



Governor Edmund G. Brown Jr.

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Governor Edmund G. Brown Jr.

**BEFORE THE DEPARTMENT OF GENERAL SERVICES
OF THE STATE OF CALIFORNIA**

In the Matter of the Protest of the Proposed
Award of RFP No. 2014-03

CAPITOL CITY AMUSEMENTS, INC.,

Protestant,

vs.

FAIR & EXPOSITIONS, 14TH DAA,

Awarding Agency.

PROTEST CASE NO.: 14-046

STATEMENT OF DECISION

TO: David L. Price, Counsel for,
CAPITOL CITY AMUSEMENTS, INC., Protestant

Harry W. Mason, CEO
BRASS RING AMUSEMENTS INC., Proposed Awardee

Dave Kegebein, Manager
FAIRS & EXPOSITIONS, 14TH DAA, Awarding Agency

This protest has been heard and decided pursuant to California Public Contract Code section 10345 et seq. and California Code of Regulations, title 2, section 1195 et seq. through written submissions before Bryan H. Kimura, who has been duly appointed by Fred Klass, Director of the Department of General Services, to hear and decide this case.

RECORD

The following were received from the parties:

From Protestant Capitol City Amusements, Inc. (Capitol City):

1. Letter of protest dated April 23, 2014
2. Detailed statement of protest dated April 25, 2014
3. Notice of Unavailability dated May 9, 2014
4. E-mail regarding extension of time for Rebuttal dated May 14, 2014
5. Rebuttal dated June 12, 2014

From Proposed Awardee, Brass Ring Amusements Inc. (Brass Ring):

1. Response letter undated but postmarked on June 6, 2014, and received on June 9, 2014¹

From Awarding Agency, Fairs & Expositions, 14th DAA (District):

1. Response letter with exhibit dated May 7, 2014
2. Request For Proposal RFP 2014-03 (RFP)
3. RFP 2014-03 Scoring Sheet
4. Capitol City bid documents for RFP
5. Brass Ring bid documents for RFP

BACKGROUND

1. District issued this Request For Proposal (RFP) on or about April 4, 2014, to establish a contract for the purpose of providing, managing, and operating a carnival during the Santa Cruz County Fair. The evidence submitted indicates only

¹ The Notice Of Hearing required proposed awardee's Response to be submitted prior to 5:00 p.m. on May 27, 2014. As Brass Ring's Response was postmarked late, it's Response will not be considered in formulation of this decision. A First Amended Notice of Hearing did not affect the timeline for proposed awardee's Response.

5. Capitol City filed a timely protest of District's intent to award this contract to Brass Ring.

LEGAL ANALYSIS AND CONCLUSIONS

1. California law limits the grounds that may be asserted in a bid protest. The basis for any protest of a services contract award is derived from statute, specifically California Public Contract Code (PCC) section 10345. Subdivision (a) applies to low bid awards, commonly referred to as invitation for bid solicitations. Subdivision (b) applies to solicitations pursuant to PCC section 10344 which provides two methodologies for request for proposals (RFP) solicitations. Protests under subdivision (a) have only one possible basis which requires a showing by a bidder that "he or she is the lowest responsible bidder meeting the specifications for the contract."
2. The grounds for a protest under subdivision (b) for an RFP solicitation are as follows: (a) that the state agency failed to follow the procedures specified in either subdivision (b) or (c) of Section 10344; (b) the state agency failed to apply correctly the standards for reviewing the format requirements or evaluating the proposals as specified in the request for proposal; (c) the state agency used the evaluation and selection procedure in subdivision (b) of section 10344, but is proposing to award the contract to a bidder other than the lowest responsible bidder; (d) the state agency used the evaluation and selection procedure in subdivision (c) of section 10344, but failed to follow the methods for evaluating and scoring the proposals specified in the request for proposal; or, (e) the state agency used the evaluation and selection procedure in subdivision (c) of Section 10344, but is proposing to award the contract to a bidder other than the bidder given the highest score by the state agency evaluation committee. (PCC, § 10345, subdivisions (b)(2):(A)-(E).)
3. Capitol City has invoked four of the allowable grounds for a protest under PCC section 10345 subdivision (b)(2)(A), subdivision 10345(b)(2)(B), subdivision 10345(b)(2)(D), and subdivision 10345(b)(2)(E).

two bids were received in response to the RFP, the bids of Capitol City, the protestant in this matter, and Brass Ring, the proposed awardee.

2. Capitol City protested the proposed award to Brass Ring claiming: 1) that in issuing amended RFPs and in reviewing submissions to the instant RFP, District failed to follow the requirements imposed by Public Contract Code section 10345(b)(2)(A), (B), (D), and (E); 2) that District failed to retain in confidence the financial bid information provided by Capitol City; 3) that District improperly opened Capitol City's bid documents and thereafter disseminated the confidential financial information to Brass Ring; 4) that District discriminated against Capitol City in its evaluation process; and, 5) that District acted in an arbitrary, capricious and biased manner in awarding this contract to Brass Ring. For these reasons, Capitol City argues, this protest must be upheld.
3. District responded: 1) that Capitol City's allegations of improperly opening confidential information and distributing that information to Brass Ring is not relevant to this protest hearing ; and 2) that Capitol City is attempting to resurrect a prior RFP process, and asking for its appeal to be upheld on grounds that do not exist, and is without any factual or legal support.
4. Brass Ring submitted a response letter which was late and therefore cannot be considered in formulation of this decision.

