

A Primer on Bid Protest Procedures Under the Kentucky Model Procurement Code

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As government agencies in the Commonwealth of Kentucky seek to engage an ever expanding group of contractors to perform government contracts, state procurements have become extremely competitive. In one recent, high-profile example, Kentucky is currently reviewing proposals from potential contractors to transition by July 1, 2011 its current Medicaid budget of more than \$6 billion to a new Medicaid managed care system. Other state contracts, while smaller in scope and revenue, are no less valuable to contractors.

With potentially billions of dollars at stake in a single procurement, these government contracts generate enormous interest from contractors, and frequently have become the subject of protests by disappointed bidders. Given that a failure to win one of these contracts may essentially lock out an interested bidder from competing for the business for a number of years, contractors need to be particularly mindful of the bid protest process and procedures that allow unsuccessful bidders to challenge the solicitation or the award of a contract. These statutory protest procedures, set forth in the Kentucky Model Procurement Code, are designed to ensure that the state's decisionmaking process and contract award are fair and objective.

As with many complex administrative processes, the bid protest framework under Kentucky's Model Procurement Code contains a number of traps for the unwary. The guideposts set out below are designed to highlight certain rights and legal remedies available under the Code, identify common protest grounds and provide additional information to assist in navigating the mechanics of filing a protest.

Background

In Kentucky, the state Finance and Administration Cabinet (the "Cabinet") generally procures all goods and services for other state agencies pursuant to the Kentucky Model Procurement Code (KY. REV. STAT. ANN. § 45A.285) (the "Code"). Certain provisions of the Code provide statutory rights allowing certain bidders to challenge the Cabinet's decision regarding the solicitation issued for a procurement or the actual award of a contract. Like federal procurements, the Code permits two basic types of bid protests: (1) Pre-award protests that challenge the terms of a solicitation, or (2) Post-award protests that challenge the Cabinet's evaluation of bidders' proposals or the final award of a contract. Under the Code, protests are to be filed with the Secretary of the Finance and Administration Cabinet ("Secretary").

Who can protest?

Any actual or prospective aggrieved bidder may file a protest. To assert a protest, a prospective bidder must show: (1) 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; and (2) that it has a substantial chance of obtaining the award. Under the Code, while an actual bidder (i.e., one that submitted a bid or proposal on the challenged contract) has standing to file a protest, that bidder also must come forward with viable protest grounds demonstrating that it is somehow aggrieved by the Cabinet's decision to award the contract.

Potential protest grounds include, among others: (1) failure of the Cabinet to follow Code procedures; (2) collusion, fraud or dishonesty; (3) the Cabinet's failure to act in good faith; (4) the Cabinet's (or the selection team's) deviation from the criteria outlined in the solicitation; and (5) the use of arbitrary solicitation standards. Importantly, Kentucky courts have ruled that claims based solely on differing interpretations of bid terms do not rise to the level required for judicial review and therefore do not form a satisfactory basis for a protest filing.

How is a Pre-Award Protest Perfected?

A *pre-award protest* to the content of a solicitation document must be filed by a prospective bidder within fourteen (14) calendar days of the posting of the solicitation on the Commonwealth's eProcurement website (www.eprocurement.ky.gov). For purposes of the Code, "filed" means the date *received* by the Secretary of the Finance and Administration Cabinet. Prospective bidders may file a protest after the fourteen (14) day deadline if they can demonstrate the alleged improprieties leading to the protest were not and should not have been known to the prospective bidder on the solicitation posting date. In addition, prospective bidders must protest the solicitation *before* submitting a bid; otherwise the bidder is deemed to have waived all objections to the solicitation document.

Pre-award protests must be made in writing to the Secretary of the Finance and Administration Cabinet ("Secretary"). The protest must contain the following:

1. Name, address, fax and telephone numbers, and e-mail address of the protestor;
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 protestor;
4. Identification of documents which the protestor believes necessary to assess the factual or legal basis of the protest;
5. Statement as to the nature of relief requested;
6. The date the facts giving rise to the protest became known to the protestor; and
7. If necessary to justify filing after the fourteen (14) day filing period has elapsed, "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."

The Secretary will issue a decision based upon the available protest record. For a solicitation protest, the record consists of: (1) the protest; (2) the agency's response; and (3) the solicitation documents. No hearing is available. The decision of the Secretary is final and conclusive for purposes of administrative remedies, and further judicial review of the Secretary's determination is available in the Franklin County Circuit Court.

How is a Post-Award Protest Perfected?

A protest to the award of a contract by the Cabinet must be filed by an actual bidder within fourteen (14) days of the notice of award being posted on the Commonwealth's eProcurement website. Bidders may file a protest after the fourteen (14) day deadline if they can demonstrate the alleged improprieties leading to the protest were not and should not have been known to the bidder on the notice posting date.

Like pre-award protests, a post-award protest must be made in writing to the Secretary of the Finance and Administration Cabinet. The protest must contain the following:

1. Name, address, fax and telephone numbers, and e-mail address of the protestor;
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 protestor;
4. Identification of documents which the protestor believes necessary to assess the factual or legal basis of the protest;
5. Statement as to the nature of relief requested;
6. The date the facts giving rise to the protest became known to the protestor; and
7. If necessary to justify filing after the fourteen (14) day filing period has elapsed, "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."

The Secretary will issue a decision based upon the available protest record. For a contract award protest the record consists of: (1) the protest; (2) the agency's response; (3) the awardee's response; (4) the solicitation documents; (5) the bids or proposals; (6) the official Determination and Finding of the Secretary; and (7) the contract. Again, no formal hearing is available to the protestor. The decision of the Secretary is final and conclusive for purposes of administrative remedies, and further judicial review of the Secretary's determination is available in the Franklin County Circuit Court.

What Remedies Are Available Through a Protest?

In the event a protest is sustained by the Secretary or the Franklin County Circuit Court, potential remedies can include: (1) cancellation of the solicitation; (2) cancellation of the award; (3) an order directing the agency to re-score the bids or offers; or (4) other remedies as may be appropriate.

What is the Effect of Filing a Protest?

In the event a protest is filed, the Code requires that the Commonwealth stay the performance of the award (or any further action on the solicitation, for pre-award protests) until the Secretary makes a determination on the merits of the protest or finds that continuation of the procurement is necessary to protect substantial interests of the Commonwealth.

Can a Protester Appeal the Secretary's Ruling on a Protest?

Protestors who are unsatisfied with the Secretary's resolution of a protest may seek judicial review of the decision. Typically framed as actions for declaratory judgment, appeals from the Secretary's determination must be filed in Franklin County Circuit Court. Under the Code, legal reviews may be sought where the award (or other agency action) was allegedly (1) procured by fraud; (2) arbitrary and capricious, or not supported by the findings of fact of the agency; or (3) was contrary to law, including a decision issued in violation of the Code. The decision or award at issue is legally presumed to be correct and therefore the protestor carries the burden to rebut the presumption and prove the decision or award was improper.

Final Thoughts

While the Kentucky Model Procurement Code provides disappointed bidders a statutory right to protest agency procurements, the Code imposes strict procedural requirements on how such protests may be filed. As such, protestors and their counsel need to be acutely aware of the short filing deadline that begins upon either the posting of the solicitation or the posting of the notice of award on Kentucky's eProcurement website. Moreover, as initial protest decisions are based upon a single written record without the opportunity for a hearing, protestors would be wise to enlist the assistance of competent and effective counsel to ensure the development of a robust agency record in the event judicial review of the Secretary's decision is warranted in the Franklin County Circuit Court.

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