitted an Open Records request requesting the bid tabulation and reasoning for the award. On July 17, 2009, Klein received a copy of the D & F. By letter dated July 20, 2009 (and received July 22, 2009), Klein filed a written protest with the Secretary of the Finance Cabinet. In its letter of protest, Klein alleges that its bid was not properly evaluated. On July 30, 2009, ICOM was invited to submit a response to the protest. As of this date, no response from ICOM has been received. On August 17, 2009, OPS submitted a written response to the protest.

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. Klein 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 July 7, 2009; the protest was received on February 23, 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 protestor 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 protestor 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 Klein's protest was only apparent upon review of the D & F. Klein received the D & F pursuant to an Open Records request on July 17th. The written protest was received on July 22nd. 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 letter of protest, Klein alleges that its bid was not properly evaluated.

This procurement was conducted as a Competitive Sealed Bid procurement under KRS 45A.080. "The contract shall be awarded by written notice to the responsive and responsible bidder whose bid offers the best value." KRS 45A.080(5); 200 KAR 5:306 Section 3 ("After a reasonable bid evaluation period, the contract shall be awarded to the responsive and responsible bidder whose bid offers the best value to the Commonwealth.")

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.”). ICOM did not bid line 4. Thus, its bid may have been non-responsive. It could not be cured or changed after bid opening.

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.*

Thus, an evaluation of a bid in a competitive sealed bid procurement requires an initial determination of responsiveness. Prior to award, there must also be a finding of responsibility. KRS 45A.110 (1) (“A written determination of responsibility of a bidder or offeror shall be made and it shall be made in accordance with administrative regulations promulgated by the secretary of the Finance and Administration Cabinet.”); FAP 111-34-00(3). When an “Or Equal” or equivalent product has been proposed, there must be a reasoned finding whether the product is or is not an equivalent or better product. Responsive bids are then evaluated based upon the Best Value criteria. The highest scoring bid under the Best value criteria is then selected for award.

The bid evaluation is required to be memorialized. KRS 45A.025 (“Every determination required by this code shall be in writing and based upon written findings of the public official making the determination. These determinations and written findings shall be retained in an official contract file in the office of the chief purchasing officer or in the office of the using agency administering the contract.”). The determination must be reasoned. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007) (procurement decisions must not be arbitrary, capricious, or contrary to law).

Here, the D & F recited that there were 15 bidders: ICOM, Bear Communications, Klein, Florida Corp. SAT Radio Comm. Diversified Comm., Holzberg Comm. Brewer and Assoc. RELM Wireless and Mobile Communications. The D & F does not state which bidders were responsive and which bidders were not responsive. The D & F contains no finding of responsibility. If a bidder had proposed an alternative product, the D & F provides no finding concerning whether the alternative product was equivalent or better than the specified product. It

is not clear from the D & F why only two of the fifteen bidders were selected for a Best Value determination. The D & F does not provide reasoned support for an award to ICOM.

Further, there were thirteen separate line items to be bid. Line 4 sought 200 quantity 7.4V/1150mAh Li-Ion batteries. ICOM did not bid line 4. Klein did bid line 4. ICOM's bid was non-responsive. Its bid could not be cured or altered after bid opening. *Interstate Rock Products v. U.S.*, 50 Fed.Cl. 349, 360 (Fed.Cl. 2001). Klein's bid was responsive.

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).

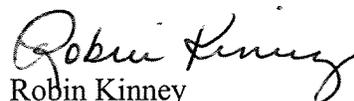
Here, Klein was the apparent low bidder. While price was not the sole factor considered in the RFB's Best Value scoring, it was 95% of the total score. If Klein's bid were responsive, and if it offered an equivalent or better product to the brand name specified, then there is a reasonable likelihood that Klein's bid would have been evaluated as the Best Value. Klein has shown prejudice.

Accordingly, upon review of the record, Klein has demonstrated an error in the procurement and prejudice. The protest, therefore, must be **SUSTAINED**. The Finance Cabinet Office of Procurement Services is directed to rescind the award to ICOM and either to re-score the bids to the RFB or, if it is in the best interest of the Commonwealth, to cancel the RFB and to issue a revised solicitation or to implement some other action consistent with this Determination. 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



Robin Kinney
Executive Director
Office of Administrative Services

cc: Paul Bentley, OPS