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**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS  
ON REFERRAL BY THE COMMISSIONER OF  
THE DEPARTMENT OF ADMINISTRATION**

In the Matter of: )  
)  
RICHARD C. SANDERS, )  
)  
Appellant. ) OAH No. 05-0240-PRO  
\_\_\_\_\_ ) DNR RFP No. 2005-1000-5284

**DECISION**

**I. Introduction**

This is a protest appeal. It concerns Request for Proposals [RFP] No. 2005-1000-5284, issued by the Department of Natural Resources, Trust Land Office, for the services of a professional forester to administer a timber sale contract.

The request for proposals was issued on January 3, 2005. On February 17, 2005 the Trust Land Office issued a notice of intent to award the contract to Forest & Land Management, Inc. Richard Sanders filed a protest on February 22, 2005. The Trust Land Office denied the protest on March 11, 2005, and awarded the contract on March 15, 2005. Sanders filed an appeal on March 21, 2005. The commissioner referred the matter to the Office of Administrative Hearings. The administrative law judge conducted a hearing in Anchorage on May 4-6, 2005.

Based on the evidence in the record and the testimony at the hearing, the administrative law judge recommends that the appeal be denied.

**II. Facts**

A. Timber Sale Administration and Related Contracts, Pre-2003.

The Alaska Mental Health Trust owns or has an interest in about one million acres of land in the State of Alaska. The Trust Land Office of the Department of Natural Resources manages those lands on behalf of the trust.<sup>1</sup>

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<sup>1</sup> See generally AS 44.37.050, AS 38.05.801, 11 AAC 99.

The office conducts sales of timber on lands it manages, in order to obtain funds for trust purposes. Typically, the office hires a timber sale administrator for such sales. The administrator's primary function is to monitor and enforce contract compliance by the timber purchaser, on behalf of the office as the timber seller. In 1998-2002 the office issued solicitations for administration of several sales of trust land timber, including sales in Icy Cape (1998; \$103,510),<sup>2</sup> Thorne Bay (1999-2000; 4,821 acres; est. 71 mmbf; \$716,504),<sup>3</sup> Southcentral (Kenai and Seldovia/Tyonek Sales, 2001; 11,678 acres; est. 50 mmbf; \$168,641),<sup>4</sup> Moose Pass (2002; 125 acres; \$12,183),<sup>5</sup> and Katlian Bay (2002; 2,400 acres; est. 7 mmbf; \$31,535).<sup>6</sup> The Icy Cape, Thorne Bay and Katlian Bay sale administration contracts were awarded to Forest and Land Management, Inc., (FLMI) the Southcentral contract to Richard Sanders, and the Moose Pass contract to Mike Cooney.<sup>7</sup>

In November, 2002, the office issued a solicitation for the services of a professional forester to develop a comprehensive Timber Asset Management Plan for trust lands with commercial timber sale potential and to assist in the implementation of the plan.<sup>8</sup> The office identified seven parcels in Southeast Alaska as of particular note, totaling 10,697 acres with an estimated 195 mmbf of timber, as well as land in the Matanuska-Susitna Valley and land accessible from the road system in the vicinity of Nenana, Fairbanks, the Tanana River valley, and Delta Junction.<sup>9</sup> The solicitation called for a timber inventory, market analysis, and timber sale planning, design, and layout.<sup>10</sup>

Pre-sale layout for a timber sale typically includes field reconnaissance, road and landing layout and flagging, and marking and measuring boundaries.<sup>11</sup> The timber asset management plan solicitation advised potential respondents that "[t]he Contractor may be

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<sup>2</sup> Ex. L. This contract included log accountability. Mike Cooney provided field inspection and Clair Doig financial accounting and other services.

<sup>3</sup> ASP 10-00-007 [Ex. U], ASP 10-00-043 [Ex. 38]. ASP 10-00-007 was primarily for the timber sale planning and layout; ASP 10-00-043 was for timber sale administration over a six-year term.

<sup>4</sup> ASP 2001-1000-2454. [Ex. U] This contract covered two separate timber sales in three separate areas. The Tyonek/Seldovia sale covered about 35 mmbf, and the Kenai sale covered about 15 mmbf.

