

Protests To An Award: Competitive Sealed Bidding (KRS 45A.080), Competitive Negotiation (KRS 45A.085), And Personal Service Contracts (KRS 45A.695)

The following is an outline of the standards that apply to protests to an agency award under “competitive sealed bidding” (KRS 45A.080), “competitive negotiation” (KRS 45A.085), or “personal service contracts” (KRS 45A.695).

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/>.

Competitive Sealed Bidding (KRS 45A.080)

The hallmark of “competitive sealed bidding” is the general mechanical (that is non-discretionary) nature of the award. *Compare* KRS 45A.080 (competitive sealed bidding award to the responsible, responsive bidder whose bid offers a pre-defined “best value”) *with* KRS 45A.085 (competitive negotiation award “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.”) 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.”

One of the key factors distinguishing sealed bidding from negotiated acquisition is the requirement for the public opening of all bids at the time and place stated in the Request for Bids. *Compare* 200 KAR 5:306(2) *and* KRS 17.080(2) (Competitive Sealed Bidding) *with* 200 KAR 5:307 (Competitive Negotiation). The purpose of the public bid opening requirement is to protect the public and the interest of the bidders against fraud, favoritism or partiality in the letting of contracts, and to enable competing bidders to verify whether other bids are

responsive. *Bartomeli Co., Inc.*, Comp Gen Dec B-246060, 92-1 CPD 170 (Comp. Gen. Feb. 10, 1992).

A competitive sealed 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 determination of responsiveness must be made with information contained in the bid document only. *Firth Const. Co., Inc. v. U.S.*, 36 Fed.Cl. 268, 272 (Fed.Cl. 1996); *but compare* 200 KAR 5:306(3) (purchasing officer may seek post bid-opening “clarification” of matter contained in bid) *with Central States Bridge Co.*, 85-2 CPD ¶ 154 (Comp.Gen. 1985) (“A bid which is nonresponsive on its face may not be changed, corrected, or explained by the bidder after bid opening.”). However, an agency may waive minor irregularities in a bid. 200 KAR 5:306(4). This determination is discretionary, within limits. An irregularity is minor only if it does not provide the bidder with a competitive advantage. 200 KAR 5:306(4)(3).

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 determination of “responsibility” is made after bid opening but before award. *Honeywell, Inc. v. U.S.*, 870 F.2d 644, 649 (Fed.Cir. 1989). Further, this determination of “responsibility” may consider extrinsic matters, that is, information obtained outside the bid document. *Precision Standard, Inc. v. U.S.*, 69 Fed. Cl. 738, 752 (2006), *judgment aff’d*, 228 Fed. Appx. 980 (Fed. Cir. 2007) (citing FAR 9.105-2(b)). A responsibility determination is a discretionary determination by the agency. *See Ryan Co. v. U.S.*, 43 Fed.Cl. 646, 651 (Fed.Cl. 1999).

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); OAG 80-311. The evaluation factors must also be stated in the solicitation document. *Id.* *See also* FAP 111-35-00(4) (“A Solicitation shall clearly identify the procurement as a best value award, shall contain the measurable best value criteria, and shall clearly explain how the criteria shall be used in the evaluation and award process. Best value shall be based on objective and quantifiable criteria that shall include price”); *Community Services Project, Inc. v. BAWAC Cleaning Services, Inc.*, 226 S.W.2d 852, 855 (Ky.App. 2007) (considering a procurement with “best value” points awarded based on objective factors such

as price, months in business, and number of similarly-sized contracts). An evaluation of “best value” should be made with information contained in the bid document. *See Firth Const. Co., Inc. v. U.S.*, 36 Fed.Cl. 268, 272, 275 (Fed.Cl. 1996) (concerning “responsiveness” but since “sealed bids” are opened publicly, the same rationale also applies to “best value” criteria).

In sum, the Secretary will review a sealed bid award to determine whether the bid is responsive, whether the bidder is responsible, and whether the best value criteria have been followed. The determination of responsiveness and “best value” are primarily objective analyses. However, the determination to waive minor irregularities and the determination of responsibility involve an exercise of agency discretion. Agency decisions are entitled to a presumption of correctness. KRS 45A.280. The protestor, therefore, has the burden to show that (1) the determination of responsiveness or the application of “best value” criteria was contrary to law or (2) the waiver of minor irregularities or the determination of responsibility was arbitrary or capricious, that is, irrational. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Competitive Negotiation (KRS 45A.085)

The hallmark of “competitive negotiation” is discretion. A Request for Proposals or RFP is utilized for “competitive negotiation” under KRS 45A.085. Under the “competitive negotiation” 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 “responsibility” determination is identical to the “competitive sealed bidding” process. KRS 45A.85(6); KRS 45A.070(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); KRS 45A.085(6) (“Award shall be made to the responsible and responsive offeror . . .”).

