



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

Jonathan Miller
Secretary

October 27, 2010

No. 10-25

Mike Reece
Miller Oil Co., Inc.
4504 Bells Lane
Louisville, KY 40211

RE: Determination of Protest: RFB 605 1000000049 (Pre-Mixed Antifreeze).

Dear Mr. Reece:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Miller Oil Co., Inc. ("Miller Oil") relating to RFB 605 1000000049 (the "RFB") for Pre-Mixed Antifreeze. For the reasons stated herein, this protest is denied.

FACTUAL BACKGROUND

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued the RFB on July 28, 2010. Miller Oil submitted a bid which, upon bid opening, appeared to offer the lowest price. On August 4, 2010, KYTC made a written Determination and Finding which scored Miller Oil with the highest number of best value points. However, KYTC concluded that the specifications were unclear and made no award. The RFB was cancelled.

By letter date August 11, 2010 (and filed August 13, 2010), Miller Oil protested the cancellation of the RFB. Miller Oil argued that it had bid the same antifreeze product on an earlier solicitation (RFB 605 1000000243). While it had not been the best evaluated bidder on this earlier solicitation, KYTC did not cancel that RFB and awarded a contract to another vendor. On August 30, 2010, KYTC submitted a written response.

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. Miller Oil submitted a bid in response to the RFB. Miller Oil, therefore, has standing to protest.

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). Here the Determination and Finding was made on August 4, 2010. Miller Oil filed its protest on August 13, 2010. Accordingly, the protest is timely.

KRS 45A.105 provides:

An invitation for bids, a request for proposals, or other solicitation may be canceled, or all bids or proposals may be rejected, if it is determined in writing that such action is taken in the best interest of the Commonwealth and approved by the purchasing office.

The determination to cancel the RFB was a discretionary act by an agency. *See Laboratory Corp. of America Holdings v. Rudolph*, 4 S.W.3d 68, 75 (Ky.App. 2005); *Hensley v. City of Russell*, 2006 WL 2988174 (the award of a public contract is a purely discretionary act). Agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law will be overturned. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

The protestor has the burden to show that the agency's actions were either without a reasonable basis or in violation of applicable procurement law. *See GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 779 (Fed.Cl. 1997). The protestor must clearly establish that the determination was irrational. This is not accomplished by the protestor's mere disagreement with the agency's judgment. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). The Secretary will not “substitute [his] judgment ... for that of the agency, but [will] intervene only when it is clearly determined that the agency's determinations were irrational or unreasonable.” *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). If the agency shows that there was a reasoned basis for its decision, the determination must be upheld. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998).

Miller Oil argues that it had bid the same product on an earlier solicitation (RFB 605 1000000243) and a contract had been awarded to another vendor. KYTC responds:

RFB 605 1100000049 for Pre-Mixed Antifreeze was cancelled and set for a re-bid after it was noticed that the product specification information put into the line

extended description on the RQS document had been omitted when the solicitation was issued. During the Solicitation process vendor questions were received and an addendum issued. Multiple vendors sent emails with questions about the product. (See Bid file). After the bids were opened and the evaluation began it became clear that there were issues with the failure to include all the specification information. Leaving out the complete product specification information did not allow for products bid to be compared to important product characteristics such as freezing point, boiling point, and various ASTM testing methods that should have been listed. The previous year's bid had asked for vendors to submit product information with the bid response. This product information is most often referred to as Material Safety Data Sheet (MSDS) which would have included all information that should have been included ...all information that should have been included in the solicitation specifications. (Emphasis Added)

While Miller Oil Company states that they bid the same product as last year and possibly may have bid this product over a period of time, this solicitation had responses from seven vendors (four of the seven bidders did not participate in the previous year's solicitation). In an attempt to be fair to all vendors KYTC determined that the solicitation should be cancelled and a new bid be issued with all specification information included. Also, as stated in the Solicitation in Section 4.03 "In accordance with KRS 45A.105, this Solicitation may be canceled at any time and for any reason, or all bids rejected, if it is determined in writing that such action is in the best interest of the Commonwealth. Receipt of an offer by the Commonwealth or submission of a bid to the Commonwealth confers no rights upon the Offeror nor obligates the Commonwealth in any manner. RI-13 cancellations will be posted to the e-Procurement web site at <https://eprocurement.ky.gov>."

It is unfortunate that KYTC did not discover the omission of the specification language prior to the bids being opened and evaluated. However, KYTC clearly possesses the authority to reject all bids pursuant to KRS 45A.105. In the view of the Secretary, KYTC properly rejected all these bids, given the fact that KYTC could not properly compare the bids given the potential wide range of grades of product etc. Under the facts of this situation, KYTC could not perform an "apples to apples" comparison. Thus, any evaluation or award could have been unfair to any of the vendors depending on what grade of product they quoted/bid etc. The proper action was to reject all bids and proposals and not make an award.

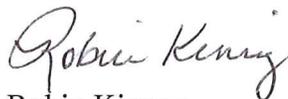
The Secretary finds that KYTC's rationale for canceling the RFB, under KRS 45A.105 and RFB Section 4.03, was reasonable and was not arbitrary, capricious, or contrary to law. Accordingly, upon review of the record, the protest of Miller Oil is without merit. Further, the presumption of correctness in KRS 45A.280 applies and Miller Oil 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: Peggy Stratton, KYTC
Linda Shinn, KYTC