



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

May 23, 2008

No. 08-11

Arthur M. Dore, President
Dore & Associates Contracting, Inc.
900 Harry S Truman Parkway
P.O. Box 146
Bay City, MI 48706

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

Dear Mr. Dore:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Dore & Associates Contracting, Inc. ("Dore") dated February 28, 2008, relating to an award of contract by the Louisville Arena Authority ("LAA") to O'Rourke Wrecking ("O'Rourke") arising from Hazardous Material Remediation and Building Demolition RFP ("RFP").

FACTUAL BACKGROUND

The LAA issued the RFP on December 12, 2007. The RFP was then modified by three Addenda, the last of which was issued on January 16, 2008. On January 22, 2008, five offerors submitted proposals in response to the RFP: Brandenburg Industrial, CRS Demolition, Dore & Associates, J & L Management, and O'Rourke Wrecking. On January 22, a consultant performed an initial evaluation in accordance with Item 6 of Section 00 11 19 of the RFP. The offers were scored and ranked as follows: Dore & Associates (83.5); O'Rourke Wrecking (71.7); Brandenburg Industrial (63.4); CRS Demolition (62); and J & L Management (56.9). On January 24, the LAA conducted interviews with the three highest evaluated offerors: Dore & Associates, O'Rourke Wrecking, and Brandenburg Industrial. Next members of the LAA Board of Directors scored these three offerors.¹ Finally, an award under the RFP was made on January 28, 2008, to O'Rourke Wrecking ("O'Rourke").

¹ No official Determination & Finding was prepared to document the evaluation process and scoring. 200 KAR 5:307((5)(4)) ("All evaluation documentation, scoring, and summary conclusions shall be in writing, and made part of the file records for the

By letter dated and received on February 28, 2008, Dore protested the award of the RFP to O'Rourke alleging that the O'Rourke proposal varied from the RFP specifications.

DETERMINATION

After a review of the solicitation, the protest and responses, the applicable statutes, regulations, and case law, and other relevant information, the 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 ("Secretary"). KRS 45A.285. Dore submitted a proposal in response to the RFP. Hence, Dore 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 award of an RFP. On January 28, 2008, the LAA Board of Directors awarded the contract to O'Rourke Wrecking. In its protest Dore asserted that "[i]t was not until Thursday, February 21, 2008 that Dore received word of an impending award of this contract to O'Rourke Wrecking Co. by reading a newspaper article in The Courier-Journal."

Since this procurement was not posted on the Commonwealth's eProcurement website, the standard presumptions do not apply. 200 KAR 5:380(1). The inquiry about when the protestor "knew or should have known" the factual basis giving rise to the protest is guided therefore by the (1) availability of the relevant facts and (2) the protestor's diligence to uncover those facts. *Matter of: Air Masters Corporation*, 92-2 CPD 299 (Comp.Gen. 1992) (protestor must diligently pursue information that forms the basis of protest); *Warren Elec. Constr. Corp.*, 90-2 CPD ¶34 (Comp.Gen. 1990) (protestor has an affirmative obligation to seek the information that forms its basis of protest).

Here, Dore protests the award of contract to O'Rourke. More specifically, Dore protests the award based upon the content of the O'Rourke proposal, i.e., the non-compliance with the specifications arising from the planned demolition of the Humana Building parking structure. The award was made at the January 28th LAA Board of Directors meeting. The draft minutes of the meeting, however, do not reveal the fact that the O'Rourke proposal contemplated the demolition of the Humana Building parking structure. At the point of award, the content of the O'Rourke proposal was not publicly known and Dore did not know, nor could it have known from the information publicly available, O'Rourke's plans for the Humana Building parking structure. Dore, however, after January 28, 2008 took no affirmative steps to obtain information about the status of or content of O'Rourke's proposal. *Warren Elec. Constr. Corp.*, 90-2 CPD ¶34 (Comp.Gen. 1990). Dore did not act with diligence or in a timely fashion. Accordingly, this protest is untimely.

procurement.") Accordingly, it is not entirely clear whether the RFP process was followed. "[I]t is a well-settled rule that the solicitation should inform all offerors of the basis of evaluation of proposals and the evaluation must, in fact, be based upon the scheme set forth in the solicitation." *Matter of: Human Resources Research Organization*, 82-2 CPD ¶31 (Comp.Gen. 1982); 200 KAR 5:307(5)(4) ("Proposals shall be evaluated based on factors stated in the request for proposals."). However, in this case, no evidence has been presented to challenge the presumption of correctness. KRS 45A.280.

Accordingly, upon review of the record, the protest of Dore is untimely. Therefore, the protest must be **DENIED**. Pursuant to KRS 45A.280:

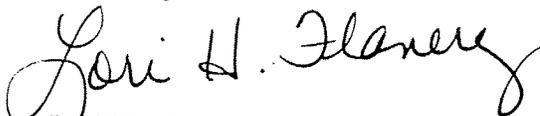
The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured 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.

Please note that the Cabinet received correspondence from Mark Sommer, attorney for the LAA, dated May 16, 2008. As said correspondence was received after the time period set for receiving responses, it was not considered by the Cabinet.

It is the further determination of the Finance and Administration Cabinet that, after June 30, 2008, and the expiration of the current budget bill, HB 380, the Cabinet shall not be the appropriate entity to entertain protests pursuant to KRS 45A.285. It is the recommendation of the Cabinet that the LAA conceive and fashion its own procurement review and protest process, with independent oversight, consistent with the provisions of KRS Chapter 45A and common practice regarding entities similar to the LAA that receive public dollars. The Finance and Administration Cabinet stands ready to offer technical assistance in the establishment of such process.

For the Secretary
Finance and Administration Cabinet
By Designation



Lori H. Flanery
Deputy Secretary

cc: Mark F. Sommer
Counsel for Louisville Area Authority