

December 21, 2004 Request for Advice Regarding State Auditor's Duty to Disclose Contract File Prior to Awarding of Contract

December 21, 2004

Mr. Paul Lottes
Office of the Auditor of State
240 State House
Indianapolis, IN 46204

Re: Informal Inquiry Regarding Contract File

Dear Mr. Lottes:

This is in response to your question regarding whether a person is entitled to records relating to a Request for Proposal (RFP) that was issued by the Auditor of State.

BACKGROUND

The RFP in question was issued earlier this year to procure services relating to a third party administrator for Indiana's Deferred Compensation plan. At the time of the request for records and your informal inquiry to me, the Auditor had issued notification letters to the six vendors that had submitted proposals in response to the RFP. The notification letters informed all potential vendors that had submitted proposals that a vendor had been awarded the contract. However, the contract with the vendor for third party administrator services has not yet been negotiated or signed.

The *Indianapolis Star* newspaper has requested access to correspondence relating to the procurement as well as the RFP and submitted proposals. You stated that you have timely responded to The Star's request, and that you had indicated that you would need to ascertain whether the documents could be disclosed at this stage of the procurement, or whether no disclosure could occur until a formal contract had been executed. You then requested that I determine the legal rights of The Star to inspect and copy the records regarding the procurement prior to full execution of the contract.

ANALYSIS

Any person may inspect and copy the public records of a public agency during the agency's regular business hours, unless an exemption to disclosure applies to the records. Ind.Code 5-14-3-3(a). There are various statutory provisions outside of the Access to Public Records Act that either grant or limit access to particular records. I.C. 5-22-9 sets out certain provisions regarding a Request for Proposal. IC 5-22-9-5 mandates that a register of proposals be maintained that must be prepared and open for public inspection after contract award. The register of proposals must contain:

- (1) A copy of the request for proposals;
- (2) A list of all persons to whom copies of the request for proposals were given;
- (3) A list of all proposals received, which must include all of the following:
 - (A) The names and addresses of all offerors.
 - (B) The dollar amount of each offer.
 - (C) The name of the successful offeror and the dollar amount of that offeror's offer.
- (4) The basis on which the award was made;
- (5) The entire contents of the contract file except for proprietary information included with an offer, such as trade secrets, manufacturing processes, and financial information that was not required to be made available for public inspection by the terms of the request for proposal.

The Star has requested the RFP, proposals, and correspondence regarding the procurement. The above list of types of information that must be available for inspection does not specifically include the proposals and correspondence. Rather, any records not specifically enumerated in the statute that are contained in the contract file because the record relates to the RFP would fall into section 5(a)(5), "the entire contents of the contract file..." except where the record contains proprietary information, trade secrets, manufacturing processes, and financial information.

The issue presented in this informal inquiry is the meaning of the term "contract award." This is important because IC 5-22-9-5 requires that specified information be made available only *after* "contract award," and by implication, may not be available before then. In discussions with the Department of Administration ("DOA"), I learned that the contract file, under longstanding practice of DOA, is not disclosed until the contract is negotiated, signed by the vendor and agency, and approved by the other signatory agencies required to sign a contract.

IC 5-22 does not define "contract award" or "award." Nor are "contract award" or "award" defined in rules of the Indiana Department of Administration or the Auditor. Therefore, it is necessary to look to principles of statutory construction to determine what is meant by "contract award." "Award" means "to give as the result of judging the relative merits of those in competition." *Webster's New World Dictionary*, 2nd ed. Therefore, the plain meaning of "contract award" is the giving of a contract as the result of judging the relative merits of those in competition.

I also looked to the language contained in IC 5-22-9 that describes the process or procedure for requesting proposals, evaluating them, and awarding the contract. IC 5-22-9-7 states:

(a) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the governmental body, taking into consideration price and the other evaluation factors set forth in the request for proposals.

(b) If provided in the request for proposals, award may be made to more than one (1) offeror whose proposals are determined in writing to be advantageous to the governmental body, taking into consideration price and other evaluation factors set forth in the request for proposals.

