STEVEN L. BESHEAR
GOVERNOR

FINANCE AND ADMINISTRATION CABINET
OFFICE OF GENERAL COUNSEL
392 CAPITOL ANNEX
FRANKFORT, KY 40601
(502) 564-6660
(502) 564-9875 FAX

JONATHAN MILLER
SECRETARY

E. JEFFREY MOSLEY
GENERAL COUNSEL
OFFICE OF GENERAL COUNSEL

August 7, 2009

No. 09-19

Thomas M. Todd
Kinkead & Stilz, PLLC
301 Main Street, Suite 800
Lexington, KY 40507

RE: Determination of Protest: RFP 605 0900003955

Dear Mr. Todd:

The Finance & Administration Cabinet ("FAC") is in receipt of your letter of protest on behalf Vittitoe Tree Service, Inc. ("Vittitoe") relating to RFB 605 0900003955 ("RFB"), which was designed to award multiple contracts for tree, brush and limb removal for the Kentucky Transportation Cabinet. The specific concern raised in your protest relates to Vittitoe's bid being found non-responsive for striking out and replacing a price in the bid, without initialing the change.

FACTUAL BACKGROUND

The Kentucky Transportation Cabinet Division of Purchases ("KYTC") issued a Request for Bids ("RFB") on May 19, 2009. The RFB closed on June 6, 2009. Vittitoe was one of the vendors who submitted a response.. Vittitoe filed a protest, received on June 25, 2009, before actual contract award was made. Vittitoe filed a supplemental protest, received on July 6, 2009. Actual contract award was made on July 7, 2009.

DETERMINATION

KRS 45A.285(2) establishes the statutory grounds under which a protest may be filed. The statute notes in pertinent part:

> Any actual or prospective bidder, offeror, or contractor 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.

The protest does not contest the solicitation itself. However, it does contest the actual selection of other vendors for contract. Therefore, the protest adequately establishes standing under 45A.285(2) to protest. Furthermore, while the protest was originally premature as filed, it is now ripe for review, since contract award has occurred. The protest is also timely, since it was filed before the two calendar weeks from the actual date of contract award expired.

It is undisputed that, in Vittitoe's bid response, the bidder struck out the unit price on Line 14 and replaced it with another number, without initialing this change. The protest essentially alleges that the bid response should not have been found non-responsive for this, because such disallowance is not in the best interest of the Commonwealth. The supplemental protest further alleges that KYTC should have determined that the change in price was simply a minor irregularity or technicality in the bid, which could have been waived[1]. KYTC determined that this change in price, without initials, was a material change in the bid, which violated 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 revaluate 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.

Upon review of the record, KYTC acted reasonably in determining that a price change, without initials, violated existing law. Furthermore, 200 KAR 5:306, Section 4, only permits the waiver of a item as a minor irregularity or technicality during the sealed bid process, if it would not affect the relative standing of other bidders during in the evaluation process. A price change materially affects how a vendor is evaluated, relative to other vendors, and cannot be considered a minor irregularity or technicality. KRS 45A.280 is also 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 and Vittitoe has failed to

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[1] Vittitoe's supplemental protest also alleges that FAP 111-10-00 19 c. allows for acceptance of a bid in certain situations. However, this section of the FAP is specifically limited to a particular fact situation in which only a late bid is received. This is clearly not the situation at hand and FAP 111-10-00 19 does not apply.

provide compelling evidence which would overcome this presumption. 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

Robin Kinney
Executive Director
Office of Administrative Services

cc: Peggy Stratton, KYTC
Don Speer, FAC OPS