



STATE OF INDIANA

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November 5, 2014

Ms. Kathleen McLaughlin
41 E. Washington St.
Indianapolis, IN 46219

Re: Formal Complaint 14-FC-184; Alleged Violation of the Access to Public Records Act by the Indianapolis Office of Corporation Counsel

Dear Ms. McLaughlin,

This advisory opinion is in response to your formal complaint alleging the City of Indianapolis ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The City has responded via Ms. Samantha DeWester, Esq., Corporation Counsel. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on October 14, 2014.

BACKGROUND

On or about July 22, 2014, you began requesting a series of documents from the City of Indianapolis regarding its criminal justice center initiative. You originally requested the request for proposals ("RFP") issued by the City soliciting bids for the project. On September 23, 2014, the City responded to your complaint claiming the RFP is still under negotiation and it also contained trade secrets. In a letter dated September 24, 2014, I issued a letter from this Office questioning the applicability of the APRA exclusions to RFPs. At the time, I was skeptical as to how RFPs can be considered to be "negotiated" by their very nature. As is noted below, I maintain that skepticism; however, the RFP was eventually released to the public and made available to you.

From the information I have been provided, it appears as if the City released a request for qualifications ("RFQ") to the public at large. After receiving responses, the City narrowed the potential vendor list to three contractors. My understanding is the City worked with the short list in preparing what was to be the final RFP. The City labels this process as negotiations. On or about October 15, 2014 the RFP was made public.

Shortly thereafter, your publication, the Indianapolis Business Journal, followed up with a request for the draft RFPs created during the "negotiation process". On October 17,

2014, the City again denied your request stating the draft is considered deliberative. The City also asserted a public safety concern exception found at Ind. Code § 5-14-3-4(b)(10).

DISCUSSION

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” See Ind. Code § 5-14-3-1. The City of Indianapolis is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the City’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

I incorporate by reference my September 24 letter to you expressing my concern over categorizing the information in the draft RFPs as trade secrets. I stand by that analysis as three separate competitors (and thereby two eventual losing bidders) were made privy to what the City considers a trade secret. The City has indicated through its outside counsel in a verbal conversation to me they are withdrawing this argument.

Furthermore, I also continue to contend RFPs are not instruments intended to be under negotiation as contemplated by Ind. Code 5-14-3-4(b)(5)(A). Negotiations are between identified commercial prospects and the political subdivision over contractual terms and conditions of an offer. In this case three pre-qualified vendors are vying for a contract and not negotiating terms and conditions of an offer.

The City asserts the negotiation process includes the three vendors giving input as to what the RFP should look like, specifically the portion of the RFP identified as the Public Private Agreement (“PPA”). This Office does not hold itself out to be an expert on procurement; however, it has sought the advice of several other authorities – all of whom consider the City’s bidding practices in this situation to be irregular. Irregularities notwithstanding, I am not compelled by the City’s assertion of the negotiation exception to disclosure in this instance.

Neither party has provided any authority stating when the negotiation period commences. It stands to reason negotiation of a contract would occur after an RFP is released and before an offer is awarded. It is my understanding bids are not even due until November 21, 2014.

The Uniform Commercial Code states an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances. See U.C.C. § 2-206(1)(a) (2002). Even though the PPA portion of the RFP is akin to a contract and is the working document referenced as “under negotiation”, there has been no offer inviting acceptance – only a request for preliminary qualifications. Presumably there will eventually be negotiations of the terms and conditions of the PPA (and would

potentially fall under Ind. Code 5-14-3-4(b)(5)(A)), however, this occurs *after* the release of the RFP.

Much has been made of the City's criminal justice facility being a public-private agreement. It is true the governmental body may refuse to disclose the contents of proposals during discussions with eligible offerors (see Ind. Code § 5-23-5-6), but nothing allows the withholding of a *request for proposals* developed by a public agency during these discussions. See also Ind. Code § 5-23-5-7 (offers are negotiated, not the actual request for bids and proposals). The interim process during which the short list gave input into the RFP was simply feedback and not actual negotiations. Again, the City was not inviting acceptance of an offer to enter into a contract and should not be considered to be negotiating an agreement.

The public-private partnership statute does contemplate discussions with the offeror for clarifications regarding full understanding of the proposal. See Ind. Code § 5-23-5-2(4). I am not familiar with an authorized procedure to enter into discussions with three potential vendors to amend an RFP before it is made public.

Similarly, the communication during the RFP development process cannot be considered deliberative by definition. Deliberative material may be withheld at the discretion of the public agency when it meets the criteria for being considered deliberative. Ind. Code § 5-14-3-4(b)(6) defines deliberative material as:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

To my knowledge, the three qualified vendors are not under contract with the City yet and therefore the exception would not apply to communication between the bidders and the City.

Finally, the City has asserted Ind. Code § 5-14-3-4(b)(10) and (b)(19) as justification for withholding elements of the proposals. The City has allegedly had the pre-qualified bidders sign confidentiality agreements prohibiting them from releasing technical specifications of the project in order to preserve the integrity of security. Given the project houses a jail or lock-up, it is within the City's discretion to redact portions of any generated documentation, but must disclose the remainder.

CONCLUSION

If any draft documents exist of the working document developed as the RFP, it should be disclosed by the City. By definition, discussions with a short list of pre-qualified vendors are not negotiations of a contract and would not fall under the APRA. Neither are they deliberative communication as the contractor is not yet under contract. The City does have a valid argument regarding the release of the technical specifications of the RFP

potentially compromising the integrity of the secure facility; however, the rest of the documentation should be released.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Ms. Samantha DeWester, Esq.