<sup>5</sup> ASP 10-03-013. [Ex. U]

<sup>6</sup> ASP 10-03-004. [Ex. 7]

<sup>7</sup> Mr. Cooney won the contract under his d/b/a, Ursus Enterprises.

<sup>8</sup> ASP 2003-1000-3720. [Ex. U]

<sup>9</sup> *Id.* at 13.

<sup>10</sup> *Id.* at 13-15.

<sup>11</sup> J. Eleazar testimony. [Tape 2B]

precluded from participating in future projects that are generated by or conflict with the performance of this contract and may result in financial benefit to the Contractor.”<sup>12</sup> After reviewing six proposals, the office awarded the contract to FLMI, in the amount of \$99,325.

B. Minimum Cost Component.

Prior to 2003, the office’s solicitations for timber sale administration services, and its solicitation for preparation of a timber asset management plan, routinely provided for 20-25% of the evaluation to be based upon cost, with 60-65% based upon experience, qualifications, understanding of the project, and the proposed plan of operations.<sup>13</sup> These solicitations were consistent with the Department of Administration’s policy at the time, under which there was no mandatory minimum cost component, but as a “rule of thumb,” a 40% minimum cost component was suggested.<sup>14</sup> Effective May 1, 2003, however, the department initiated a new policy, under which the mandatory minimum cost component for requests for proposals is 60% of the total points available.<sup>15</sup> A solicitation with a lower cost component could be issued only after approval by the Chief Procurement Officer, based on the best interests of the State.<sup>16</sup>

C. Post-2003 Timber Sale Administration Contracts.

In 2004, the office issued its first two solicitations for timber sale administration for sales that had been planned by FLMI under its Timber Asset Management Plan contract. The solicitations were subject to the new policy requiring a minimum 60% cost component in the evaluation.

The first solicitation included three separate timber sales, Signal Mountain, Gravina Island, and Minerva Mountain, covering about 6,385 acres with an estimated 10-

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<sup>12</sup> *Id.* at 11.

<sup>13</sup> The Thorne Bay solicitations called for 20% (1999) and 25% (2000) of the evaluation to be based upon cost, Southcentral 25%, and Moose Pass, Katlian Bay, and the Timber Asset Management Plan 20%.

<sup>14</sup> AAM 81.470(3) (Rev. July 15, 1999).

<sup>15</sup> Ex. S.

<sup>16</sup> *Id.* The 40% minimum was in effect as a mandatory minimum in 1990, with the same “best interests” requirement for a higher cost component. AAM 82.160(3) (Rev. March, 1990) The “rule of thumb” language, eliminating the mandatory nature of the minimum cost component, was in effect in 1995. AAC 82.160(3) (Rev. November 13, 1995). The various versions of the Alaska Administrative Manual may be accessed at the website of the Department of Administration’s Division of Finance, located at [www.state.ak.us/admin/dof](http://www.state.ak.us/admin/dof).

15 mmbf of timber in the Ketichikan area.<sup>17</sup> The timber sale plan included a significant helicopter logging component, and the solicitation for the timber sale administrator included log accountability. The solicitation was issued in the spring of 2004; FLMI was the lone respondent and was awarded the contract, worth about \$40,000.

The second solicitation, for the Wrangell 8 Mile sale, was issued on September 9, 2004. The solicitation was a small procurement under AS 36.30.320, and was issued as an informal request for proposals under 2 AAC 12.400(d). The planned timber sale covered 240 acres with an estimated 5 mmbf of timber,<sup>18</sup> located along the Zimovia Highway outside Wrangell. The solicitation called for review of the timber sale layout and timber sale administration, including log accountability, with the frequency of on site visits “to be proposed by bidder.”<sup>19</sup> Among the qualifications stated as required for consideration were “Administration of at least 3 timber sales (4-5 MMBF minimum volume per sale) that included a component of helicopter harvest. Primary responsibility for log accountability, record keeping and end of sale reconciliation for at least 3 timber sales of 5 MMBF or more within the last five years.” The due date for proposals was November 29, 2004.

