Commonwealth of Kentucky
Finance and Administration Cabinet
OFFICE OF THE SECRETARY
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Steven L. Beshear
Governor

Jonathan Miller
Secretary

April 2, 2010

No. 10-11

Aaron Hill
IB Mowing, LLC
P.O. Box 703
Hopkinsville, KY 42241

RE: Determination of Protest: RFB 605 1000000579 (Montgomery County Rest Area Landscape/Grounds Maintenance).

Dear Mr. Hill:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of IB Mowing, LLC ("IB Mowing") relating to RFB 605 1000000579 (the "RFB") for Montgomery County Rest Area Landscape/Grounds Maintenance. For the reasons stated herein, this protest is denied.

FACTUAL BACKGROUND

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued the RFB on January 21, 2010. The RFB was to be evaluated on a 100 total point basis with 95 maximum points determined by cost and with the remaining 5 points determined by "Number of Crews" (2 points maximum) and by "Earliest Response" (3 Points maximum). There were fifteen specific line items. The evaluation was weighted to Line 1 – Mowing, and Trimming with a value of 152.50 units. The remaining maintenance line items were valued at 1 unit each.

IB Mowing had filed a protest to a similar KYTC evaluation methodology in 2008. *See* Determination 08-42 (October 10, 2008). In a procurement involving the Christian County I-24 Rest Area, IB Mowing contended that the KYTC evaluation methodology was unrealistic since it did not represent the actual work which was required to be performed. The Secretary of the Finance Cabinet denied IB Mowing's protest because, by submitting a bid to the solicitation, IB Mowing had waived objections to the evaluation methodology which were apparent on the face of the solicitation.

Here, the RFB closed on February 4, 2010. IB Mowing submitted a bid with the lowest total bid amount. However, in a written Determination and Finding, KYTC rejected IB Mowing's bid as unreasonable pursuant to 200 KAR 5:306. While IB Mowing had submitted the lowest amount for Line 1 (mowing), IB Mowing bid the other 14 Lines at rates far exceeding the other bidders. For example, IB Mowing bid Line 13 (Weed Landscape Beds) at $50.00 per square foot compared with a rate of $0.25 per square foot by the awarded bidder. A contract was awarded to ZKB Construction as the best evaluated bidder.

On March 1, 1010, KYTC posted the award of the RFB on the eProcurement website. On that same date, KYTC e-mailed the bid tab to IB Mowing.

IB Mowing filed its written protest on March 16, 2010. In its protest, IB Mowing states "I figured out your game and how to make contracts worth a lot more money than they should be worth based on how the contracts are scored" IB Mowing had realized that a bidder could bid a low dollar amount on the heavily weighted item (Line 1) and bid high dollar amounts on the lower weighted items (Lines 2-15). On March 22, 2010, KYTC submitted a written response to the protest. 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 ("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. IB Mowing submitted a bid in response to the RFB. IB Mowing, therefore, has standing to protest the award under KRS 45A.285.

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person *knows or should have known* of the facts giving rise thereto. KRS 45A.285(2). For purposes of computing the fourteen (14) calendar day deadline for the submission of a protest, the following legal presumption applies:

> (b) For protests based upon alleged improprieties in the award of a contract, the facts giving rise to the protest shall be presumed to have been known to the protester on the date the contract award was posted to the Commonwealth of Kentucky's eProcurement web site. 200 KAR 5:380 (1).

A legal presumption is a fact assumed from the specific circumstances. The legal presumption in this case may be overcome upon presentation of evidence showing that the facts giving rise to the protest were not and could not have been known to the protester on the date presumed by the regulation. 200 KAR 5:380 (1).

Here, the award was posted on the eProurement website on March 1, 2010. IB Mowing states that it found out that it was not awarded the contract on March 2, 2010. However, KYTC has provided an e-mail to IB

Mowing which transmitted the bid tabulation on March 1, 2010. The Secretary finds that IB Mowing knew or should have known that its had not been awarded the contract on March 1, 2010. While the protest letter was dated March 2, 2010, and the protest was mailed on March 12, 2010, the protest letter was not received by the Office of the Secretary until March 16, 2010. A protest is filed upon receipt by the Secretary's Office. 200 KAR 5:380 Section 3(2) ("For the purposes of KRS 45A.285, "filed" shall mean actual receipt by the Office of the Secretary of the Finance and Administration Cabinet.") The protest letter, therefore, was not filed within two calendar weeks of the date the protestor knew or should have known that it had not been awarded the contract. Accordingly, the protest is untimely.

Moreover, IB Mowing has failed to show that KYTC's determination was arbitrary, capricious, or contrary to law. In fact, IB Mowing's protest concedes that its bid was unreasonable, bolstering KYTC's determination of same pursuant to 200 KAR 5:306. *See* 45 C.F.R. 52.214-19(d) ("The Government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.") *and Matter of: Burney & Burney Construction Company, Inc.*, B- 292458.2, 2004 CPD ¶ 49 ("A bid properly may be rejected if the contracting officer determines that the lack of balance poses an unacceptable risk to the government.")

Accordingly, upon review of the record, the protest of IB Mowing is untimely and is without merit. Further, the presumption of correctness in KRS 45A.280 applies and IB Mowing 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 by BJ

Robin Kinney
Executive Director
Office of Administrative Services

cc: Peggy Stratton, KYTC
Jennifer Houchin, KYTC