FACTUAL FINDINGS

1. District issued this RFP for providing, managing and operating carnival services at the Santa Cruz County Fair, on or about April 14, 2014.
2. Prior to this RFP, District had previously released two RFPs requesting similar carnival services, RFP No. 2014-01 and RFP No. 2014-02. RFP No. 2014-01 was terminated by District prior to determination of a proposed awardee. RFP No. 2014-02 was terminated by District after a proposed awardee was noticed and a protest was filed.
3. Capitol City and Brass Ring submitted timely bids that were evaluated by District.
4. Upon evaluation, Capitol City's bid was deemed non-responsive, and Brass Ring was noticed as the proposed awardee.

4. A protestant filing a protest pursuant to PCC section 10345, subdivision (b) is not required under the statute to make a showing that it should have been selected as the winner in order to proceed with a protest. If one were to assume that such a requirement existed, it would be inherently unfair to dismiss a protest for lack of jurisdiction on this basis because the fact that a bidder was disqualified before being scored would leave it with no opportunity to protest on any of the five grounds provided for an RFP. No bidder disqualified after an evaluation of format requirements would ever be able to protest an award. This is clearly not what the legislature intended when it provided for the protest process, since it included the ability to challenge the evaluation as set forth in the statute.
5. The protestant bears the burden of proof and must establish each fact essential to the claim of relief it is seeking. (Evid. Code, § 500.) The standard of proof to be applied is a preponderance of the evidence. (Evid. Code, § 115.)
6. A basic rule of competitive bidding is that bids must conform to specifications. If a bid does not conform it may not be accepted. (*Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal.App.3d 449, 454.)
7. As discussed above, PCC 10345 limits the jurisdiction of this protest hearing to five grounds to protest an award pursuant to a Request For Proposals solicitation. These five grounds relate specifically to a state agency's failure to follow the procedures of the RFP, failure to correctly apply the standards as detailed in the RFP, or a failure to apply the evaluation and selection procedures as delineated in the RFP. As District correctly points out in its Response letter, only these issues are relevant to this protest. Therefore, although Capitol City crafts intriguing arguments related to the previous two cancelled RFPs leading to RFP 2014-03 (the instant RFP), this hearing officer only has jurisdiction to render a decision on a protest over those arguments relating to RFP 2014-03.
8. Therefore, for purposes of this protest hearing, Capitol City's protest is based upon the assertion that District added a requirement to its RFP that is "wholly unrelated to the operation of the county fair and its midway". Specifically, Capitol City contends that the District required that bidders have no less than twenty-seven rides (seven "spectacular" rides, nine "major" rides, and eleven

"kiddie" rides), even though the "physical location set aside for the midway area at the Santa Cruz County fair only has space for perhaps ten spectacular and major rides (combined), and no more than seven kiddie rides". District responds that the minimum number of rides is an RFP requirement, and that by submitting a bid, each bidder represented that it met all RFP requirements. In its section 1 Cover Letter to the bid response, Capitol City states that it agrees that "any deviation from any requirement ... shall constitute grounds for rejection of [Capitol City's] proposal". In section 4 of its bid response, Capitol City lists four "spectacular" rides, eight "major" rides, and nine "kiddie" rides. Capitol City clearly does not meet the RFP requirement for twenty-seven rides (seven "spectacular" rides, nine "major" rides, and eleven "kiddie" rides).

9. In support of its allegation, Capitol City contends that District knows precisely how many rides each carnival operator owns, and has imposed this arbitrary requirement so as to be able to award this RFP to Brass Ring. While District does not address Capitol City's contention that the Santa Cruz County fair midway only has space for, at most, seventeen rides, asking for more rides than available space for those rides, does not, on its face, define this requirement as arbitrary, capricious, or "wholly unrelated to the operation of the county fair and its midway". To the contrary, it seems reasonable for District to require its potential vendors to carry as many rides as possible, then to have the opportunity to select the few that would make an appearance in its midway during the Santa Cruz County fair. As District states in its response letter, "the District exercised it[s] discretion by requiring a minimum number of carnival rides", and that "the District also determined that this was a material requirement of the RFP and could not be waived". Part III, section A, on page 8 of the RFP, affords potential bidders the opportunity to bring any "ambiguity, conflict, discrepancy, omission, or other error in this RFP" to the attention of District. Pursuant to this section, Capitol City could have raised objections to the minimum ride requirement prior to the bid submission due date, and District could have, at its discretion, chosen to modify its RFP. However, Capitol City failed to raise this contention at that time, and by submitting a bid,

Capitol City agreed to meet the requirements as delineated by District in the RFP.

DECISION

Capitol City has not met its burden of proving the merits of a protest under PCC 10344, subdivision (b), by a preponderance of the evidence. District has not been shown to fail to follow the procedures of the RFP, fail to correctly apply the standards as detailed in the RFP, or fail to apply the evaluation and selection procedures as delineated in the RFP. Based on the foregoing facts and findings and the hearing record, Capitol City's protest is denied.

07/24/14
Date


BRYAN H. KIMURA
Hearing Officer

SERVICE LIST

Protest No.: 14-046

Protestant

David L. Price, Counsel for
Capitol City Amusements, Inc.
3300 Douglas Boulevard, Suite 125
Roseville, CA 95661
Fax: 916-772-5357

Proposed Awardee

Harry Mason, CEO
Brass Ring Amusements, Inc.
9700 Fair Oaks Boulevard, Suite J
Fair Oaks, CA 95628
Fax: 916-400-2552

Awarding Agency

Dave Kegebein, Manager
Fairs and Expositions, 14th DAA
2601 East Lake Avenue
Watsonville, CA 95076
Fax: 831-761-5827