A solicitation for the timber sale contract was issued on September 17, 2004.<sup>20</sup> The timber sale contract solicitation advised offers that the office “estimates that the sale contains areas that are suitable for conventional [*i.e.*, non-helicopter] logging.”<sup>21</sup> It notified offerors that additional parcels “in the immediate vicinity” could be added to the sale.<sup>22</sup> Timber sale layout beyond the pre-sale layout provided with the solicitation to the purchaser was the responsibility of the offeror.<sup>23</sup> The timber sale contract was awarded to Silver Bay Logging, which prepared a plan of operations for submission to the Department of Natural Resources on October 1, 2004.<sup>24</sup> The plan did not include a provision for helicopter logging.

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<sup>17</sup> ASP 10-04-907. [Ex. U]

<sup>18</sup> Ex. B.

<sup>19</sup> Ex. B, at 3.

<sup>20</sup> Ex. 17.

<sup>21</sup> Ex. 17, at 2.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> Ex. 19.

D. Revision of Solicitation

In early November, 2004, while the timber sale administrator solicitation was pending, several local residents contacted the office to express their concerns about the planned sale.<sup>25</sup> Additional concerns were aired in informational meetings conducted by Silver Bay Logging and the office.<sup>26</sup> The proposed logging area, above the Zimovia Highway, was characterized by steep slopes in several locations. There were two residential subdivisions in the vicinity, with about 14 homes located along the highway directly below the planned timber sale area. In addition to the highway, a power line traversed the downslope area. Residents expressed particular concern about the potential for adverse impacts on adjacent privately owned tracts from landslides, blowdowns or other possible incidents. The Department of Environmental Conservation advised the office of its concerns regarding soil stability.

Doug Campbell is the office's senior resource manager with primary responsibility for timber management. He was the project manager for the Wrangell 8 Mile timber sale and the administrator's contract. Before the end of November, 2004, in response to the concerns expressed, in consultation with Mr. Doig and the office's executive director, Mr. Campbell decided to amend the timber sale contract to provide for more stringent slope stability and water quality protection measures, and other operational changes.<sup>27</sup> In addition, he identified two parcels for possible addition to the sale, one of 40 acres and the other of less than 2 acres.<sup>28</sup>

In the course and scope of his employment under the timber asset management plan contract, Mr. Doig traveled to Wrangell on November 30-December 4, 2004. The purpose of the trip was to look at the two potential additional parcels, document existing water systems on the property, and "to begin installing the buffer markings along the private properties adjacent to the timber sale site."<sup>29</sup> While Mr. Doig was in Wrangell, on December 1, 2004, Leann McGinnis, the office's business manager and procurement officer, sent an email to Doug Campbell and Dave Hanson, the executive director of the

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<sup>25</sup> Ex. P, Q; D. Campbell testimony; L. McGinnis testimony.

<sup>26</sup> D. Campbell testimony; L. McGinnis testimony.

<sup>27</sup> Ex. 55; D. Campbell testimony; L. McGinnis testimony.

<sup>28</sup> Ex. 70.

<sup>29</sup> Ex. 65

Trust Land Office. By that time, Ms. McGinnis was aware that substantial changes to the underlying timber sale contract were contemplated. She wrote that in her opinion, Mr. Doig's duties under the timber sale asset management contract, and his inside knowledge of the proposed changes to the timber sale contract, had created a conflict of interest and that his firm, FLMI, should be barred from participating in the timber sale administrator solicitation.<sup>30</sup> With respect to the effect of the changes in the timber sale contract on the timber sale administration solicitation, Ms. McGinnis indicated that discussions with offerors after proposals were submitted would provide an appropriate means of informing them of the changes to the underlying timber sale contract.<sup>31</sup>

