



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

May 23, 2008

No. 08-12

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 dated February 28 2008, on behalf of CRS Demolition ("CRS") relating to award of 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 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, 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 (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 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

By letter dated February 28, 2008 (received March 3, 2008), CRS protested the award of above-referenced RFP to O'Rourke. CRS alleges that "LAA awarded the project based on items that were outside the scope of the RFP." For the reasons stated herein, the protest is sustained.

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. CRS submitted 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 award of an RFP. On January 28, 2008, the LAA Board of Directors awarded the contract to O'Rourke Wrecking. On February 4, 2008, CRS sent an Open Records request (KRS Chapter 61) to the LAA requesting, among other things, copies to the proposals and evaluations of proposals for the RFP. On February 5, 2008, the LAA declined to provide documents since a "definitive agreement" had not been entered into between the LAA and O'Rourke. On February 6, 2008, CRS submitted a second Open Records request requesting a copy of the bid form submitted by O'Rourke. On February 8, 2008, the LAA again refused to provide the documents since the O'Rourke documents were in "active use" by the LAA in "ongoing negotiations" with O'Rourke.² CRS, by letter dated February 28 and received March 3, 2008, submitted a written protest to the Secretary of the Finance Cabinet. In its protest CRS asserted that "I have only found out this information this week through media sources since LAA has refused to supply me with the documents that I have requested through the open records act."

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).

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.

² At this point, the exact status of the O'Rourke proposal was unclear. On the one hand, the LAA awarded the contract to O'Rourke. According to the Draft Minutes of the LAA Board of Directors' Meeting (<http://www.arenaauthority.com/docs/Jan2808Minutes.pdf>) at page 4 "Mr. Ulmer moved the Arena Authority to engage O'Rourke Wrecking as its demolition Services firm. The motion was seconded by Ms. Houston and passed unanimously." On the other hand, in the February 8th LAA response to CRS' second Open Records request, counsel for LAA justified the refusal to provide documents on RFP 00 11 19-4, a section which refers to preliminary negotiations with the "first ranked Bidder" prior to award.

Here, CRS protests the award of contract to O'Rourke. More specifically, CRS protests the award based on 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 CRS did not know, nor could it have known from the information publicly available, O'Rourke's plans for the Humana Building parking structure. Seven days after the award to O'Rourke, CRS submitted an Open Records request to the LAA in an attempt to obtain the O'Rourke proposal. The LAA refused to provide CRS with the O'Rourke proposal. On February 6th, CRS submitted another Open Records request to the LAA. The LAA, once again, refused to provide the O'Rourke proposal. Up until the time CRS submitted its protest, the content of O'Rourke's proposal was not publicly available and CRS acted with diligence and in a timely fashion. Accordingly, this protest is timely.

As a basis for its protest, CRS alleges that "LAA awarded the project based on items that were outside the scope of the RFP," in other words, the award to O'Rourke was improper since O'Rourke proposal did not comply with the specifications.

In general, procurement under Kentucky's Model Procurement Code ("KMPC") is by "competitive sealed bidding." KRS 45A.080. This process utilizes a Request for Bids or RFB. In competitive sealed bidding, the contract will be awarded to the responsible bidder whose bid is responsive and determined to be "best value." A bidder is "responsible" if "it has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." KRS 45A.070(6). A bid is "responsive" if it conforms in all material respects to the invitation for bids. KRS 45A.070(7). Responsiveness is determined at bid opening. *Interstate Rock Products v. U.S.*, 50 Fed.Cl. 349, 360 (Fed.Cl. 2001). A non-responsive bid cannot be cured after bid opening. *Id.* A bid offers "best value" if, based upon objective and quantifiable criteria including price, it meets the specific business requirements and best interests of the Commonwealth. KRS 45A.070(3).

