

200 KAR 5:375. Multistep Competitive Sealed Bidding.

RELATES TO: KRS 45A.080

STATUTORY AUTHORITY: KRS 45A.035

NECESSITY, FUNCTION, AND CONFORMITY: KRS 45A.035 authorizes the secretary of the Finance and Administration Cabinet to promulgate administrative regulations for the implementation of the Kentucky Model Procurement Code (KRS Chapter 45A). This administrative regulation implements a multistep bidding process under the provisions of KRS 45A.080.

Section 1. Definitions.

- (1) "Acceptable" means the unpriced technical offer is compliant with technical specifications described in the solicitation.
- (2) "Multistep sealed bidding" means a two (2) phase process consisting of a technical first phase composed of one (1) or more steps in which bidders may submit unpriced technical offers to be evaluated by the purchasing agency, and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their price bids considered.
- (3) "Potentially acceptable" means the unpriced technical offer.
- (4) "Prebid conference" means a meeting or discussion with the purchasing officer and interested bidders.
- (5) "Reverse auction" means a real-time, structured bidding process, usually lasting less than one (1) hour and taking place during a previously scheduled time and Internet location, during which multiple suppliers, anonymous to each other, submit revised, lower bids to provide the solicited good or service.
- (6) "Unacceptable" means the unpriced technical offer is not materially compliant with the technical specifications described in the solicitation to such an extent that there is no reasonable assurance that, by amendment, the offer will meet or exceed the specifications and other requirements.

Section 2. General Terms.

- (1) Except for the variations described in this administrative regulation, the provisions of 200 KAR 5:306 shall apply to multistep bidding.
- (2) Reverse auction may be used as a form of competitive bidding in a multistep bidding process, and as an alternative to sealed bidding if it is determined by the purchasing officer that it is in the best interest of the commonwealth.
- (3) A contract resulting from multistep bidding shall not be awarded for an amount greater than the published price in an existing fixed-price contract with the commonwealth for a substantially similar good or service that was solicited through competitive sealed bids.

Section 3. Multistep Sealed Bidding.

- (1) The multistep sealed bidding method may be used if the procurement officer determines in writing that:
 - (a) Definite criteria exist for evaluation of technical proposals and more than one (1) technically qualified source is expected to be available; or
 - (b) A reverse auction is in the best interest of the commonwealth; and
 - (c) It will be advantageous to the purchasing agency to:
 1. Invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirements;
 2. Conduct discussions for the purposes of facilitating understanding of the technical offer and, if appropriate, obtaining supplemental information, permitting amendments of technical offers, or amending the purchase description;

3. Accomplish paragraphs (a) and (b) of this section prior to soliciting priced bids; and

4. Award the contract to the responsive and responsible bidder providing the best value to the commonwealth.

(2) Prebid conferences in multistep sealed bidding. Prior to the submission of unpriced technical offers, the procurement officer may conduct a prebid conference. If a reverse auction shall be part of Phase Two, the process shall be explained during the prebid conference. The issuing agency may respond to questions and concerns during the conference, but the official response from the issuing agency shall be in writing and shall be provided to all potential bidders who attended the prebid conference.

Section 4. Procedure for of Multistep Sealed Bidding.

(1) Multistep sealed bidding shall be initiated by the issuance of a solicitation as required by KRS 45A.080 and FAP 111-35-00, incorporated by reference in 200 KAR 5:021. The multistep solicitation shall state:

(a) That unpriced technical offers are requested;

(b) Whether price bids are to be submitted at the same time as unpriced technical offers or if a reverse auction shall be conducted. If a price bid is required with the unpriced technical offer, the price bids shall be submitted in a separate sealed envelope;

(c) That it is a multistep sealed bid procurement, and priced bids shall be considered only in the second phase and only from those bidders whose unpriced technical offers are found acceptable in the first phase;

(d) The criteria to be used in the evaluation of the unpriced technical offers;

(e) That the purchasing agency, to the extent the procurement officer finds necessary, may conduct oral or written discussions of the unpriced technical offers in accordance with subsection (5) of this section;

(f) That bidders may designate those portions of the unpriced technical offers which contain trade secrets or other proprietary data that are to remain confidential;

(g) That the good or service being procured shall be furnished generally in accordance with the bidder's technical offer as found to be finally acceptable; and

(h) The manner in which the second phase reverse auction shall be conducted, if applicable.

(2) Amendments to the solicitation. After receipt of unpriced technical offers, amendments to the solicitation shall be distributed only to bidders who submitted unpriced technical offers, and those bidders shall be allowed to submit new unpriced technical offers or to amend those submitted. If, in the opinion of the procurement officer, a contemplated amendment will significantly change the nature of the procurement, the solicitation shall be canceled in accordance with KRS 45A.105, and a new solicitation issued.

(3) Receipt and handling of unpriced technical offers. Unpriced technical offers shall be opened publicly, identifying only the names of the bidders. Technical offers and modifications shall be time stamped upon receipt and held in a secure place until the specified date and time. After the date established for receipt of bids, a register of bids shall be open to public inspection and shall include the name of each bidder. Prior to the completion of phase two of the multi-step bidding process, documents related to the bid evaluation process shall be considered preliminary and may only be disclosed to authorized state personnel and those involved in the evaluation process who have a legitimate interest in a particular matter.