Ms. McGinnis, Mr. Campbell and Mr. Hanson conferred regarding her concerns. Mr. Campbell expressed the view that Mr. Doig's duties under the timber asset management plan did not conflict with the duties of a timber sale administrator and that his planning activities had not provided him an unfair competitive advantage. He pointed out that Mr. Doig had not assisted in the preparation of the solicitation for the timber sale administrator. Mr. Campbell had estimated that the price component under the outstanding solicitation was around \$30,000, but he estimated the actual cost of administration under the revised timber sale contract would be around \$80,000, due to the need for more on-site supervision by the timber sale administrator and other increases in the amount of work.<sup>32</sup> In light of these changes, Mr. Campbell proposed canceling the prior solicitation and issuing a new request for proposals identifying the increased duties expected of the administrator, which would also render moot any inside information that Mr. Doig had obtained.<sup>33</sup> Based on the information provided by Mr. Campbell, Ms. McGinnis and Mr. Hanson concluded that Mr. Doig did not have a disqualifying conflict of interest, and that a new solicitation should be issued. On December 6, 2004, the office notified the respondents (Sanders and FLMI) that the timber sale administration solicitation had been cancelled. Proposals were returned unopened, and the respondents were advised that a new solicitation would be issued.

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<sup>30</sup> Ex. 53.

<sup>31</sup> *Id.* See 2 AAC 12.290.

<sup>32</sup> Ex. 53; D. Campbell testimony; L. McGinnis testimony.

<sup>33</sup> Ex. 53; D. Campbell testimony; L. McGinnis testimony.

In the meantime, Mr. Doig had been working with Mr. Campbell and Mr. Hanson on changes to the underlying timber sale contract.<sup>34</sup> Silver Bay Logging was provided with an amendment to the logging contract that added the two areas previously identified for inclusion in the sale and incorporated the new provisions for enhanced attention to slope stability and water quality issues. The Department of Natural Resources was notified of the addition of the parcels, but no changes were made to the operating plan.<sup>35</sup>

Following cancellation of the initial solicitation, in consultation with Mr. Campbell, Ms. McGinnis prepared a new solicitation for the timber sale administration contract.<sup>36</sup> Because of the increase in the estimated cost, the new solicitation was issued as a formal request for proposals under AS 36.30.200-.265. RFP No. 2005-100-5284 was issued on January 3, 2005, with proposals due on January 24, 2005.<sup>37</sup>

The solicitation stated, "The timber sale will be harvested using conventional logging methods."<sup>38</sup> It described the new areas added to the sale as appropriate for "uphill and downhill yarding" and "conducive to shovel logging," respectively.<sup>39</sup> The solicitation advised potential respondents that the office had "established more stringent than normal management prescriptions that include slope stability and water quality protection measures. Implementation of these requirements on the ground will require more time on the ground, and more attention to details than would be expected under the...Forest Resources Protection Act and past TLO sales."<sup>40</sup> The full set of requirements was included in the solicitation.<sup>41</sup>

The minimum qualifications included "Administration of at least three timber sales (4 to 5 MMBF minimum volume per sale) that included a component of helicopter harvest **and** the primary responsibility for log accountability, record keeping and end of sale reconciliation within the last five years." [emphasis added] The office had not

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<sup>34</sup> Ex. 55, 56.

<sup>35</sup> Ex. 56-59.

<sup>36</sup> Ex. 9, 10.

<sup>37</sup> On January 6, 2005, the office issued an interim contract for timber sale administration to Len Brady, pending completion of the solicitation for the permanent administrator. Ex. 67.

<sup>38</sup> RFP 2005-1000-5284, Sec. 1.03, at 7.

<sup>39</sup> RFP 2005-1000-5284 at 24.

<sup>40</sup> RFP 2005-1000-5284, Sec. 5.01 at 25. Similar language was also included in Sec. 4.01, at 24.

