



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. 08-48

Nellie Blair
President, CEO
Industrial Video Corp.
14885 Sprague Road
Cleveland, OH 44136

RE: Determination of Protest: RFB 758 0800003355.

Dear Ms. Blair:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest, on behalf of the Industrial Video Corporation ("IVC"), to the award of a contract based upon the above-referenced solicitation. In your letter you protest the determination that IVC's bid was late since IVC was not aware that the Commonwealth of Kentucky's business offices were closed on Election Day, November 4, 2008.

FACTUAL BACKGROUND

The Office of Procurement Services ("OPS") issued RFB 758 0800003355 (the "RFB") on October 22, 2008 for KY Afield TV HD Equipment. The RFB closed on November 5, 2008 at 1:30 p.m. IVC attempted to deliver its bid by private courier service on November 4, 2008. The Commonwealth of Kentucky's business offices were closed that day in observance of national Election Day. Three bids were timely received. The IVC bid was not delivered until November 6, 2008. OPS rejected the IVC bid as late. On November 6, 2008, OPS awarded the contract to VSA. By letter dated November 6, 2008 and received November 12, 2008, IVC filed a written protest. On November 17, 2008, OPS provided its comments to the protest. VSA 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. IVC 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 awarded on November 6, 2008. The protest was filed on November 12, 2008. The protest was filed within fourteen (14) days after the contract award and, therefore, is timely.

IVC protests OPS' determination that its bid was late since IVC was not aware that the Commonwealth of Kentucky's business offices were closed on Election Day, November 4, 2008.

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.

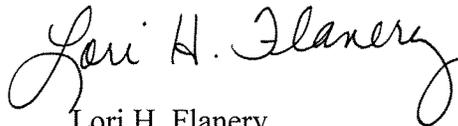
The IVC bid was received after the advertised closing time for the RFB. IVC concedes this point. OPS did not review or consider the IVC bid in its determination to award the contract. A determination by an agency is entitled to a presumption of correctness. KRS 45A.280. A protester must clearly establish 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). IVC 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, while OPS was closed on November 4th, the date of attempted delivery, IVC has not explained why its bid was not timely delivered on November 5th. The decision by OPS not to review IVC' late bid was not arbitrary or capricious. This ground for protest, therefore, is without merit.

Accordingly, upon review of the record, the protest of IVC 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: Megan F. Thompson, OPS