



Commonwealth of Kentucky  
Finance and Administration Cabinet  
**OFFICE OF THE SECRETARY**  
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**Steven L. Beshear**  
Governor

**Jonathan Miller**  
Secretary

April 23, 2008

**No. 08-24**

Larry Humphress  
Branch Manager  
ValleyCrest Landscape Maintenance  
4510 Poplar Level Road  
Louisville, KY 40213

RE: Determination of Protest: RFB 605 0800002487.

Dear Mr. Humphress:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of ValleyCrest Landscape Maintenance ("ValleyCrest") to the award of a contract based upon the above-referenced solicitation. ValleyCrest's protest alleges that the solicitation ignored the likely actual quantities required and, as a result, the most cost-effective bidder did not obtain the award. For the reasons stated herein, this protest is denied.

### **FACTUAL BACKGROUND**

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued RFB 605 0800002487 ("RFB") on February 18, 2008 for District 5 Landscape Maintenance. The RFB closed on March 4, 2008. ValleyCrest submitted a bid but was not evaluated as the responsible and responsive bidder which offered "best value." A Master Agreement was awarded to Swartz Mowing, Inc.

ValleyCrest submitted a written protest which was filed on March 26, 2008. In its protest, ValleyCrest alleged that the solicitation ignored the likely actual quantities required and, as a result, the most cost-effective bidder did not obtain the award.

## DETERMINATION

After a review of the solicitation of RFB, the applicable statutes and regulations, and other relevant information, the 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 and Administration Cabinet ("Secretary"). KRS 45A.285. ValleyCrest 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 RFB was issued on February 18, 2008. The protest was filed more than fourteen (14) days after the RFB was issued and, therefore, is untimely.

ValleyCrest has alleged that the solicitation ignored the likely actual quantities required and, as a result, the most cost-effective bidder did not obtain the award.

This ground for protest is directed at the contents of the RFB. 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.")

ValleyCrest submitted a bid in response to the RFB. Therefore, it has waived objections to the content of the RFB. This ground for protest, therefore, has been waived.

Moreover, under KRS 45A.080, the Commonwealth purchases items through competitive sealed bidding by using "best value" criteria. "Best value" means a procurement in which the purchasing decisions are based on the primary objective of meeting the specific business requirements and best interests of the Commonwealth. KRS 45A.070(3). Thus, it is the Commonwealth that determines its business requirements as well as the specifications and criteria for each bid. In this case, the using agency, KYTC, determined the criteria by which bids were to be judged.

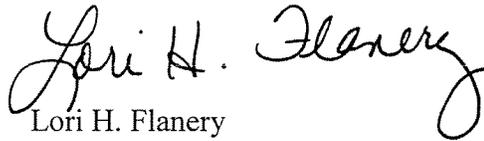
ValleyCrest has failed to state any violation of the statutes, regulations, or policies relating to this procurement. ValleyCrest has not shown that KYTC's specifications are irrational or arbitrary. Therefore, the determination of the using agency will not be disturbed.

Accordingly, upon review of the record, the protest of ValleyCrest is untimely, has been waived, and is without merit. The protest, therefore, 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 Finance Cabinet shall be final and conclusive.

For the Secretary  
Finance and Administration Cabinet  
By Designation

A handwritten signature in cursive script that reads "Lori H. Flanery". The signature is written in black ink and is positioned above the printed name and title.

Lori H. Flanery  
Deputy Secretary

: Kathryn Lyles, KYTC