<sup>41</sup> RFP 2005-1000-5284, Attachment 4, Ex. F.

intended to require that offerors have experience in both helicopter harvest and log accountability on the same sales, and Ms. McGinnis had not intended to require helicopter experience within the last five years.<sup>42</sup>

E. Submission and Evaluation of Proposals

Three proposals were submitted, by FLMI, Robert Girt d/b/a Higher Ground Pursuit Consulting Services, and Richard Sanders d/b/a Sanders Consulting Forester [Sanders]. Mike Cooney was identified as a key employee in the Sanders proposal. The Sanders proposal included, as qualifying prior experience, the following:

1. Icy Bay: contract forester, logging engineer, logging contractor administration (Sanders), timber sale administrator (Cooney); "Helicopter logging was planned and field reviewed but not initiated due to market constraints"; "Assisted in preparing final sale reconciliation" (Cooney) [1998-2002, per resume]
2. Sealaska: contract logging engineer on 5 mmbf or greater sales, including 8 listed sales with helicopter component (Sanders & Cooney) [2004]
3. Citifor: contract forester/logging engineer for several large sales, including 6 listed sales, one of which included helicopter logging (Sanders) [1990-1998]
4. Southcentral: timber sale administrator for landowner (TLO) for large timber sales in Tyonek and North Kenai, including log accountability (Sanders) [2001-ongoing]
5. Johnson Creek: contract forester, logging engineer, logging contractor administration (Sanders); "Helicopter logging was planned and field reviewed but not initiated due to market constraints" (Sanders) [1996-1997, per resume]

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<sup>42</sup> The draft formal request for proposal included the same minimum qualification as the cancelled informal request for proposals. Marlys Hagen, the procurement officer for the Department of Natural Resources, questioned whether the office intended to require three helicopter component sales and an additional, separate requirement for three other sales with log accountability. In response to Ms. Hagen's question, the language was changed to the final form. [Email MH to LM, 12/30/04 @ 3:33 p.m.]

Ms. McGinnis's decision on the protest noted that the wording on the solicitation was more restrictive than intended, and that the office had intended to state: "Administration of at least three timber sales...that included a component of helicopter harvest. In addition, administration of at least three timber sales...within the last five years where you had primary responsibility for log accountability, record keeping, and end of sale reconciliation." [Protest Decision, 3/11/05 at 3] This language could have been read by respondents to mean that the helicopter experience and the log accountability must have occurred on different sales, and that a total of six different sales were required to qualify, but it clearly does not require helicopter experience within the last five years. Mr. Campbell testified that he did not intend to require that respondents have both helicopter and log accountability experience on the same sales, but that he did want at least one of the three sales with a helicopter component to have been within the past five years. He testified that the wording used in the revised solicitation was the result of a drafting error on his part.



Elsewhere, the proposal stated that Mr. Cooney was the timber sale administrator on four sales: Tyonek, North Kenai, Icy Cape, and Johnston Creek. Mr. Cooney's resume also states that he performed timber sale administration on University of Alaska timber sales on the Kenai Peninsula, as well as "tasks necessary to administer" four sales on Alaska Native corporation lands near Tatilek and Cordova that included helicopter harvest, in 1995-1997.

The Sanders proposal offered one site visit per month and had a total cost of \$62,133.75. The FLMI proposal offered three site visits per month and had a total cost of \$96,870.

Doug Campbell reviewed the proposals and determined that only the FLMI proposal was responsive. He wrote a memorandum to Ms. McGinnis on January 27, indicating that the Sanders proposal showed "administration on only 2 timber sales neither of which involved helicopter harvest and only one of which involved log accountability, record keeping and end of sale reconciliation,"<sup>43</sup> apparently referring to the Southcentral and Icy Cape sales.<sup>44</sup> Ms. McGinnis initially directed Mr. Campbell to refer only the responsive proposal to the proposal evaluation committee, but after reconsidering she directed him to send all three of the proposals for review.

A proposal evaluation committee was formed consisting of Doug Campbell and Greg Palmieri and Roy Josephson, two foresters in the Haines office of the Division of Forestry. On February 2, 2005, while in Anchorage on other business, Mr. Palmieri and Mr. Josephson met with Doug Campbell to pick up the proposals, which they briefly reviewed.<sup>45</sup> There was no discussion of the responsiveness issue at that time, and Mr. Palmieri and Mr. Josephson took the proposals back to their office in Haines.

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<sup>43</sup> Ex. 33.

<sup>44</sup> *Id.* The memorandum refers to the North Kenai sale as involving timber sale administration and log accountability, and mentions that Mr. Cooney "as a subcontractor to FLMI provided timber sale administration services to the TLO on the Icy Cape 50 Timber Sale."

