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24-ORD-195

September 12, 2024

In re: Todd Loehnert/University of Louisville

Summary: The University of Louisville (“the University”) did not violate the Open Records Act (“the Act”) when it could not provide a record that does not exist. However, the University violated the Act when it failed to provide requested subcontracts pertaining to a construction project. The Act does not require a public agency to fulfill a request for information that does not describe public records to be inspected.

Open Records Decision

On July 22, 2024, Todd Loehnert (“the Appellant”) requested “copies of public records that pertain to the awarded construction management/general contracting contract and general conditions for the JB Speed [School] of Engineering Student Success Building (RP-011-23) project at the University of Louisville and specifically describe and delineate the total contract amount, including the compensation of the construction manager, and all contractual performance and payment bonding requirements.”¹ In response, the University provided a contract dated November 28, 2022, between the University and construction manager/general contractor (“CM-GC”) Whittenberg Construction Company (“Whittenberg”).

On August 2, 2024, the Appellant requested “a complete breakdown of all subcontracts and the amounts of each subcontract that was assigned to the CM-GC” as well as “a copy of the 100% [performance and payment] bond from the CM-GC for the total amount of the contract.” In response, the University provided a performance

¹ Under KRS 61.880(2)(a), a party wishing to appeal a denial of a request for public records must “forward to the Attorney General a copy of the written request and a copy of the written response denying inspection.” Here, the Appellant did not provide a copy of the original July 22 request, but only provided a copy of a response from the University that quoted the language of the request. Thus, the University’s disposition of the July 22 request is not part of this appeal. However, it is included here to provide factual background.

and payment bond² in the amount of \$3,037,461 but stated it “did not identify any” subcontract agreements that were responsive to the request.

On August 9, 2024, the Appellant informed the University that the payment bond it had provided was far less than 100% of the contract price, as the Appellant was aware of two subcontractors on the project whose contracts totaled “approximately \$30 million.” The Appellant therefore requested “the Total Contract Amount of the CM-GC which includes ALL subcontracts that were assigned to them and the date of the assignment.” In response, the University stated it “does not have any contract agreements with Subcontractors for this project” and further asserted “that there is not a single, comprehensive 100% Payment and Performance Bond that covers the entire amount of the contract for this project.” This appeal followed.³

Under KRS 45A.190, when a public agency awards a construction contract in an amount exceeding \$100,000,⁴ a performance bond must be executed “in an amount equal to one hundred percent (100%) of the contract price as it may be increased.” KRS 45A.290(2)(a). Further, a payment bond must be executed in such cases “for the protection of all persons supplying labor and material to the contractor or his subcontractors, for the performance of the work provided for in the contract[,] in an amount equal to one hundred percent (100%) of the original contract price.” KRS 45A.290(2)(b).

The Appellant explains that the procurement method used here involves two phases. First, “the purchasing officer enters into a single contract with an offeror (Whittenberg) to provide preconstruction and constructions [*sic*] services.” This was the contract in the amount of \$3,037,461, for which the University provided a copy of the performance and payment bonds. The Appellant further explains, “During the preconstruction phase, the successful offeror provides design consulting services. During the construction phase, the successful offeror acts as general contractor by: (a) Contracting with subcontractors; and (b) Providing for management and construction at a fixed price[.] The final construction cost [for] the project [is] established by change order after the [CM-GC] enters into all applicable subcontracts. When the [University] assigned the Trade Contracts [*i.e.*, subcontracts] to the CM-

² The University indicated it had redacted certain information from the payment bond under KRS 61.878(1)(c)1., which it described as “consolidated financial statements, summary experience charts, work plans, references, and pricing schedules.” The Appellant has not objected to these redactions.

³ The Appellant made an additional request on August 14, 2024, for “the subcontractor trade contracts, amount of each and the date they were assigned to the CM-GC.” However, the Appellant initiated this appeal on August 15, 2024. Under KRS 61.880(1), a public agency has five business days to respond to a request for public records. Accordingly, this appeal is premature as to the August 14 request. *See, e.g.*, 11-ORD-073.

