



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

**Jonathan Miller**  
Secretary

August 11, 2008

**No. 08-34**

Steve Gallagher  
Atlas Machine and Supply, Inc.  
7000 Global Drive  
Louisville, KY 40258

RE: Determination of Protest: RFB 605-0800002835.

Dear Mr. Gallagher:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Atlas Machine and Supply, Inc. ("Atlas") relating to RFB 605-0800002835 (the "RFB") for Sewage Grinder Pumps.

### **FACTUAL BACKGROUND**

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued the RFB on May 7, 2008. The RFB closed on May 23, 2008. Three bids were received: one from Atlas, one from D & F Distributors; and one from Straeffler Pump. Upon evaluation, all bids were determined to be responsive; Atlas received 95 points; D & F Distributors received 95 points; and Straeffler Pump received 79.46 points. Pursuant to the terms of the RFB (KYTC Solicitation Instructions and Conditions, VIII.c, p. 25 of 29), the tie score was submitted to the Executive Director of the Office of Budget and Fiscal Management. D & F Distributors was selected as the winning bidder. The award was issued on June 2, 2008.

Atlas filed its written protest on June 23, 2008. In its protest, Atlas alleged that D & F Distributors is not authorized to sell the equipment offered in its bid. 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. Atlas submitted a bid in response to the RFB. Atlas, 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 award was made on June 2, 2008. The Atlas protest was filed on June 23, 2008. Thus, the protest was filed more than two (2) calendar weeks after the date of the award. The protest, accordingly, is not timely.

In its letter of protest, Atlas contends that D & f Distributors is not authorized to sell the equipment offered in its bid.

There is a presumption of correctness in a procurement. KRS 45A.280. Accordingly, the protestor has the burden of proof to show that the action challenged is arbitrary, capricious, or contrary to law. *Commonwealth v. Yamaha Motor Manufacturing Corporation*, 237 S.W.3d 203, 206 (Ky. 2007) (citing *Pendleton Bros. v. Commonwealth*, 758 S.W.2d 24 (Ky. 1988)). With respect to Atlas' protest, the Secretary finds and determines:

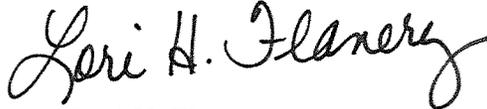
D & F Distributors offered to provide specific equipment in its bid. The Commonwealth does not research whether bidders are authorized by manufacturers to provide specific equipment. The Commonwealth accepted D & F Distributors' bid. A binding contract was formed. The bidder will be required to meet all the terms and conditions of the RFB and its bid. Should it fail to provide the offered equipment, D & F Distributions may be subject to termination for default and/or debarment from contracting with the Commonwealth. Accordingly, this ground of protest is without merit.

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

A handwritten signature in black ink that reads "Lori H. Flanery". The signature is written in a cursive, flowing style.

Lori H. Flanery  
Deputy Secretary

cc: Kathryn Lyles, KYTC