Although not directly on point, the General Assembly enacted procedures relating to competitive bidding for supplies, at IC 5-22-7. In those provisions, the term “contract award” is also used. IC 5-22-7-8 states that “a contract must be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder.” Patently, in IC 5-22-7, the legislature provided that a contract is awarded by written notice, not full execution of a contract, even though the law contemplates that a contract may be entered into in connection with a procurement for supplies. Also, IC 5-22-7-10 uses the term “award” as contradistinct from “contract” when it provided that a governmental body may cancel awards or contracts based on a mistake resulting from an inadvertently erroneous bid. Finally, under IC 5-22-7-9, the purchasing agency is to maintain and disclose the name of each bidder and the amount of the bid after each “contract award.”

There are fundamental differences between the types of procurement provided under chapter 7 and chapter 9. However, the legislature used the same terminology to describe when certain bid information would be available for inspection. The DOA stated that its policy equating “contract award” with full execution of the contract furthers the agencies’ need to maintain the confidentiality of submitted proposals so that the state is not competitively harmed if the contract negotiations or approval process fails. Although the DOA’s rationale is compelling, I may consider only the statutes as written. Nothing in IC 5-22-9 or its companion provisions at IC 5-22-7 suggests that “contract award” necessarily means the time that a contract is negotiated and signed by all signatories. Moreover, the DOA’s own rules at 25 IAC 1.1 do not set out any special definition of “contract award.” Rather, 25 IAC 1.1-1-6 uses the same terminology as the statute. DOA has not codified in its rules the agency’s interpretation of “contract award” to mean “full execution of the contract.”

Therefore, to the extent that the Auditor has notified the six potential vendors that it has awarded the contract to an identified vendor, in advance of final contract terms being negotiated, I believe that the law mandates that the specific information in IC 5-22-9-5 be maintained and disclosed at the time of the notification that the contract has been awarded, not after the contract is executed.

However, I wish to note that an agency may take advantage of several provisions in IC 5-22-9 that could operate to protect from disclosure the contents of the competing bidder’s proposals as well as the other types of information specified by IC 5-22-9-5 until after the terms of the contract are negotiated and agreed to by the successful bidder. IC 5-22-9-4 states that

proposals must be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. IC 5-22-9-6 states that as provided in the request for proposals or under rules or policies of the governmental body, discussions may be conducted with, and best and final offers obtained from, responsible offerors who submit proposals determined to be reasonably susceptible of being *selected for award*. *Emphasis added*. IC 5-22-9-9 requires that in conducting discussions with an offeror, information derived from proposals submitted by competing offerors may not be disclosed. From these provisions, it is my opinion that the legislature meant for negotiations or discussions with one or more offerors be concluded prior to the “contract award.”

Therefore, if the agency issuing the RFP has concluded discussions or contract negotiations prior to issuing a letter awarding the contract, which I believe is the procedure contemplated in IC 5-22-9, the law would require that the contract file be disclosed only after the contract is negotiated. Here, under the facts presented to me, certain letters to unsuccessful bidders were issued identifying the vendor to whom the Auditor had awarded the contract **prior to** the formal contract negotiations with the successful vendor or vendors. In my opinion, this notification triggered the disclosure requirements contained in IC 5-22-9-5 and 25 IAC 1.1-1-6 even though final contract negotiations had not been concluded.

In a future procurement, if the Auditor or any other agency issuing an RFP were to identify the vendor or vendors who had submitted proposals that were determined to be reasonably susceptible of being selected for award, and notified the vendors of its finding, this notification would not trigger IC 5-22-9-5, since no contract would have been awarded at that point. After concluding discussions toward a best and final offer, when a contract award may be made, that notification would trigger the disclosure requirements of IC 5-22-9-5.

Please let me know if you have any other questions regarding my interpretation of the RFP statutes and public access laws.

Sincerely,

Karen Davis
Public Access Counselor

cc: Dan Dovenbarger, Department of Administration
Kevin Corcoran