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August 7, 2009

No. 09-17

Ocie Ann May  
Nova Inc  
P.O. Box 380  
Allen, KY 41601

RE: Determination of Protest: RFP 605 0900003902

Dear Ms. May:

The Finance & Administration Cabinet ("FAC") is in receipt of your letter of protest on behalf Nova, Inc. ("NOVA") relating to RFB 605 0900003902 ("RFB"), which was designed to award multiple contracts, for different groups of equipment rental needs for the Kentucky Transportation Cabinet. The specific concern raised in your protest relates to Nova's bid being found non-responsive for Group 1.

### **FACTUAL BACKGROUND**

The Kentucky Transportation Cabinet Division of Purchases ("KYTC") issued a Request for Bids ("RFB") on May 12, 2009. The RFB closed on May 19, 2009. Nova was one of the vendors who submitted a response. Three (3) separate contract awards were made on May 21, 2009, one to each group listed in the bid. Nova subsequently filed this protest, received on June 1, 2009.

### **DETERMINATION**

After a review of the solicitation, the applicable statutes and regulations, the protest, and other relevant information, the Secretary of the Finance Cabinet (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 Cabinet. KRS 45A.285. Nova submitted a bid in response to the RFB. Therefore, Nova has standing to protest the award of the RFB. A protest to an award of contract must be made within two (2) calendar weeks after the award. KRS 45A.285. Here, the protest was received on June 1, 2009, within two calendar weeks of the contract award on May 21, 2009, and is timely.



It is undisputed that, in Nova's bid response, Nova struck out the unit price for Group 1, Line 3 and replaced it with \$143. The protest alleges that Nova was found non-responsive for submitting a change to Group 1, Line 3, when in actuality there was no change to Line 3. Accordingly, the protest contends that Nova should not have been found non-responsive. The protest argues that this alleged change was not an actual change at all (i.e. that the unit price for Group 1, Line 3 was \$143, both before and after being stricken). However, upon review of Nova's bid response, KYTC determined that the unit price appeared to have first been entered as \$145, with a subsequent change to \$143, before the price was stricken out completely and replaced with \$143. Therefore, KYTC considered this an actual change to the bid response, from \$145 to \$143, without initials, in violation of Finance Administrative Policy ("FAP") 111-00-00, Section 2, paragraph d., which notes: "The person signing the offer shall initial an erasure or other change in ink." This FAP is incorporated by reference into 200 KAR 5:021 and has the force and effect of law.

In reviewing a protest, this Office will not reevaluate the proposals at issue, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the requirements of the solicitation as a whole and applicable statutes and regulations. In other words, that the decision was not procured by fraud and that the findings of fact support the decision. In this particular instance, KYTC reasonably determined that the original unit price for Group 1, Line 3, was \$145 and was subsequently changed to \$143, before being stricken, making this an actual change to the bid without initials. KRS 45A.280 is clear:

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.

Upon review of the record, and based on the foregoing, it appears that the contract award was in accordance with the requirements of the solicitation as a whole and applicable statutes and regulatory procedures. The presumption of correctness in KRS 45A.280 clearly applies, Nova has failed to provide compelling evidence which would overcome this presumption, and this protest must be **DENIED**. 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: Peggy Stratton, KYTC  
Don Speer, FAC OPS

