

Finance and Administration Cabinet Protest Procedure

The following is a narrative description of the procedure for bid protests to the Finance and Administration Cabinet.

Jurisdiction

The Secretary of the Finance and Administration Cabinet has the authority to determine protests for procurements conducted under Kentucky Revised Statutes (“KRS”) Chapter 45A. KRS 45A.285. KRS 45A applies “to every expenditure of public funds by this Commonwealth under any contract or like business agreement, excepting only that this code shall not apply to contracts or like business agreements between the Commonwealth and its political subdivisions or other governments, except as provided in KRS 45A.295 to 45A.320. It shall also apply to the disposal of state property.” KRS 45A.020(1).

In general, KRS 45A does not apply to cities, counties, and their subdivisions. Local jurisdictions, however, may adopt certain provisions of KRS 45A. KRS 45A.343 (local agencies may adopt the provisions of 45A.345 to 45A.460); *E.M. Bailey Dist. Co. v. Conagra, Inc.*, 676 S.W.2d 770, 774 (Ky. 1984) (KMPC is not applicable to a local public agency because the agency had not adopted the provisions of the code required by KRS 45A.343); *Laurel Const. Co., Inc. v. Paintsville Utility Com'n*, --- S.W.3d ----, 2010 WL 568934 (Ky.App. 2010) (“[T]he provisions of the KMPC only apply to a local governmental agency if the agency in question chooses to adopt them.”); see also KY OAG 80-279 (adoption of KMPC optional for local public agencies).

The Protest

A protest can be made either (1) to the solicitation documents or (2) to an award of contract based upon the solicitation. The protest process for Requests for Bids (“RFB”) and for Request for Proposals (“RFP”) is the same.

Protest to A Solicitation

Any prospective bidder may file a protest to the content of solicitation documents. KRS 45A.285(2). A party seeking to establish standing as a “prospective bidder” must show that it has a direct economic interest that will be impacted by the award of the contract or by

the failure to award the contract. See 28 U.S.C. 1491 (b) (1). A prospective bidder has standing when it shows it had a substantial chance of obtaining the award. *Myers Investigative and Security Service, Inc. v. United States*, 275 F. 3d 1366, 1370 (Fed. Cir. 2002). A protest to the solicitation documents is directed at the contents of the solicitation, for example, the protest may concern an irregularity in the evaluation process apparent from the face of the solicitation document itself.

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.”)

Protest to An Award

In general, only an actual bidder can file a protest to an award of contract. KRS 45A.285(2). A protester is an “actual bidder” if the protestor has submitted a bid or proposal. A protest to an award of contract may concern, for example, mistakes in the application of the evaluation process. A party may protest the award of a non-competitive contract such as a sole source award if it can demonstrate that it would have bid on the contract if it had been competitively bid. See *CW Travel v. United States*, 61 Fed. Cl. 559, 570 (2004) (Where a claim is made that the Government violated procurement rules by refusing to engage in a competitive procurement, it is sufficient for standing purposes if the plaintiff shows that it would have competed for the contract had the Government publicly invited bids or requested proposals.)

Where to Protest and Filing Instructions

All protests must be in writing. KRS 45A.285(2) The written protest must be delivered to the Secretary of the Finance and Administration Cabinet, either by personal delivery, U.S. mail, or by a private express mail service. The Secretary will investigate, analyze, and determine the protest. 45A.285(1). The address of the Secretary of the Finance and Administration Cabinet is:

Finance and Administration Cabinet
Office of the Secretary
200 Mero Street, 5th Floor
Frankfort, KY 40622

In order to ensure the protest is timely, it should be received by the Office of the Secretary within the applicable time limits. *The Secretary will not receive protests by facsimile transmission or by electronic mail.* 200 KAR 5:380 Section 3(1).

If filing via personal delivery, call 502-564-6660 or 502-564-4240 from the lobby of 200 Mero Street and a Finance Staff member will meet you at the lobby reception desk to receive your protest. **NOTE: Protests delivered in person must be delivered, and received, between 8:00 a.m. and 4:30 p.m., Monday through Friday.**

The Time Limits for Filing A Protest

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person knows or should have known of the facts giving rise thereto. KRS 45A.285(2). This requirement applies both to an initial protest and to revisions or supplements to the protest. See GEC Avionics, Inc., Comp Gen Dec B-250957, 93-2 CPD ¶24.

“Filed” means actual receipt by the Office of the Secretary. 200 KAR 5:380 Section 3(2). For purposes of computing the fourteen (14) calendar day deadline for the submission of a protest, the following legal presumptions apply:

- (a) For protests based upon alleged improprieties in a solicitation for bids or proposals which relate to the solicitation documents themselves, the facts giving rise to the protest shall be presumed to have been known to the protester on the date the solicitation, or a modification to it, was posted to the Commonwealth of Kentucky's eProcurement web site. 200 KAR 5:380 (1) (a).
- (b) For protests based upon alleged improprieties in the award of a contract, the facts giving rise to the protest shall be presumed to have been known to

the protester on the date the contract award was posted to the Commonwealth of Kentucky's eProcurement web site. 200 KAR 5:380 (1)

A legal presumption is a fact assumed from the specific circumstances. The legal presumption in this case may be overcome upon presentation of evidence showing that the facts giving rise to the protest were not and could not have been known to the protester on the date presumed by the regulation. 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) (protester must diligently pursue information that forms the basis of protest); Warren Elec. Constr. Corp., 90-2 CPD ¶34. (Comp.Gen. 1990) (protester has an affirmative obligation to seek the information that forms its basis of protest).

