

Protests To A Solicitation (RFB or RFP)

The following is an outline of the grounds for and standards that apply to protests to a solicitation document, that is, to a Request for Bids (“RFB”) or to a Request for Proposals (“RFP”). A protest to a solicitation is a protest to the content of, that is, the terms and conditions of, the solicitation document. Every solicitation document should have (1) mandatory contents, for example, an advertising period, and (2) discretionary criteria of the agency, for example, the evaluation criteria. Legal requirements will be evaluated on a “contrary to law” basis, that is, the inquiry will be whether the solicitation meets the requirements of law. Discretionary determinations will be evaluated on an “arbitrary or capricious” standard, that is, the inquiry will be whether the agency’s determination is irrational. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Procedural issues such as the timing of and contents of a protest are addressed in “Finance and Administration Cabinet Protest Procedure” which can be found together with other resources at: <http://finance.ky.gov/ourcabinet/caboff/OGC/>.

Caution: Waiver

A protest to a solicitation should be filed *before* the protestor actually submits a bid or proposal. When a timely protest is filed, the Commonwealth will not proceed further with the solicitation, 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.

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.”); *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579, 583 (Ky. 2003) (The Supreme Court of Kentucky has found federal statutes and decisions to be persuasive in the procurement context.)

Standing To Protest

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.

Protest To A RFB (Competitive Sealed Bidding (KRS 45A.080))

The statutory scheme imposes certain requirements for RFBs. The solicitation shall state that awards shall be made on the basis of best value. KRS 45A.080(2). “Best value” means a procurement in which the decision is based on the primary objective of meeting the specific business requirements and best interests of the Commonwealth. These decisions shall be based on objective and quantifiable criteria that shall include price and that have been communicated to the offerors as set forth in the invitation for bids. KRS 45A.070(3). Each RFB shall be advertised for a minimum of seven (7) days. KRS 45A.080(3).

While the use of best value criteria is mandatory, the agency has discretion concerning the fashioning of the criteria. The standard is the best value criteria must “meet [. . .] the specific business requirements and best interests of the Commonwealth.” The agency’s determination about its business requirements will be reviewed under an arbitrary, capricious, or contrary to law standard. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Other grounds for protesting a solicitation include a restricted advertising period, the improper use of a sole source contract, the improper use of a “brand name” specification without an “or equal” provision, or of any other ground which illegally restricts competition.

As noted above, legal requirements will be evaluated on a “contrary to law” basis, that is, the inquiry will be whether the solicitation meets the requirements of law. Discretionary determinations will be evaluated on an “arbitrary or capricious” standard, that is, the inquiry will be whether the agency’s determination is irrational. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Protest To A RFP For A Competitive Negotiation (KRS 45A.085) Or To A RFP for a Personal Service Contract (KRS 45A.695)

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). While the competitive negotiation process is intended to be flexible, there must be a common basis for evaluating proposals. *Matter of: Arthur Young & Company*, 85-1 CPD ¶598 (Comp.Gen 1985). To that end, a RFP under the “competitive negotiation” scheme must include, among other things, a description of the supplies or services sought the evaluation factors to be considered in determining the proposal most advantageous to the Commonwealth, the relative importance of price and other evaluation factors. KRS 45A.085. Most other elements in a competitive negotiation RFP are a matter of agency discretion.

The personal service contract is a hybrid process combining the competitive sealed bid process and the competitive negotiation process. Similar to a competitive negotiation RFP, an RFP for a Personal Service Contract “shall describe the services required, list the type of information and data required of each offeror, and state the relative importance of particular qualifications.” 45A.695. Other terms and conditions in a personal service contract RFP are matters of agency discretion.

Legal requirements will be evaluated on a “contrary to law” basis, that is, the inquiry will be whether the solicitation meets the requirements of law. Discretionary determinations will be evaluated on an “arbitrary or capricious” standard, that is, the inquiry will be whether the agency’s determination is irrational. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).