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October 19, 2009

No. 09-33

William Zehnal
Director of Business Development
ISS Facility Services, Inc.
101 South Mercer St., Suite 206
New Castle, PA 16101

RE: Determination of Protest: RFB 785 1000000134.

Dear Mr. Zehnal:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of ISS Facility Services, Inc. ("ISS") relating to RFB 785 1000000134 ("RFB") for Building Maintenance.

FACTUAL BACKGROUND

The Finance Cabinet Facilities & Support Services, Division of Building Services ("DBS") issued the RFB on August 13, 2009. The RFB sought bids for various cleaning services at the Kentucky State Office Building. There were seven separate line items to be bid. The bids were scored on a 500 point basis on lowest price per line item.

According to the RFB:

5.5.2.5. - Unless otherwise instructed, bid unit pricing for commodities or services after deducting trade discounts and calculating quantity discounts, and then extend totals to the amount column for each item offered. In case of a discrepancy between unit price and extended price, the unit price shall govern.

The RFB closed on August 62, 2009. Aetna Building Maintenance ("Aetna") was awarded 494 points. ISS was awarded 452 points. On September 22, 2009, Aetna was awarded a contract based upon the RFB.

By letter dated September 24, 2009 (received October 1, 2009), ISS filed a written protest. In its protest, ISS points out that Aetna's bid contained an error on page 3, line 3 for power washing: the line item total amount does not equal the unit price multiplied by the quantity amount. ISS, therefore, requests that the RFB be re-bid. On October 7, 2009, DBS 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. ISS submitted a bid in response to the RFB. Therefore, ISS 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 September 22, 2009. The protest was received on October 1, 2009, within two calendar weeks. This protest, accordingly, is timely.

In its written protest, ISS argues that Aetna's bid contained an error on page 3, line 3 for power washing: he line item total amount does not equal the unit price multiplied by the quantity amount. ISS requests that the RFB be re-bid.

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." 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:

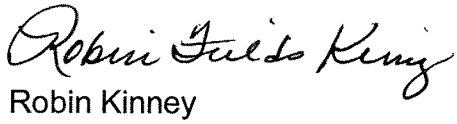
ISS believes that Aetna committed an error in preparing its bid and contends that the RFB should be re-bid "to ensure accuracy and clarity of a vendors [sic] proposed intention." DBS agrees that Aetna's bid contained an error: The total bid amount for line 5 (power washing) did not equal the unit price multiplied by the quantity. But DBS noted that RFB 5.5.2.5 deals with this sort of error: When a discrepancy exists between a unit price and a total amount, the unit p[rice shall prevail. DBS scored Aetna's bid based upon the unit price for line 5. According to the terms of the RFB, this was correct. Accordingly, ISS' protest is without merit.

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