⁴ This amount was increased from \$40,000 to \$100,000 during the General Assembly’s 2024 Regular Session. *See* 2024 Ky. Acts ch. 223 §§ 79, 81 (amending KRS 45A.190 effective April 27, 2024).

GC, Whittenberg, the CM-GC contract increased accordingly.” Thus, the Appellant asserts the University should have required a performance and payment bond to be executed for 100% of the contract price as “increased” by the subcontracts.

The University claims no “single, comprehensive 100%” performance and payment bond exists for the project. Once a public agency states affirmatively that it does not possess a record, the burden shifts to the requester to present a *prima facie* case that the record does exist. See *Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). A requester must provide some evidence to support a *prima facie* case that requested records exist, such as the existence of a statute or regulation requiring the creation of the requested records, or other factual support for the existence of the records. See, e.g., 21-ORD-177; 11-ORD-074. If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency “may also be called upon to prove that its search was adequate.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, the Appellant cites KRS 45A.190(2), which requires 100% performance and payment bonds to be executed for all construction contracts greater than \$100,000. However, it is not clear from the face of the statute whether a single, comprehensive bond must be executed for the entire price of the contract as increased by the subcontracts, or whether a series of separate bonds may be executed in an aggregate amount equal to 100% of the total contract price. Thus, the Appellant has not clearly established a *prima facie* case that a “single, comprehensive 100%” bond should exist. To the extent additional performance and payment bonds may exist for this project, the Appellant may request copies of them from the University. However, the University did not violate the Act when it could not provide a nonexistent single bond in an amount equal to the total contract price.⁵

The University also denies possessing any subcontracts related to the project. However, the Appellant has provided an “Assignment and Assumption of Trade Contract” with names and dates redacted, representing one of the agreements by which the University assigned to Whittenberg its rights and duties under the trade contracts with subcontractors on the project. The Appellant claims that after sending this redacted copy to the University on August 14, 2024, he “received copies of additional Trade Contracts” from the University, thus negating the University’s initial denial that it possessed any such subcontracts. The fact that the University later located subcontracts for the project establishes that its initial search was inadequate. See, e.g., 21-ORD-178; 20-ORD-013. Thus, the University violated the

⁵ The Appellant has requested the Office’s “assistance in correcting” the University’s alleged failure to comply with KRS 45A.190(2). However, “[i]ssues unrelated to the Open Records Act are beyond the Attorney General’s review powers under KRS 61.880.” 09-ORD-057.

Act when it initially failed to provide subcontracts responsive to the Appellant's August 2 request.

As for the August 9 request, the Appellant requested *information*, and not public *records*. Specifically, the Appellant asked for the "Total Contract Amount," including the subcontract amounts, and the dates when the subcontracts were assigned. The Act does not require public agencies to fulfill requests for information, but only requests for records. *See* KRS 61.872(2)(a) (a request to inspect records must include, among other things, a description of "the records to be inspected"); *see also* *Dep't of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The [Act] does not dictate that public agencies must gather and supply information not regularly kept as part of [their] records."). Here, the Appellant requested only information—the total contract amount and the assignment dates of subcontracts. Although that information may appear in records possessed by the University, the Appellant's August 9 request did not describe any public records he wished to inspect. Accordingly, the University did not violate the Act when it did not provide the requested information.⁶

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Russell Coleman
Attorney General

/s/ James M. Herrick
James M. Herrick
Assistant Attorney General

⁶ In correspondence dated August 22, 2024, the Appellant states he is "still waiting for a complete copy of the CM-GC proposal, a complete list of negotiated items and list of positive and negative deducts to the CM-GC contract." Because these items are not listed in any of the requests the Appellant provided to the Office in this appeal, they are not pertinent to this decision.

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Distributed to:

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