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

August 11, 2008

No. 08-33

G. Bruce Stigger
Alber Crafton. PSC
Hurstbourne Place, Suite 1300
9300 Shelbyville Road
Louisville, KY 40222

RE: Determination of Protest: M.A. Mortenson Company/Louisville Arena.

Dear Mr. Strigger:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of RAM Engineering & Construction, Inc. ("RAM") relating to the subcontract solicitation by M.A. Mortenson Company ("Mortenson"), the Construction Manager at Risk for the Louisville Arena project.

FACTUAL BACKGROUND

The Louisville Arena Authority ("LAA") is subject to the Kentucky Model Procurement Code ("KMPC"), KRS Chapter 45A, pursuant to House Bill 380 (the initial bond fund appropriation) and its own internal policies. In accordance with the KMPC, the LAA retained Mortenson as a Construction Manager for the construction of portions of the Louisville Arena project. Mortenson has sought to obtain subcontractors to perform certain work. RAM submitted proposals to Mortenson for subcontract work. RAM was not awarded the work.

On June 23, 2008, counsel for RAM filed a protest with the Secretary of the Finance Cabinet pursuant to KRS 45A.285. RAM contends that Mortenson is obligated to conduct its solicitations for subcontracts pursuant to the KMPC and, in specific, that Mortenson's solicitation for earthwork, site utilities, and auger cast piles subcontracts were improperly conducted. Counsel for Mortenson filed a response to RAM's protest on July 11,

2008. RAM then filed a reply to Mortenson's response on July 14, 2008. Counsel for RAM submitted a second reply to Mortenson's response on July 17, 2008. Next, counsel for Mortenson filed a "surreply" to RAM's reply to Mortenson's response on July 23, 2008. On July 28, 2008, counsel for RAM filed a response to Mortenson's "surreply" to RAM's reply to Mortenson's response to RAM's protest. On August 6, 2008, Mortenson's counsel filed a reply to RAM's response to Mortenson's "surreply" to RAM's reply to Mortenson's response to RAM's protest. On August 8, 2008, counsel for RAM provided a response to Mortenson's reply to RAM's response to Mortenson's "surreply" to RAM's reply to Mortenson's response to RAM's protest.[1] For the reasons stated 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:

RAM has standing to file a protest (1) if the procurement at issue is governed by the KMPC (KRS 45A.020) and (2) RAM is a prospective or an actual bidder (KRS 45A.285(2)). The first prong of the standing requirement is at issue here. The KMPC states that it "shall apply to every expenditure of public funds by this Commonwealth under any contract or like business agreement . . .." KRS 45A.020. It is evident that neither the Commonwealth nor the LAA conducted Mortenson's solicitation.

The LAA contracted with Mortenson to act as a Construction Manager in the construction of the Louisville Arena. RAM notes that the LAA had to approve Mortenson's selection of subcontractors. RAM suggests that Mortenson was acting as an agent or an instrumentality of the LAA and that, as an agent or an instrumentality of the LAA, Mortenson was required to follow the KMPC.

The KMPC recognizes two separate kinds of "Construction Manager."

> (5) "Construction manager-agency" means services to assist the purchasing agency manage construction that are procured through a contract that is qualifications-based;
>
> (6) "Construction management-at-risk" means a project delivery method in which the purchasing officer enters into a single contract with an offeror that assumes the risk for construction at a contracted guaranteed maximum price as a general contractor, and provides consultation and collaboration regarding the construction during and after design of a capital project. The contract shall be subject to the bonding requirements of KRS 45A.190.

---

[1] 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 protestor has the burden to introduce facts which evidence that the protest is timely. 200 KAR 5:380 Section 2. RAM's initial protest makes no showing that the protest was timely. In later submissions, RAM has provided evidence in an attempt to show that its June 23rd protest letter was timely. *See, e.g.* Affidavit of Richard C. Chilton attached to RAM's July 14th letter. RAM, however, has made no attempt to show why this evidence could not have been submitted with its initial protest letter.

KRS 45A.030. *See also* KRS 45A.180 (selection of Construction Manager) *and* 200 KAR 5:365 (alternative project delivery methods).

As KRS 45A.030(6) recognizes, the Construction Manager with a Guaranteed Maximum Price ("GMP") acts like a traditional fixed-price lump-sum General Contractor. Just like a public works General Contractor, a Construction Manager with a GMP is not subject to the KMPC for subcontract procurements since such subcontract procurements take place within the limits of the GMP and involve public funds already competitively bid. In other words, the KMPC applies to the *initial* "expenditure" of public funds, not to *subsequent* procurements with the *same funds.* Thus, the KMPC applies to the initial solicitation of a lump-sum General Contractor or GMP Construction Manager and not to subsequent subcontracting by the General Contractor or Construction Manager within the confines of the General Contractor's lump sum or Construction Manager's GMP.

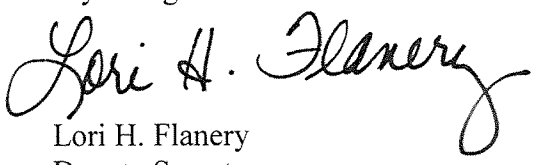
Mortenson's selection was based on more than qualifications (KRS 45A.030(5)); Mortenson also offered a GMP (KRS 45A.030(6)). Mortenson is at risk if the total cost of construction exceeds the GMP. Thus, Mortenson is acting as a "Construction Manager at Risk" for the LAA. RAM has not shown that Mortenson was acting as a mere agent or instrumentality of the LAA. Accordingly, Mortenson as a Construction Manager at Risk to the LAA, the full GMP amount has already been competitively bid, and Mortenson is not bound by the KMPC in procuring subcontracts. RAM, therefore, lacks standing to file a protest to Mortenson's subcontract procurements under KRS 45A.285.

Accordingly, upon review of the record, RAM lacks standing to protest since Mortenson is not bound by KMPC in subcontracting work. 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 Sommers, counsel for LAA
Mark Leach, counsel for Mortenson.