



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

**Jonathan Miller**  
Secretary

**Steven L. Beshear**  
Governor

July 17, 2008

**No. 08-36**

Mark L. McAlpine  
McAlpine & Associates, P.C.  
3201 University Drive, Suite 100  
Auburn Hills, MI 48326-2361

RE: Determination of Protest: Louisville Arena Authority: Hazardous Material Remediation  
And Building Demolition RFP (re-bid).

Dear Mr. McAlpine:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Dore & Associates Contracting, Inc. ("Dore") dated June 20, 2008, relating to the Louisville Arena Authority ("LAA") Hazardous Material Remediation and Building Demolition RFP ("RFP"). For the reasons stated herein, this protest is denied.

### **FACTUAL BACKGROUND**

This protest arises from the planned Louisville Arena project. On May 23, 2008, the Finance Cabinet issued a Determination (No. 08-12) which sustained a protest by CRS Demolition to an award for site demolition and hazardous material remediation to O'Rourke Wrecking ("O'Rourke"). The LAA then issued this RFP on May 28, 2008 for a similar scope of work. This new RFP was then modified by two Addenda. Proposals were due on June 4, 2008 at 4:30 p.m. Dore submitted a proposal to the RFP on June 4, 2008. Proposals were also submitted by CRS Demolition and O'Rourke.

CRS Demolition submitted a "no bid" proposal (devoid of pricing) which was rejected by the LAA. The two remaining proposals then were scored: O'Rourke was awarded 93 points; Dore received 74.5 points. The LAA invited O'Rourke and Dore to participate in an interview process on June 9<sup>th</sup>. Dore declined to participate in person but provided a written submission. On June 9<sup>th</sup>, the LAA determined to award a contract based on the RFP to O'Rourke. On June 20, 2008, counsel for Dore mailed a protest (which was filed on June 23) alleging that the LAA denied Dore access to the site thereby providing an advantage to O'Rourke. On June 25, 2008,

counsel for Dore submitted supplemental material to respond to materials obtained from LAA pursuant to an Open Records request.

## 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. 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.

The RFP was issued on May 28, 2008. A site inspection was required by the RFP.<sup>1</sup> On June 2, 2008, two representatives from Dore visited the site. Dore alleges that it was materially hindered in its efforts to inspect the Humana Building and the LGE Boiler House.<sup>2</sup> As a result, Dore contends that it was forced to estimate and to make assumptions in its proposal pricing. On June 4<sup>th</sup>, Dore submitted a proposal in response to the RFP to the LAA. Dore declined to participate in an in-person interview on June 9<sup>th</sup>, but rather submitted a substantive letter in support of its proposal. On that same day, the LAA determined to award the contract to O'Rourke. Dore then submitted Open Records requests to the LAA relative to the award to O'Rourke. Then, on June 20, 2008, Dore mailed the present protest which was filed on June 23<sup>rd</sup>.

Dore's protest is directed at the solicitation. Dore is not protesting the form, that is, the content, of the RFP. Rather, Dore is protesting how the RFP process was conducted based on its June 2, 2008, site visit. Dore argues that the resulting process was unfair. As of June 2<sup>nd</sup>, Dore was fully aware of the facts upon which it now alleges that the RFP process was unfair. Yet, on June 4, 2008, Dore submitted a proposal in a real effort to compete for the award. Dore's June 9<sup>th</sup> letter, provided in lieu of an in-person interview, manifestly evidences its efforts to obtain the award. Dore did not unambiguously protest the RFP until it mailed a protest until June 20<sup>th</sup>.

"[A] waiver exists only where one with full knowledge of a material fact does or forebears to do something inconsistent with the existence of the right ...." *Holbrook v. Lexmark International Group, Inc.*, 65 S.W.3d 908, 913 (Ky. 2002)(quoting 28 Am. Jur.2d, Estoppel and Waiver, §157). Here, Dore with full knowledge of the alleged improprieties in the RFP process, submitted a proposal in an attempt to obtain the award. The submission of a bona fide bid, with full knowledge of the alleged solicitation process improprieties, in a serious effort to compete for the award, acted as a waiver of objections to be conduct of the RFP process.

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<sup>1</sup> The RFP, Item 3 (B) required; "Each Bidder shall acquaint itself with the site and all conditions relevant to the work and shall make all evaluations and investigations necessary to obtain a full understanding of any difficulties which may be encountered in performing the work. Some demolition and abatement work have already been accomplished, and the Bidder shall be responsible for determining the work remaining for full abatement, demolition, and all work required by the Contract Documents."

<sup>2</sup> Dore and the LAA have provided affidavits concerning the events which transpired during Dore's site visit. The affidavits provided by Dore support its assertion that it was denied a full and meaningful site visit. The affidavits provided by LAA do not directly contradict the assertions in the Dore supplied affidavits.

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.”)

If a party believes a solicitation or solicitation process is unfair or improper, the party must protest before submitting a serious bid. A party may not submit a competitive bid, lose, and then complain that the solicitation process was flawed. While the Kentucky Model Procurement Code is intended to promote fairness and competition (KRS 45A.0.10), the Code is also intended to benefit the public as a whole. *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579, 585-586 (Ky. 2003); *Ohio River Conversions, Inc. v. City of Owensboro*, 663 S.W.2d 759, 761 (Ky.App. 1984). The public benefits from a prompt airing and resolution of process flaws. The integrity of the process also includes rules to prevent bidder protest “gamesmanship.”

Dore has waived its objections to the RFP process by the submission of a bona fide bid. Moreover, Dore was aware of the facts upon which it based its protest on June 2, 2008. The protest was not mailed until June 20, 2008 and not filed until June 23rd. This was more than 2 calendar weeks after Dore knew of its alleged protest grounds. The protest is therefore untimely.

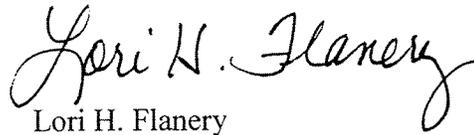
Dore also asserts that it should have been awarded the contract since its “net bid” was actually lower than O’Rourke’s price. It is not clear whether this allegation is directed at the solicitation (a facial challenge to the evaluation criteria) or to the award (a challenge to the evaluation criteria, as applied). The RFP states that the contract will be awarded to the bidder whose bid is determined to be “most advantageous.” RFP, Item 6, B. The evaluation criteria consisted of 100 points, 40 of which were based on price. Dore has not shown that the evaluation criteria were arbitrary or irrational. Moreover, even if Dore were correct about its “net price,” price only comprised forty per cent of the total evaluation score. Dore has not shown that it would have prevailed under the entire evaluation scheme. A solicitation evaluation is entitled to a presumption of correctness. KRS 45A.280. This basis for protest is without merit.

Accordingly, upon review of the record, the protest of Dore has been waived and 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.

For the Secretary  
Finance and Administration Cabinet  
By Designation

A handwritten signature in cursive script that reads "Lori H. Flanery". The signature is written in black ink and is positioned above the printed name and title.

Lori H. Flanery  
Deputy Secretary

cc: Mark F. Sommer  
Counsel for Louisville Area Authority