Commonwealth of Kentucky
Finance and Administration Cabinet
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Executive Director

October 20, 2009

No. 09-36

John Deters, Owner
Bluegrass International Trucks, Inc.
101 Triport Circle
Georgetown, KY 40324

RE: Determination of Protest: RFB 605 1000000279.

Dear Mr.Deters:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Bluegrass International Trucks, Inc. ("BIT") relating to RFB 605 1000000279 ("RFB 279") for Tandem Axle Dump Trucks.

FACTUAL BACKGROUND

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued RFB 605 1000000126 for dump trucks ("RFB 126") on August 19, 2009. RFB 126 closed on August 26, 2009. Eight vendors submitted bids. In a written Determination and Finding, KYTC cancelled RFB 126 because it determined that there was "conflicting and ambiguous language concerning the evaluation criteria."

KYTC issued RFB 279 on September 21, 2009. RFB 279 closed on September 30, 2009. Six vendors submitted bids. Two bidders were determined to be non-responsive. Kentucky Freightliner Trucks, Inc. ("KFT") was determined to have the highest evaluated score with 99.17 total points; Kentucky Truck Sales, Inc. ("KTS") had the second highest score with 98.63 points; BIT was awarded 98.18 points. On October 5, 2009, a contract was awarded to KFT.

By letter dated October 7, 2009 (received October 8, 2009), BIT filed a written protest to the award of RFB 279. BIT argues that the evaluation criteria were changed from RFB 126 to RFB 279. On October 9, 2009, KYTC submitted a written response to the protest. For the reasons stated herein, this protest is DENIED.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest, 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. BIT submitted a bid in response to RFB 279. Therefore, BIT has standing to protest the award of RFB 279.

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 award was posted on October 5, 2009. BIT's protest was received on October 8, 2009. The protest was received within two calendar weeks of the award. This protest, accordingly, is timely.

This procurement was conducted under "competitive sealed bidding" procedures found at KRS 45A.080. Under this process, the contract is to be awarded to the responsive, responsible bidder which offers "best value." In addition, "it is a well-settled rule that the solicitation should inform all offerors of the basis for evaluation of proposals and the evaluation must, in fact, be based on the scheme set forth in the solicitation. *Human Resources Research Organization,* B-203302, 82-2 CPD P31 (Comp. Gen. July 8, 1982) (considering competitive negotiation, but the principle is even more applicable to competitive sealed bidding). A protest to a competitive sealed bid award must show that the award was arbitrary, capricious, or contrary to law. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). Agency decisions are entitled to a presumption of correctness. KRS 45A.280. The protestor, therefore, has the burden to show that the award violates the arbitrary, capricious, or contrary to law standard.

In addition, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) ("[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it."). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Moreover, 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.")

Applying these general rules to the specific grounds of protest, the Secretary finds as follows:

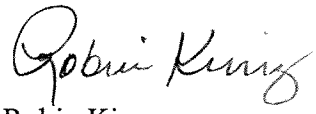
BIT argues that the evaluation criteria were changed from RFB 126 to RFB 279. KYTC concedes this point. However, BIT does not argue that its bid was improperly evaluated in accordance with the criteria which applied to RFB 279. To the extent that BIT wishes to protest the solicitation evaluation criteria in RFB 279, BIT has waived its right to protest the terms of the solicitation by submitting a bid. *Parsons Precision Products, Inc.*, Comp. Gen. B-249940, 92-2 CPD 431. Further, BIT was evaluated as the third ranked score. Even if BIT's protest were to overturn the award to KFT, KTS would then become the first ranked score. BIT has not shown any prejudice. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) BIT's protest is without merit.

Accordingly, upon review of the record, the protest of BIT lacks merit. Further, the presumption of correctness in KRS 45A.280 applies and BIT 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



Robin Kinney
Executive Director
Office of Administrative Services

cc: KYTC, Div. of Purchases