



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

Jonathan Miller
Secretary

October 10, 2008

No. 08-42

Aaron Hill
IB Mowing, LLC
P.O. Box 703
Hopkinsville, KY 42241

RE: Determination of Protest: RFB 605-0800003053.

Dear Mr. Hill:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of IB Mowing, LLC ("IB Mowing") relating to RFB 605-0800003053 (the "RFB") for Christian County I-24 Rest Area Grounds Maintenance.

FACTUAL BACKGROUND

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued the RFB on July 30, 2008. The RFB was to be evaluated by cost. There were fifteen specific line items. The evaluation was weighted to Line 1 – Mowing and Trimming with a value of 300 units. The remaining maintenance line items were valued at 1 unit each. The RFB closed on August 14, 2008.

Three bids were received: one from IB Mowing, a second from C & H Mowing Service; and a third from Kentucky Kutterz. Upon evaluation, all bids were determined to be responsive. IB Mowing received 91.59 points; C & H Mowing Service received 94.62 points; and Kentucky Kutterz received 100 points. Kentucky Kutterz was determined to have submitted the best evaluated bid. An award was issued to Kentucky Kutterz on August 21, 2008.

IB Mowing filed its written protest on August 29, 2008. In its protest, IB Mowing alleges that the units allocated to each line item do not accurately reflect what work will actually be required. For the reasons contained herein, this protest is denied.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest and responses thereto, 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. IB Mowing submitted a bid in response to the RFB. IB Mowing, therefore, has standing to protest the award under KRS 45A.285.

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. The award was made on August 21, 2008. The IB Mowing protest was filed on August 29, 2008. Thus, the protest was filed within two (2) calendar weeks after the date of the award. The protest, accordingly, is timely.

In its letter of protest, IB Mowing alleges that the units allocated to each line item do not accurately reflect what work will be required.

IB Mowing's protest is directed at the basis for evaluating bids for the RFB. This basis was stated in the RFB document. As such, it is a protest to the solicitation document itself. 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.")

The basis for the evaluation of bids to the RFB was disclosed to all potential bidders and there is no allegation the evaluation criteria were not accurately applied to the bids. The unit values assigned to the individual line items were estimates. KYTC points out that available funding and conditions may vary from year to year. The evaluation criteria appear to have been rationally developed and there is no evidence that the criteria were developed in an arbitrary or capricious manner.

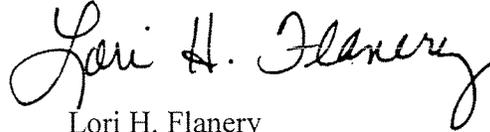
Accordingly, upon review of the record, the protest of IB Mowing has been waived and is without merit. Further, the presumption of correctness in KRS 45A.280 applies and IB Mowing has failed to provide

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

A handwritten signature in cursive script that reads "Lori H. Flanery".

Lori H. Flanery
Deputy Secretary

cc: Ben McCray, KYTC