



Commonwealth of Kentucky
Finance and Administration Cabinet
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Steven L. Beshear
Governor

Jonathan Miller
Secretary

February 26, 2008

No. 08-07

Daryl Brown
Vice President – Operations
CRS Demolition
1520 Algonquin Parkway
Louisville, KY 40210

RE: Determination of Protest: Louisville Arena Authority: Hazardous Material Remediation
And Building Demolition RFP

Dear Mr. Brown:

The Finance & Administration Cabinet (the “Finance Cabinet”) is in receipt of your letter of protest on behalf of CRS Demolition (“CRS”) relating to the Louisville Arena Authority (“LAA”): Hazardous Material Remediation and Building Demolition RFP (“RFP”).

FACTUAL BACKGROUND

The LAA issued the RFP on December 12, 2007. The RFP was modified by three Addenda, the last of which was issued on January 16, 2008. On January 22, 2008, CRS submitted a proposal in response to the RFP. An award under the RFP was made on January 28, 2008, to O’Rourke Wrecking.

By letter dated February 8, 2008 (received February 12, 2008), CRS protested the above-referenced RFP alleging that the RFP did not meet the requirements of KRS 45A.370(1)(a), (b), or (c) for a competitive negotiated bid (Request for Proposals) and that the work should have been put out as a competitive sealed bid (Request for Bids).

DETERMINATION

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 ("Secretary"). KRS 45A.285. CRS intended to and did submit a proposal in response to the RFP. Hence, CRS has standing under KRS 45A.285.

A protest to a solicitation (an RFP or RFB) 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. This protest concerns the issuance of a solicitation as an RFP. Here, the RFP was issued on December 12, 2007; the protest was received on February 12, 2008. The protest (which challenges the issue of the solicitation as an RFP) was filed more than fourteen (14) days after the issuance of the RFP and, therefore, is untimely.

After a review of the solicitation, the applicable statutes, and other relevant information, the Secretary finds and determines as follows:

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.") Here, CRS submitted a proposal in response to the RFP. Therefore, it has waived objections to the content of or to the form of the solicitation.

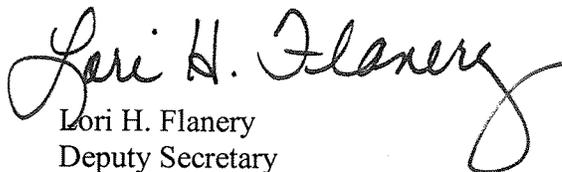
Further, CRS has not presented sufficient evidence to show that that the determination by LAA to utilize competitive negotiation under KRS 45A.085 was arbitrary, capricious, or contrary to law. KRS 45A.155.

Accordingly, upon review of the record, the protest of CRS is untimely, has been waived, and is without merit. Further, the presumption of correctness in KRS 45A.280 applies and CRS 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: Mark F. Sommer
Counsel for Louisville Area Authority