The fourteen (14) day period in which to file a protest does not include the day on which the alleged basis for protest arises. See Kentucky Rules of Court, CR 6.01; 4 C.F.R. § 21.0(e). If the last day of the fourteen (14) calendar day period within which a protest is to be filed falls on a Saturday, Sunday, or Legal Holiday, the period in which to file a protest is extended to the next day not a Saturday, Sunday, or Legal Holiday. See Kentucky Rules of Court, CR 6.01; 4 C.F.R. § 21.0(e). Thus, if an award of contract is made on a Friday, the fourteen (14) calendar day period would commence on the next day, Saturday, and run through the Saturday fourteen (14) days later. Since the time period in which to file a protest ends on Saturday, the time in which to file a protest would be extended to the following Monday.

Note, however, that the Finance and Administration Cabinet will not extend the fourteen (14) calendar day period if a Legal Holiday or other event excusing a filing on the fourteenth (14th) day occurs on another day during the applicable time period. Thus, for example, if the Finance and Administration Cabinet is closed for a Legal Holiday on the thirteenth (13th) calendar day but is open on the fourteenth (14th) calendar day, the thirteenth (13th) day will still count against the fourteen (14th) day period, and the protest must be filed on the next calendar day.

New factual allegations made in submissions after the initial protest, without a new and separate showing of timeliness, will be disregarded as untimely. KRS 45A.285. The inquiry about when the protestor "knew or should have known" the factual basis giving rise to the protest is guided 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) (protester must diligently pursue information that forms the basis of protest); Warren Elec. Constr. Corp., 90-2 CPD ¶34. (Comp.Gen. 1990) (protester has an affirmative obligation to seek the information that forms its basis of protest).

Further, new legal arguments made in submissions after the initial protest, such as additional grounds of protest, will also be disregarded. See, e.g., Wright v. Holbrook, 794 F.2d 1152, 1156 (6th Cir.1986) (“it is well-settled in this circuit that arguments raised for the first time in a reply brief will not be considered by this Court.”); Kentucky Rules of Court, CR 76.12(4)(e).

The Contents of The Written Protest

A written protest must contain the following information:

- (1) Name, address, fax and telephone numbers, and e-mail address of the protester;
- (2) Solicitation or contract number;
- (3) Detailed statement of the legal and factual grounds for the protest, including a description of the prejudice resulting to the protester;
- (4) Copies of documents ready reference to which is believed necessary to assess the factual or legal basis of the protest;
- (5) Statement as to the form of relief requested;
- (6) The date the facts giving rise to the protest became known to the protester; and
- (7) If necessary to rebut the presumption established by 200 KAR 5:380 (1), all relevant factual information establishing the timeliness of the protest under KRS 45A.285(2) and purported to be sufficient for a justifiable finding of timeliness under that statutory provision. Failure to comply with this subsection, if necessary, shall conclusively render the protest untimely. 200 KAR 5:380 Section 2.

A protest which fails to contain the required information may be denied solely on that basis. 200 KAR 5:380 Section 3(3).

The Protest Record

The protest will be determined based on the protest record. For a protest to a solicitation, the record will consist of: (1) the protest, (2) the agency response, and (3) the solicitation. For a protest to an award, the record will consist of: (1) the protest, (2) the agency response, (3) the awardee response, (4) the solicitation, (5) the bids or proposals, (6) the official Determination and Finding, and (7) the contract. Should a protestor wish to include additional documents in the record, the protestor must include such additional documents within the time provided in KRS 45A.285(2).

The Effect Of A Timely Protest

In the event that a protest is timely filed, the Commonwealth will not proceed further with the solicitation or the award involved, unless the Secretary of the Finance and Administration Cabinet makes a written and adequately supported determination that continuation of the procurement is necessary to protect substantial interests of the Commonwealth. KRS 45A.290

The Determination of The Protest

All protests will be referred to the agency administering the solicitation for a response. When a protest is filed with respect to an award of contract, the contract awardee will be provided with a copy of the protest and invited to respond within fourteen (14) calendar days. *Charlie's Towing & Recovery, Inc. v. Jefferson County, Ky.*, 183 F.3d 524, 527 (Ct.App. 6, 1999). A hearing is not available. See KRS 45A.285(3) (no hearing provided), 200 KAR 5:380 (same), and 13B.020(1) (KRS Chapter 13B does not create substantive rights).

The Secretary or her designee will issue a written determination of the protest. The Secretary or her designee will only issue a determination of the grounds asserted in the protest. KRS 45A.285(1). The determination will be based upon the applicable statutes, regulations, case law, and the protest record. A protest which is untimely, fails to establish standing to protest, or fails to include the information required by 200 KAR 5:380(2), will be summarily determined and denied. In other cases, the determination will contain findings of fact, an analysis of the protest, and a conclusion that the protest be either sustained or denied. If the protest is sustained, remedies include canceling the solicitation, canceling the award, rescoring the bidders or offerors, or other remedies appropriate to the situation.

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.

The decision by the Secretary of the Finance and Administration Cabinet (or her designee) is final and conclusive. KRS 45A.285(4). Thus, there is no basis to request nor authority for a re-consideration of the decision.

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