



Commonwealth of Kentucky  
Finance and Administration Cabinet  
**OFFICE OF THE SECRETARY**  
Room 383, Capitol Annex  
702 Capital Avenue  
Frankfort, KY 40601-3462  
(502) 564-4240  
Fax (502) 564-6785

Steven L. Beshear  
Governor

Jonathan Miller  
Secretary

October 29, 2008

**No. 08-43**

Douglas A. U'Sellis  
U'Sellis & Kitchen, PSC  
600 East Main Street, Suite 100  
Louisville, KY 40202

RE: Determination of Protest: RFP 605-0800001372.

Dear Mr. U'Sellis:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Community Services Project, Inc. ("CSP") relating to RFP 605-0800001372 (the "RFP") for the Bullitt County Rest Area.

### **FACTUAL BACKGROUND**

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued the RFP on June 19, 2008. The RFP was to be scored as follows: technical proposal (600 points); cost proposal (150 points). RFP, Section 70.000. Proposals scoring less than 420 points in the technical evaluation were to be eliminated from further consideration. RFP, Section 40.010 (p.46-7). The RFP closed on June 25, 2008.

CSP submitted a proposal. The KYTC performed an evaluation of the technical proposals. On August 18, 2008, KYTC issued a written determination which stated that each submitted proposal received a score of less than 420 points and that, in accordance with Section 30.040 of the RFP, all proposals were rejected and the RFP was cancelled. The determination was provided to all offerors, including CSP, on that same date.

By letter dated August 28, 2008 (received September 3, 2008), CSP protested the cancellation of the RFP. On September 12, 2008, KYTC submitted its written comments to the protest. In its protest, CSP

contends that its technical proposal should have been awarded more than 420 points and the RFP, therefore, should not have been cancelled. 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. CSP submitted a proposal in response to the RFP. CSP, therefore, has standing to protest the award under KRS 45A.285.

A protest to an award must be filed within two (2) calendar weeks within the date the protestor knew or should have known of the grounds for protest. KRS 45A.285. "Filed" means *actual receipt* by the Office of the Secretary. *See Matter of: CD-Tabco Products Inc.—Reconsideration, B- 252637* (April 12, 1993) ("The term "filed" regarding protests to our Office means receipt of the protest in the General Accounting Office. 4 C.F.R. § 21.0(g)"; ABA, Model Procurement Code, Recommended Regulations, R9-101.03.1). The determination to cancel the RFP was made on August 18, 2008. The CSP protest was filed on September 3, 2008. Thus, the protest was filed more than two (2) calendar weeks after the date of the determination. The protest, accordingly, is untimely.

A determination by an agency is entitled to a presumption of correctness. KRS 45A.280. A protester must clearly establish that a solicitation evaluation was irrational or contrary to law. This is not accomplished by the protester's mere disagreement with the agency's determination. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). The protestor must show that the agency's determination was arbitrary, capricious, or contrary to law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

In its letter of protest, CSP contends that its technical proposal should have been awarded more than 420 points and the RFP, therefore, should not have been cancelled. CSP contends the following issues were improperly scored:

### 24-hour Coverage (200 points)

CSP contends it should have been awarded the full 200 points since it fully explained their plan for 24-hour coverage. Further, CSP argues that it has experience in providing 24-hour coverage at other rest stops in the Commonwealth.

KYTC's Evaluation Team found that CSP's proposal "Had a lot of detail but not any activity plan." The proposal was broad and general without much detail. The Evaluation Team awarded CSP 90 points. KYTC's evaluation was not arbitrary, capricious, or contrary to law.

Backup Plan for Unscheduled Employee Absences (50 points)

CSP argues that its have been awarded 50 points since it presented a clear and workable plan.

The Evaluation Team noted that CSP planned to use part-time employees or pay over time. An employment agency was to be used which could present problems with background checks. The Team awarded CSP 25 points. KYTC's evaluation was not arbitrary, capricious, or contrary to law.

Transportation of Employees (50 points)

CSP asserts it should have been awarded 50 points. While employees are responsible for their own transportation, CSP is currently investigating providing travel assistance to employees.

The Evaluation Team noted that CSP's proposal did not reference the distance from its office, stated that all employees, including those with disabilities, were in charge of their own transportation, and referenced that other means of transportation were in planning stages. CSP was awarded 20 points. KYTC's evaluation was not arbitrary, capricious, or contrary to law.

Employee Benefits (50 points)

CSP should have been awarded 50 points in this category since it is confident that its employee benefits are equal to or exceed the benefits offered by its competitors.

The Teams found that CSP pays only 70% of employee single coverage. "Group rates" are available for other coverages. The Team awarded CSP 20 points. KYTC's evaluation was not arbitrary, capricious, or contrary to law.

Certification As A CRP Agency (150 points)

CSP has two of the three required certifications and should have received 100 points.

The Evaluation Team awarded CSP 100 point for its two (of three) certifications.

CSP and KYTC concur in this evaluation.

References (100 points)

CSP provided three references, two of which were from other rest areas. CSP contends that it should have been awarded 100 points.

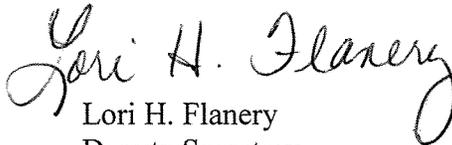
The Evaluation Team did not contact the references since, even if CSP were to have been awarded the maximum score on this item, CSP would not have met the minimum required technical score. The Secretary finds that KYTC's action was not arbitrary, capricious, or contrary to law.

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

  
Lori H. Flanery  
Deputy Secretary

cc: Ben McCray, KYTC