

OPTIONS LIMITED FOR BID PROTESTS ON STATE BUILDING AND FACILITY PROJECTS

By R. Carson Fisk (as seen in *Texas Construction* February 2009)

Although contracting with the state can be a lucrative practice, attempting to obtain a contract can be frustrating. The Texas Facilities Commission oversees the construction activities of state-owned office buildings and facilities for most state agencies. The TFC is permitted a broad range of contracting options. Under the various methods, the TFC is required to base its selection on criteria published in the request for bids, proposals or qualifications. This may not always happen.

In one case, the selection criteria for an RFP provided that proposals would be scored and interviews might be conducted. Several contractors submitted proposals. One contractor scored highest based on the evaluation of the proposals. After conducting the optional interviews, the TFC rescored the offerors based on the results of the interviews, and another offeror took the lead as the highest scorer. The contract was awarded to that contractor.

The RFP made no mention of interviews being scored or that the scoring of an interview would replace, in any manner, the scoring based on the evaluations of the proposals. Had the contractor known such importance was to be given to the interview, it likely would have spent more time preparing. Following the published selection criteria, the contractor had focused its efforts on preparing a quality proposal -- believing the optional interview to be more of a formality of lesser significance.

When the TFC does not properly publish the selection criteria or base its selection on such criteria, an aggrieved contractor's options are limited. A section of the Texas Administrative Code, titled "Protests/Dispute Resolution/Hearing," provides the only relief available to a bidder, offeror or contractor who is aggrieved in connection with the solicitation, evaluation or award of a contract. Despite its title, the rule provides no opportunity for an actual hearing.

An aggrieved party may issue a formal written protest to the procurement manager of the TFC, which must be received within 10 working days after the party has knowledge that the matter is to be protested. Copies of the protest must be sent to the agency seeking to benefit from the construction and all other vendors who have submitted bids or proposals. The formal protest must be sworn and contain: a specific identification of the statutory or regulatory provisions that are alleged to have been violated; a specific description of each act alleged to have violated those provisions; a precise statement of the relevant facts; an identification of the issues to be resolved; argument and authorities in support of the protest; and a statement that copies of the protest have been provided to the required parties. Generally, if a protest is submitted in a timely fashion, the state is prohibited from proceeding further with the solicitation or award of the contract.

Initially, the procurement manager has the authority to settle and resolve the dispute. If the protest is not resolved by mutual agreement, a written and reasoned determination will go to the protesting party and, again, the agency seeking the construction and all vendors. If it is determined that no violation occurred, the determination will state that. If it is determined that a violation occurred, the determination will set forth the appropriate remedial action and, in a case where a contract has been awarded, the contract may be determined as void.

The procurement manager's determination may be appealed by the protesting party to the executive director of the TFC. An appeal must be received in the executive director's office no later than 10 working days after the date of the procurement manager's determination. The appeal is limited to a review of the procurement manager's determination. Copies of the appeal must be sent to the agency seeking construction and all vendors. The executive director may issue a decision on the appeal or refer the matter to the commissioners of the TFC. Either decision is the final action of the commission.

Sovereign immunity will generally bar any type of legal action regarding the protest and there is no independent right to a contested case hearing through the State Office of Administrative Hearings. In most instances, there is simply no further relief available to an aggrieved contractor. Complaints regarding procurement procedures may be decided by the very people whose actions caused the complaint to arise. It is an unfair system that can result in a contractor spending unnecessary resources to obtain a contract or in addressing legitimate concerns with the procurement process.