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Jonathan Miller
Secretary

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Executive Director

December 15, 2009

No. 09-39

Gerry Kesselring, President
Contract Sweepers and Equipment
10136 Mosteller lane
West Chester, OH 45069

RE: Determination of Protest: RFB 605-1000000416.

Dear Mr. Kesselring:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Contract Sweepers and Equipment ("CSE") relating to RFB 605-1000000416 (the "RFB") for "Equipment Rental Sweeper D6."

FACTUAL BACKGROUND

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued the RFB on November 10, 2009. The RFB sought bids for highway sweeping for KYTC Highway District 6. A contract was to be awarded to the responsible bidder which submitted a responsive bid with the lowest price. The RFB closed on November 17, 2009.

CSE submitted a bid. Sweep All, Inc. was determined to have submitted the best evaluated bid. An award was issued to Sweep All, Inc. on November 19, 2009.

CSE filed its written protest on December 2, 2009. In its protest, CSE alleges that the RFB contained an ambiguous specification concerning which areas of the highway shoulder were to be swept. For the reasons contained herein, this protest is denied.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest and responses thereto, 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. CSE submitted a bid in response to the RFB. CSE, therefore, has standing to protest the award under KRS 45A.285.

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. The RFB was issued on November 10, 2009. The award was made on November 19, 2009. The CSE protest was filed on December 2, 2009, thirteen days after the award but twenty-two days after the issuance of the RFB. CSE's protest is a protest to an express term of the RFB. This protest was not filed within two (2) calendar weeks after the date of the issuance of the RFB. The protest, accordingly, is untimely.

In its letter of protest, CSE alleges that a RFB specification was ambiguous concerning which areas of the highway shoulder were to be swept.

CSE's protest is directed at an express term in the RFB. The contract requirements were expressly stated in the RFB document. As such, CSE's protest is a protest to the solicitation document itself. 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.")

Accordingly, upon review of the record, the protest of CSE is untimely and has been waived. Further, the presumption of correctness in KRS 45A.280 applies and CSE 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

Robin Kinney
Executive Director
Office of Administrative Services

cc: KYTC, Div. of Purchases