This procurement was a "competitive negotiation" pursuant to KRS 45A.085. This process uses a Request for Proposals or RFP. Under this scheme, a contract may be awarded "to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Commonwealth, taking into consideration price and the evaluation factors set forth in the request for proposals." KRS 45A.085(6). The competitive negotiation process is intended to offer the buying agency more flexibility in drafting the content of the solicitation document and more flexibility in evaluating the resulting offerors. *See, e.g., Matter of: A & C Building and Industrial Maintenance Corporation* 88-1 CPD ¶451 (Comp.Gen. 1988). As such, a response to an RFP is not initially evaluated in terms of "responsiveness" since subsequent negotiations allow an offeror to revise its proposal to comply with RFP requirements. *See Matter of: The EC Corporation*, 90-1 CPD ¶23 (Comp.Gen. 1990).

While competitive negotiation does not strictly utilize the concept of "responsiveness," an RFP proposal is subject to analogous but more flexible concept of "RFP conformance." Unlike "responsiveness" which is determined at bid opening, "RFP conformance" is measured at award. At that time, the proposal must conform to the mandatory requirements of the solicitation or it will not be deemed acceptable. *Mangi Environmental*

Group, Inc. v. United States, 47 Fed.Cl. 10, 16 (Fed.Cl. 2000); *Protest of Telos Field Engineering*, 92-1 BCA 4,676 (GSBCA 1992). Accordingly,

It is a fundamental principle of federal procurement that offerors must be treated equally and provided with a common basis for the preparation of their proposals. In negotiated procurements such as this, any proposal which ultimately fails to conform with the material terms of the solicitation should be considered unacceptable and should not form the basis of award. If an agency wishes to accept such a proposal, it must place the other offerors on notice of the specific changes and provide an equal opportunity for all offerors to compete for the requirement.

Matter of: Arthur Young & Company, 85-1 CPD ¶598 (Comp.Gen 1985). Thus, “[i]t is axiomatic in protest law that the contract awarded must conform to the mandatory requirements of the solicitation. Otherwise, offerors would not be competing on the same basis, and full and open competition would not be obtained.” *Protest of Stellar Computer, Inc.*, 90-1 BCA ¶22,584 (GSBCA 1990). And one of the fundamental policies of the KMPC is to foster effective competition. KRS 45A.010(f).

Here, the RFP contained detailed specifications for the demolition of the Louisville Gas & Electric plant and the Humana Building. In specific, RFP, Addendum No. 2, Item No. 4, A. provided:

The Humana Building shall be demolished to the upper level of the attached parking garage. The upper level of the parking garage is at approximate elevation of 467.0. *The parking garage shall be left intact* and shall be free of any structural damage caused by the demolition of the Humana Building. (Emphasis added).

The proposal submitted by O'Rourke contained "Proposal Clarifications" which included:

- 2) *Elevated parking structure surrounding Humana Building will be demolished.* This is additional scope to the original request for proposal, but it will provide for a safer project. We will engage a third party structural engineer licensed in Kentucky to review and stamp demolition and temporary shoring for surrounding structures. (Emphasis added).

The language of the RFP makes clear that the solicitation required that the parking garage adjacent to the Humana Building be left intact. The requirement was explicit and mandatory. The proposal submitted by O'Rourke called for the parking garage to be demolished. The O'Rourke proposal, therefore, did not meet a mandatory requirement of the Solicitation. The award of the RFP with the "additional scope to the original request for proposal," as O'Rourke's proposal admitted, would result in a non-competitive award for the additional scope of work. This would violate the policy of competition which underlies the KMPC. As a consequence, the O'Rourke proposal should not have formed the basis for an award of contract.

Accordingly, upon review of the record, the protest of CRS is timely and has merit. The protest, therefore, must be **SUSTAINED**. The LAA is directed to rescind the award of the contract to O'Rourke. The LAA should determine whether (1) the existing RFP should be cancelled and a new solicitation be issued; or (2) the RFP specifications should be amended to allow the parking structure surrounding the Humana Building to be demolished and then to solicit revised offers from all five initial offerors based upon the revised RFP specifications; or (3) any other resolution consistent with this determination.

Pursuant to KRS 45A.280:

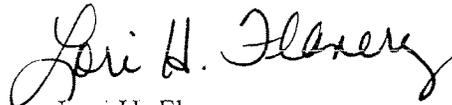
The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured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