While competitive negotiation does not strictly utilize the traditional RFB concept of “responsiveness,” an RFP proposal is subject to an analogous but more flexible concept which federal procurement law has come to call “RFP conformance.” Unlike RFB “responsiveness” which is determined *at bid opening*, “RFP conformance” or “responsiveness” under KRS 45A.085 is measured *at award*. See KRS 45A.085(6) (“Award shall be made to the responsible and responsive offeror . . .”). At award, 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 ¶24,676 (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).

Further, it is a well-settled rule that the solicitation should inform all offerors of the basis for evaluation of proposals and the evaluation must, in fact, be based on the scheme set forth in the solicitation. *Human Resources Research Organization*, B-203302, 82-2 CPD P31 (Comp. Gen. July 8, 1982). Yet, agency decisions are entitled to a presumption of correctness. KRS 45A.280.

The award of a negotiated procurement is a discretionary act by an agency. See *Laboratory Corp. of America Holdings v. Rudolph*, 184 S.W.3d 68, 75 (Ky.App. 2005); *Hensley v. City of Russell*, 2006 WL 2988174 (the award of a public contract is a purely discretionary act). The limits of discretion are not boundless, however; agency actions that are arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law will be overturned. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Therefore, the protestor has the burden to show that the agency's actions were either without a reasonable basis or in violation of applicable procurement law. *See GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 779 (Fed.Cl. 1997). The protestor must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protestor's mere disagreement with the agency's judgment. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). The Secretary will not "substitute [his] judgment ... for that of the agency, but [will] intervene only when it is clearly determined that the agency's determinations were irrational or unreasonable." *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). If the agency shows that there was a reasoned basis for its decision, the award must be upheld. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998).

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) ("[T]o prevail in a protest the protestor must show not only a significant error in the procurement process, but also that the error prejudiced it."). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Accordingly, the Secretary will review the agency's determination to determine whether there was a rational basis for its evaluation and whether the evaluation was consistent with applicable law. If the Secretary finds error, the Secretary will then examine whether the error was prejudicial to the protestor.

Personal Service Contracts (KRS 45A.695)

The Personal Service Contract ("PSC") procurement process is a hybrid process. A PSC is a contract by which an individual or entity "is to perform certain services requiring professional skill or professional judgment for a specified period of time at a price agreed upon." KRS 45A.690 (1)(f). A Request For Proposals ("RFP") is the solicitation form for PSCs.

KRS 45A.695(g)(3). An award of a PSC is to be made to the “best qualified of all offerors based on the evaluation factors set forth in the request for proposals and the negotiation of fair and reasonable compensation.” KRS 45A.695(5).

The PSC procurement process is in many respects like the competitive negotiation process under KRS 45A.085. For example, the PSC procurement process allows for post-submission inquiries about qualifications and negotiation over price. *Compare* KRS 45A.695(5) *with* KRS 45A.85(7). However, similar to the competitive sealed bid process under KRS 45A.080, there is an initial determination whether the proposal complies with the terms of the solicitation. *Compare* 45A.080(5) (bid awarded to responsive bidder) *with* 45A.695(5) (award must be based upon evaluation factors) and FAP 111-43-00 (b) (initial evaluation of proposals based on evaluation factors).

Just as in the competitive negotiation (KRS 45A.085) process, the final PSC RFP evaluation and award process involves agency *discretion*. As a result, a protest to an agency award of a PSC RFP will be reviewed in a similar fashion to protests to an award of a competitive negotiation RFP, that is, an award of a PSC RFP will be reviewed by the arbitrary, capricious, or contrary to law standard. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007) and the discussion above. In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) (“[T]o prevail in a protest the protestor must show not only a significant error in the procurement process, but also that the error prejudiced it.”). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Thus, the Secretary will review the agency's determination to determine whether there was a rational basis for its evaluation and whether the evaluation was consistent with applicable law. If the Secretary finds error, the Secretary will then examines whether the error was prejudicial to the protestor.