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

Jonathan Miller
Secretary

November 19, 2008

No. 08-45

Richard T. Berger
Vice President
Chas. H. Bilz Insurance Agency, Inc.
412 Madison Avenue
Covington, KY 41012

RE: Determination of Protest: RFB 758 0800003131.

Dear Mr. Berger:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest, on behalf of the Chas. H. Bilz Insurance Agency, Inc. ("Bilz"), to the award of a contract based upon the above-referenced solicitation. In your letter you state two grounds for protest: (1) the Bilz bid should not have been rejected since it was only two minutes late (a) due to a local power outage and (b) due to being mis-directed by "Janitorial Staff" and (2) the Bilz bid was less than the bid of the awarded vendor. For the reasons stated herein, this protest is denied.

FACTUAL BACKGROUND

The Office of Procurement Services ("OPS") issued RFB 758 0800003131 (the "RFB") on August 22, 2008 for Boiler Breakdown Insurance. The RFB closed on September 15, 2008 at 1:30 p.m. The Bilz's bid was received after the closing time and was not examined. A contract was awarded to J. Smith Lanier & Co. ("Lanier"). By letter dated and received September 22, 2008, Bilz filed a written protest. On September 25, 2008, OPS provided its comments to the protest. Lanier was invited to comment on the protest but did not provide a response.

DETERMINATION

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. Bilz 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 closed on September 15, 2008. The protest was filed on September 22, 2008. The protest was filed within fourteen (14) days after the contract award and, therefore, is timely.

Bilz states two separate grounds of protest: (1) the Bilz bid should not have been rejected since it was approximately two minutes late due to a power outage and due to being mis-directed by "Janitorial Staff" and (2) the Bilz bid was less than the bid of the awarded vendor.

After a review of the solicitation of RFB, the applicable statutes, and other relevant information, the Secretary finds and determines as follows:

The RFB contained, by incorporation, the Finance Cabinet's standard General Conditions.

> FAP 110-10-00
> **GENERAL CONDITIONS AND INSTRUCTIONS FOR SOLICITATIONS AND CONTRACTS**
>
> The following general conditions shall be incorporated by reference in each Solicitation and resulting contract for commodities or services issued by the Commonwealth of Kentucky.
>
> By submitting a bid to the Commonwealth, a bidder agrees to these conditions.
>
> . . .
>
> **19. LATE OFFERS AND MODIFICATIONS:** The state's procurement system will not allow submission of online responses after the published date and time for bid closing. A hardcopy offer or a modification of an offer received at the office designated in the solicitation after the hour and date specified for receipt shall not be considered for an award of contract, unless:
>
> a. No bids are received other than the late bid; and
>
> b. The need of an agency is determined to preclude the re-solicitation of bids; and
>
> c. The offer is evaluated and found to serve the best interest of the Commonwealth.

The Bilz bid was received after the advertised closing time for the RFB. Bilz concedes this point. OPS did not review or consider the Bilz bid in its determination to award the contract. A determination by an agency is entitled to a presumption of correctness. KRS 45A.280. A protester must clearly establish that an agency's action was irrational or contrary to law. This is not accomplished by the protester's mere disagreement with the agency's determination. *Systems & Processes Engineering Corp.,* 88-2 CPD ¶478 (Comp.Gen 1988). Bilz has provided no evidence or proof that OPS' action was arbitrary, capricious, or contrary to law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). In fact, OPS' action was consistent with and in accordance with FAP 110-10-00. Moreover, Bilz has not explained how the power outage delayed the bid. In addition, the alleged mis-direction by a janitor was entirely foreseeable. The decision by OPS not to review Bilz' late bid was not arbitrary or capricious. This ground for protest, therefore, is without merit.

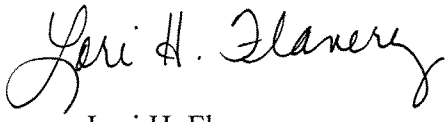
Since OPS properly did not consider the late-bid of Bilz, the Bilz bid was not eligible for award. FAP 110-10-00(19) (a late bid "shall not be considered for an award of contract."). This ground for protest, therefore, is without merit.

Accordingly, upon review of the record, the protest of Bilz 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



Lori H. Flanery
Deputy Secretary

cc: Richard Mize, OPS