<sup>45</sup> Ms. McGinnis had consulted with Ms. Hagen and she advised Mr. Campbell that the proposal should be evaluated, notwithstanding his concerns. Ex. 34.

A procurement office should review proposals for responsiveness prior to evaluation and should limit the evaluation to responsive proposals. AAM 81.470 ("The procurement officer should review all proposals for responsiveness before distributing them to the proposal evaluation committee. Proposals deemed nonresponsive should not be evaluated by the proposal evaluation committee.") However, a finding of non-responsiveness may be made after the evaluation when a deficiency been identified. *See*,

Mr. Campbell, deeming only the FLMI proposal responsive, did not score any of the proposals. After their return to Haines, Mr. Palmieri and Mr. Josephson independently scored all the proposals, using a scoresheet provided by Mr. Campbell, and faxed their scoresheets to Ms. McGinnis in Anchorage. On the subjective, non-price components constituting 30% of the total, the scores on the Sanders and FLMI proposals were within a few points. Because of Sanders' substantially lower price, however, the Sanders proposal was the highest ranked proposal overall by both Mr. Palmieri and Mr. Josephson.

After receiving the scoresheets showing Sanders the highest-rated offeror, Ms. McGinnis convened a telephonic meeting on February 17, 2005. Participating were Doug Campbell, Marlys Hagen, Leann McGinnis, Roy Josephson and Greg Palmieri. At that meeting, Mr. Campbell and Ms. McGinnis directed Mr. Josephson and Mr. Palmieri's attention to the minimum requirements in the solicitation and asked them to review the Sanders proposal with those requirements in mind. Mr. Josephson and Mr. Palmieri were of the view that the minimum requirements for helicopter experience were excessive. They expressed the opinion that Mr. Sanders was qualified to do the work, but they agreed with Mr. Campbell that Mr. Sanders did not meet the minimum requirements as set forth in the request for proposals. Following the meeting, Ms. McGinnis discarded the original scoresheets prepared by Mr. Josephson and Mr. Palmieri and issued a notice of intent to award the contract to FLMI and finding the Sanders proposal non-responsive.<sup>46</sup>

#### F. Protest and Appeal

On February 22, 2005, Sanders filed a protest, asserting that the request for proposal contained unduly restrictive minimum requirements (helicopter experience requirements), that the selected contractor had an undue competitive advantage or conflict of interest, and that there was an appearance of impropriety or actual impropriety. Leann McGinnis reviewed the matter, consulting with the members of the evaluation committee,

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*e.g.*, Azimi-Tabrizi v. State, Department of Administration, No. 3AN-00-3712 CI, at 10 (Superior Court, April 30, 2002).

<sup>46</sup> Discarding the evaluation sheets was inappropriate. Evaluation sheets should be included in the contract file. AAM 81.190; *see* AS 40.21.060(1); -.110. Evaluation sheets may play an important role in resolving a protest, or in providing an appropriate remedy if a protest is sustained.

Doug Campbell, Marlys Hagen, and counsel. Ms. McGinnis informed Wendy Woolf, who had replaced Dave Hanson as the Trust Land Office's acting executive director, of the facts. Ms. McGinnis advised Ms. Woolf that in her opinion the protest should be denied. Ms. Woolf obtained written responses to a number of questions concerning the conduct of the solicitation from Doug Campbell.<sup>47</sup> She also obtained another statement from Mr. Campbell concerning Sanders' qualifications.<sup>48</sup> Having reviewed the matter, Ms. Woolf concurred with Ms. McGinnis's determination, and on March 11, 2005 Ms. McGinnis issued a decision denying the protest.

Sanders filed an appeal, which was referred to the Office of Administrative Hearings. A hearing was conducted in Anchorage. Testimony was heard from Richard Sanders, Mike Cooney, Leann McGinnis, Wendy Woolf, Clare Doig, Roy Josephson, Greg Palmieri, James Eleazar, Joel Nudelman, and Doug Campbell.

