



Commonwealth of Kentucky
Finance and Administration Cabinet
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December 8, 2009

No. 09-31

Mary O'Bryan
President/Chief Executive Officer
Community Services Project, Inc.
1106 Penlle Road
Louisville, KY 40272

RE: Determination of Protest: RFB 605 1000000183 & RFB 605
1000000185 (Christian & Simpson County Rest Areas).

Dear Ms. O'Bryan:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Community Services Project, Inc. ("CSP") relating to RFB 605 1000000183 & RFB 605 1000000185 (Christian & Simpson County Rest Areas) (the "RFBs").

FACTUAL BACKGROUND

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued the RFBs on September 3, 2009, for janitorial service at roadside rest areas in Christian and Simpson Counties, Kentucky.

Walter A. Smith Enterprises ("WASE") was the highest evaluated bidder and CSP was the second highest evaluated bidder. On September 18, 2009, two Master Agreements arising from the RFBs were awarded to WASE.

By letter dated September 21, 2009 (and received September 23, 2009), CSP protested the awards to WASE. CSP raises three grounds of protest: (1) WASE submitted multiple bids and should have been disqualified; (2) WASE is not properly registered to do business in Kentucky; and (3) WASE was not properly registered with the eProcurement website. By letter dated October 6, 2009, WASE responded to the protest. On September 30, 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. CSP submitted bids in response to the RFBs. Therefore, CSP has standing to protest the award of the RFBs.

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 September 18, 2009. The protest was received on September 23, 2009. The protest was filed within two calendar weeks and is, accordingly, timely.

In its written protest, CSP raises three grounds of protest: (1) WASE submitted multiple bids and should have been disqualified; (2) WASE is not properly registered to do business in Kentucky; and (3) WASE was not properly registered on the eProcurement website.

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:

1. WASE submitted multiple bids and should have been disqualified.

In its written protest, CSP states:

Subsequent to the issuance of the RFBs, in checking the Cabinet's website, we noted that, in addition to a bid having been made by Walter A. Smith Enterprises, there was another bid made by a

company named North Texas Maintenance on each RFB. We were aware that Walter A. Smith Enterprises is based in the state of Texas. This led us to wonder whether there was some relationship between the two companies. Our inquiries in the state of Texas, though as yet unconfirmed, led us to believe that there may be common ownership between Walter A. Smith Enterprises and North Texas Maintenance. If this proves to be correct, this would be improper. Submission of multiple bids by the same bidder, or by two bidders with common ownership, raises the possibility of numerous irregularities which could create an unfair advantage over other bidders.

In its response, WASE states: "Walter A. Smith and Walter A. Smith Enterprises, Inc. are in no way affiliated with North Texas maintenance Company."

CSP is correct that, in general, bidders are prohibited from submitting multiple or alternate bids. See, e.g., Finance and Administration Cabinet Manual of Policies and Procedures, FAP 110-10-00(5)(e). CSP offers nothing more than speculation, however, to substantiate this claim. WASE asserts that there is no relationship between it and any other bidder. As noted above, agency decisions are entitled to a presumption of correctness. KRS 45A.280. CSP has the burden to show that the award violates the arbitrary, capricious, or contrary to law standard. In this case, CSP has failed to overcome the presumption. Therefore, this ground of protest has no merit.

2. WASE is not properly registered to do business in Kentucky.

CSP also protests because "it also came to CSP's attention that Kentucky Secretary of State's office shows no record of Walter A. Smith Enterprises being registered to do business in the Commonwealth of Kentucky." WASE responds:

Walter A. Smith Enterprises Inc. is currently registered with the Kentucky Secretary of State. Due to an oversight, WASE Inc. was not initially registered. However, as we were reviewing numerous filings we discovered the omission and filed for registration the first week in September, 2009. It was initially sent back due to incorrect paperwork. That was corrected and the filing was completed on September, 2009 [sic. The corrected application was filed on September 22nd, 2009].

Documents obtained by KYTC from the Commonwealth Secretary of State indicate that, on September 1, 2009, WASE submitted an application for a Certificate of Authority. This application was rejected by the Commonwealth Secretary of State on September 9th because it lacked certain paperwork. A Certificate of Authority was granted to WASE on September 22nd.

Although WASE was not registered with the Secretary of State at the time it was awarded the Master Agreements, when a foreign business entity lacks a Certificate of Authority, it may still enter into binding contracts. KRS 271B.15-020.

CSP has failed to overcome the statutory presumption of correctness. Therefore, this ground of protest has no merit.

3. WASE was not properly registered on the eProcurement website.

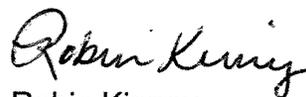
As a third ground of protest, CSP argues that WASE was not properly registered with the Commonwealth's eProcurement website. KYTC states that WASE has been registered in the state's procurement system since 2005. As noted above, agency decisions are entitled to a presumption of correctness. KRS 45A.280. CSP has the burden to show that the award violates the arbitrary, capricious, or contrary to law standard. CSP has failed to overcome the presumption. Therefore, this ground of protest has no merit.

Accordingly, upon review of the record, the protest of CSP lacks merit. Further, the presumption of correctness in KRS 45A.280 applies and CSP 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
Walter A. Smith Enterprises, Inc.