



Department of Transformation and Shared Services

Governor Sarah Huckabee Sanders

Secretary Joseph Wood

Director Edward Armstrong

April 5, 2023

Mr. Michael N. Shannon  
Quattlebaum, Groom & Tull  
111 Center Street, Suite 1900  
Little Rock, Arkansas 72201

Re: Protest of Award in Solicitation No. S000000162: Food Distribution Services

Dear Mr. Shannon:

On behalf of Educational Catering, Inc., d/b/a ECI Management Group (ECI), you submitted on March 24, 2023, a timely protest of the March 10, 2023, Anticipation to Award to Hebrews 11:1, LLC (Hebrews) in the above-referenced solicitation (the "Solicitation" or the "IFB"). Arnetta Bradford, owner and director of Hebrews, submitted Hebrews's timely protest response on March 31, 2023. Solicitation No. S000000162: Food Distribution Services was issued by the Department of Transformation and Shared Services Office of State Procurement (OSP) for the Arkansas Department of Military.

Every protest presents me with an opportunity to review and assess our procurement processes for compliance with applicable law, rules, policies, and solicitation terms, as well as an opportunity to learn more about how OSP can better serve and support the state and its citizens in the future. Where, upon review, it is determined that a solicitation or anticipated award of a contract violated the law, then the solicitation or proposed award can be cancelled or revised to comply with the law.<sup>1</sup>

With the aforesaid in mind, I appreciate that both ECI and Hebrews submitted bids in response to Solicitation No. S000000162 for Food Distribution Services, and ECI's protest has provided me with an opportunity to review the solicitation and selection processes in this case. After reviewing the protest, the response by Hebrews, the applicable law, and further relevant information, I have determined that the protest is sustained. My reasoning and the authority I have relied upon are provided below.

## **I. THRESHOLD CONSIDERATIONS**

As a threshold matter, I note that Arkansas Procurement Law only authorizes me to determine the merits of a protest that has been timely submitted by an interested party who raises one or more statutory grounds of protest.<sup>2</sup> A protest that is untimely or that does not rest on statutory grounds is dismissed.

In this case, it is undisputed that ECI's protest was timely submitted, and ECI asserts that its protest of the anticipated award of the Food Distribution Services contract to Hebrews rests on "one or all" of two statutory grounds identified in Arkansas Code Annotated § 19-11-244(a)(4)(A)(ii) and (iii).

<sup>1</sup> See Arkansas Code Annotated § 19-11-247(b).

<sup>2</sup> See Ark. Code Ann. § 19-11-244 and OSP Rule R1:19-11-244.

Office of State Procurement

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## II. LEGAL AUTHORITY

The primary statutory authority governing competitive sealed bidding, also called an invitation for bids, is found at Arkansas Code Annotated § 19-11-229 and provides, in pertinent part, as follows:

- a) **Definition.** “Competitive sealed bidding” means a method of procurement which requires:
- (1) Issuance of an invitation for bids with a purchase description and all contractual terms and conditions applicable to the procurement;
  - (2) Public, contemporaneous opening of bids at a predesignated time and place;
  - (3) Unconditional acceptance of a bid without alteration or correction, except as authorized in §§ 19-11-204 and 19-11-228 — 19-11-240;
  - (4) Award to the responsive and responsible bidder who has submitted the lowest bid that meets the requirements and criteria set forth in the invitation for bids; and
  - (5) Public notice.

Furthermore, one of several underlying purposes and policies of Arkansas Procurement Law is to provide for increased public confidence in the procedures followed in public procurement.

For purposes of Arkansas Procurement Law, “may” indicates something is permissive and “shall” means it is imperative.

To identify and remedy material deviations, Arkansas Procurement Law contains a protest process by which offerors may inform the State Procurement Director of instances where the: (i) award of the contract exceeded the authority of the director or the procurement agency at issue; (ii) procurement process violated a constitutional, statutory, or regulatory provision; (iii) director or the procurement agency failed to follow the rules of the procurement as stated in the solicitation, and that failure materially affected the contract award; (iv) procurement process involved responses that were collusive, submitted in bad faith, or not arrived at independently through open competition; or (v) the anticipated contract award resulted from a technical or mathematical error made during the evaluation process. *See* Arkansas Code Annotated § 19-11-244(a)(4)(A).

## III. DISCUSSION

ECI contends that the bid Hebrews submitted should be rejected because it was not opened during the bid opening scheduled at 2:00 p.m. on February 24, 2023, pursuant to the terms of the Solicitation. This contention is partially accurate as Hebrews’s documentation, with the exception of the pricing document, was opened at the appropriate time. As noted by ECI, Hebrews’s pricing sheet was submitted in an Apple Numbers format and had to be converted to Microsoft Excel format by OSP personnel in order to be viewed, which process was completed at 3:34 p.m. on February 24, 2023. Hebrews acknowledges that it permitted OSP to convert the formatting of its pricing sheet in order to be viewable but asserts that it timely submitted its documentation and followed applicable guidelines. Hebrews was apparently not put on notice by any terms in the IFB that its bid might not be ready for contemporaneous viewing with the other bids if it submitted its electronic bid in a format other than Microsoft Excel format.

The legal requirements of competitive sealed bidding are clear in requiring a “[p]ublic, contemporaneous opening of bids at a predesignated time and place.” In addition, Section 19-11-229(e) provides that, “[b]ids shall be opened publicly in the presence of one (1) or more witnesses at the time and place designated in the invitation for bids. Each bid, together with the name of the bidder, shall be recorded and open to public inspection.” Here, it is undisputed that Hebrews’s pricing sheet was opened and converted at 3:34 p.m., instead of 2:00 p.m. This opening was not open to public viewing since the live stream had already been terminated. As an underlying purpose and policy of Arkansas Procurement Law is to provide for increased



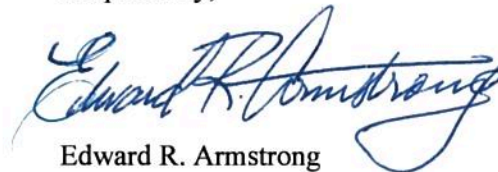
public confidence in the procedures followed in public procurement, and pricing is a fundamental component of competitive sealed bidding, I cannot consider the technical anomaly that occurred in this case to negate the mandatory requirement of publicly and contemporaneously opening bid submissions. While the particular circumstances in this case are unfortunate, public confidence in procurement processes is paramount as reflected in statutory mandatory requirements.

#### IV. CONCLUSION

The competitive sealed bidding requirements mandate that ECI's protest be sustained as Hebrews's pricing sheet was not publicly and contemporaneously opened in accordance with the solicitation's requirements; accordingly, the protest is sustained. The agency shall determine whether to cancel and reissue the IFB or award to the lowest sealed bid that was publicly and contemporaneously opened with the others.

Pursuant to Ark. Code Ann. § 19-11-244 (e)(1), this determination is final and conclusive as to the protest.

Respectfully,

A handwritten signature in blue ink that reads "Edward R. Armstrong". The signature is written in a cursive style with a large, sweeping flourish at the end.

Edward R. Armstrong  
State Procurement Director