### **III. Discussion**

Sanders' protest raised a variety of issues focussing on three basic claims: first, that the minimum requirements relating to helicopter experience were unduly restrictive; second, that FLMI has an undue competitive advantage or conflict of interest as a result of its work under the Timber Assets Management Plan contract, and third, that project manager Doug Campbell had acted in bad faith. Sanders' prehearing and posthearing memoranda substantially repeat these basic claims, although the evidence cited in support of the claims is more detailed, varied and specific than alleged in the initial protest. The office's prehearing and posthearing memoranda rejects these claims and assert that the Sanders proposal was non-responsive independent of the helicopter experience requirement.

#### **A. Timeliness**

The protest and appeal assert that the helicopter experience requirement in the solicitation was unduly restrictive, and that it was included in the request for proposals in bad faith.

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<sup>47</sup> Ex. 15; Email, W. Woolf to D. Campbell, 3/1/2005 @ 6:51 p.m.).

<sup>48</sup> Ex. 25.

AS 36.30.565(a) states: "A protest based on alleged improprieties or ambiguities in a solicitation must be filed at least 10 days before the due date of the bid or proposal.... A protest based upon alleged improprieties in an award of a contract or a proposed award of a contract must be filed within 10 days after a notice of intent to award the contract is issued...". The protest asserting that the helicopter experience requirement was unduly restrictive was untimely, because it is based on the contents of the solicitation; the allegation of bad faith was timely, because it is based on conduct relating to the award of the contract.

An untimely protest may be accepted for good cause.<sup>49</sup> Good cause to accept an untimely protest includes both sufficient reason for the delay and other circumstances that warrant consideration of the merits.<sup>50</sup> In deciding whether to accepting an untimely protest, important factors to be considered include: (1) the timing of the protest;<sup>51</sup> (2) the nature of the objections raised;<sup>52</sup> and (3) the strength of the evidence presented.<sup>53</sup>

(1) Timing of Protest.

In this case, at the time protests concerning the contents of the solicitation were due, Mr. Sanders had knowledge of the contents of the request for proposals and of the minimum requirements, but he believed that his experience was sufficient. Because he recognized that a strict application of the requirements could disqualify him, however, he could have, and should have, raised this issue prior to the due date. This factor weighs against consideration of the claim of unduly restrictive specifications.

(2) Nature of the Objections.

To the extent that Sanders asserts that an unduly restrictive minimum requirement was included in the request for proposals in bad faith, this factor weighs in favor of

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<sup>49</sup> AS 36.30.565(b).

<sup>50</sup> See generally Appeal of Scientific Fishery Systems, Inc., No. 98-08, at 2-7 (Department of Administration, July 26, 1999).

<sup>51</sup> See, e.g., Appeals of Bachner Company, Inc. and Bowers Investment Co., Nos. 02.06/07, at 12 (Department of Administration, October 16, 2002).

<sup>52</sup> See Appeals of Bachner Company, Inc. and Bowers Investment Co., Nos. 02.06/07, at 12 (Department of Administration, October 16, 2002); Appeal of Spectrum Printing, Inc., No. 98.14, at 8 note 9 (Department of Administration, April 29, 1999).

<sup>53</sup> See Appeal of Electronic Data Systems, Inc., No. 02.23, at 7 (Department of Administration, December 30, 2002).

considering the propriety of the helicopter experience requirement as evidence of bad faith.

(3) Strength of the Evidence.

Sanders alleged that the project manager had told him that the minimum requirements were set high in order to preclude a particular potential respondent. Because the allegation of bad faith was based on the protestor's personal knowledge, the allegation was sufficiently established to warrant accepting the protest.

In addition to these factors, which concern the protestor's ability to obtain relief, the commissioner's statutory responsibility for statewide procurement oversight, in the context of procurement authority delegated to purchasing agencies, gives the commissioner discretion to review issues that were not timely asserted in a protest, but that were considered by the procurement officer.<sup>54</sup> In this case, the procurement officer's decision addresses the need for the helicopter experience requirement, and one of the grounds asserted in defense of the allegedly unduly restrictive requirement is that the 60% minimum cost component of the proposal in the evaluation warranted "raising the bar" for the minimum requirements. This is a significant issue for purposes of administration of the procurement process statewide.<sup>55</sup>

In light of all the circumstances, there is good cause to accept the protest claim that the helicopter experience requirement was unduly restrictive, particularly as it pertains to the issue of bad faith and to overall procurement practice and procedures.