(4) Evaluation of unpriced technical offers. The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the solicitation. A bidder shall submit a technical offer in sufficient detail so as to

substantially comply with the technical specifications of the solicitation. The unpriced technical offers shall be categorized as:

- (a) Acceptable;
- (b) Potentially acceptable; or
- (c) Unacceptable.

(5) If the unpriced technical offer is categorized as "potentially acceptable," the bidder shall amend the offer by the specified date. If the offer is not amended by the specified date, the offer shall be classified as unacceptable.

(6) Discussion of unpriced technical offers.

(a) The procurement officer may hold a conference with all bidders at any time during the evaluation of the unpriced technical offers. The purchasing officer may discuss with bidders, including any subcontractor or supplier of goods or services, acceptable and potentially acceptable bids. Discussions may be conducted for the purposes of facilitating understanding of technical offers and specifications and may include:

- 1. Obtaining supplemental information;
- 2. Amendments to the technical offer;
- 3. Amendments to the solicitation; or
- 4. A potentially-acceptable offer being amended to become an acceptable offer.

(b) During the course of these discussions the procurement officer shall not disclose any information derived from one (1) unpriced technical offer to any other bidder. Once discussions have begun, any bidder who has submitted an offer found acceptable or potentially acceptable may submit supplemental information modifying or otherwise amending its technical offer at any time until the closing date established by the procurement officer. The procurement officer shall notify all acceptable or potentially acceptable bidders in writing when no additional supplemental information may be submitted.

(7) Technical evaluation. The evaluation of technical offers shall be in writing. If the solicitation is for computer hardware, software and related services, the purchasing agency shall comply with FAP 111-15-00(2), incorporated by reference in 200 KAR 5:021. A written record shall be maintained and become a part of the bid file.

(8) Unacceptable unpriced technical offer. The procurement officer shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file. A bidder whose technical offer is determined to be unacceptable shall not be allowed to amend or supplement the technical offer.

(9) The procurement officer may initiate Phase Two of the multistep bidding if, in the procurement officer's opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without modification or alteration of the offers. If the procurement officer finds that there are not sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without modification or alteration of the offers, the procurement officer shall issue an amendment to the solicitation or engage in technical discussions as set forth in subsection (5) of this section.

(10) Mistakes during multistep sealed bidding. Mistakes may be corrected or bids may be withdrawn during:

- (a) Before unpriced technical offers are evaluated;
- (b) After any discussions have commenced under subsection (5) of this section;
- (c) If responding to any amendment of the solicitation; or
- (d) In accordance with 200 KAR 5:306 and FAP 111-35-00, incorporated by reference in 200 KAR 5:021.

Section 5. Procedure for Phase Two of Multistep Sealed Bidding.

- (1) Upon the completion of the multistep bidding process, public notice shall not be required for Phase Two. The procurement officer shall either:
 - (a) Open price bids submitted in from bidders whose unpriced technical offers were found to be acceptable; if the offers have remained unchanged and the solicitation has not been amended;
 - (b) Invite each bidder whose technical offer was determined to be acceptable to submit a price bid; or
 - (c) Conduct a reverse auction.
- (2) If in the best interest of the commonwealth, the reverse auction shall be an open and interactive process where pricing is submitted, made public immediately, and bidders are given opportunity to submit revised, lower bids, until the bidding process is closed.
- (3) The solicitation of price bids for a reverse auction shall establish a date and time for the beginning and close of the reverse auction. The closing date and time may be a fixed point in time or may remain dependent on a variable specified in the solicitation.
- (4)
 - (a) Following receipt of the first bid after the beginning of the reverse auction, the lowest bid price shall be posted electronically, and updated as other bidders submit bids.
 - (b) At any time before the closing date and time, a bidder may submit a lower bid.
- (5) Mistakes during reverse auctions.
 - (a) Withdrawal. If a mistake in a bid is attributable to an error in judgment, the bid may not be withdrawn. If a mistake in a bid is inadvertent, withdrawal or correction may be permitted to the extent it is not contrary to the interest of the purchasing agency or the fair treatment of other bidders. If a bid is withdrawn, a later bid submitted by the same bidder may not be for a higher price. If the lowest responsive bid is withdrawn due to an inadvertent mistake after the closing date and time, the procurement officer shall determine in writing whether to:
 1. Award the contract to the next lowest responsive vendor;
 2. Cancel the solicitation; or
 3. Reopen Phase Two bidding to all bidders whose technical offers were determined acceptable during.
 - (b) If Phase Two bidding is reopened, the procurement office shall notify all other bidders whose technical offers were determined acceptable during of the new date and time for the beginning and close of Phase Two bidding.
 - (c) Confirmation of bid. If it appears from a review of the bid that a mistake has been made, the bidder shall be requested to confirm the bid. Situations in which confirmation shall be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in subsection (5)(a) of this section are met.

(31 Ky.R. 508: Am. 1233; eff. 1-21-2005; Crt eff. 2-12-2020.)