B. The Helicopter Experience Requirement was Unduly Restrictive.

Specifications must "encourage competition in meeting the state's needs, and may not be unduly restrictive."<sup>56</sup>

Specifications are unduly restrictive when they are not reasonably necessary to satisfy the agency's actual needs. When a protestor asserts that specifications are unduly restrictive, the initial burden is on the agency to make a *prima facie* case that the specifications were reasonably

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<sup>54</sup> See Appeal of Waste Management of Alaska, Inc., No. 01.08 at 11-13 (Department of Administration, April 25, 2002).

<sup>55</sup> The commissioner has discretion to consider an untimely protest that raises a significant issue of procurement law or policy. See, e.g., Matter of DynCorp, 70 Comp. Gen. 38 (1990 WL 293790).

<sup>56</sup> AS 36.30.060(c); AAM 81.470(1).

necessary. If the agency meets that burden, the protestor must show that the agency was clearly mistaken.<sup>57]</sup>

The minimum requirement for helicopter experience as set out in the request for proposals was three prior sales within the last five years including a helicopter component that also involved log accountability. The protest decision states that the helicopter sales did not need to be (but could be) the same as the log accountability sales. Because the decision found Mr. Sanders disqualified under the more lenient requirement for three prior sales within the past five years involving a helicopter component (with or without log accountability), whether the more lenient requirement described in the protest decision was unduly restrictive should also be considered.<sup>58</sup>

Minimum requirements should reflect the agency's actual needs, not all possible needs.<sup>59</sup> In most cases, it would be unreasonable to require, as a condition of eligibility for award of a contract, experience that is not reasonably anticipated to be needed during the course of the contract. Rather, extra points should be awarded in the evaluation for related experience that is not anticipated to be needed, but that may be of value. In this particular case, the request for proposals specified that the sale contemplated only conventional logging and the logger's operational plan did not include any helicopter logging.<sup>60</sup> While there was one adjacent tract, not in the sale area, that if added to the sale would "most likely" have been logged by helicopter, the office had no intent to include it in the sale and other log suspension techniques might have been used. This was a one-year sale, in which the price of timber (a central factor in determining whether helicopter logging is cost-effective) was relatively unlikely to change significantly during the sale

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<sup>57</sup> Appeal of Scientific Fishery Systems, Inc., No. 98.09 at 7 (Department of Administration, July 26, 1999).

<sup>58</sup> Doug Campbell testified that his intent had been to require only one sale involving helicopter experience within the last five years, not three sales as stated in both the request for proposals and in the protest decision. It is the protest decision, however, not the unstated intent of the project manager, that is at issue in this protest appeal. Accordingly, it is not necessary to consider whether the Sanders proposal was qualified under the less stringent requirement described at the hearing by Mr. Campbell.

<sup>59</sup> See AAM 81.150 (Specifications "should list all the essential characteristics that are necessary for the...service to meet your mission-related needs." [emphasis added]).

<sup>60</sup> 11 AAC 95.220(a)(6) mandates that an operational plan must include harvest techniques.

term. The office had no expectation that helicopter logging would occur. The possibility of helicopter logging was entirely speculative.<sup>61</sup>

Mr. Campbell testified that recent experience was desirable because the economics of helicopter logging had changed, but that one prior sale with helicopter experience within the last five years would have minimally sufficed. However, several witnesses, each of them experienced foresters in Southeast Alaska and including both the evaluators, testified that Mr. Sanders was well qualified to perform the work required under the request for proposals. Indeed, the office itself had found Mr. Sanders qualified to administer the Katlian Bay sale, which was planned as a 100% helicopter logging operation, and there is no evidence that his knowledge of the applicable economic considerations was deficient.<sup>62</sup> Furthermore, in determining whether specifications are unduly restrictive it is appropriate to consider whether there was adequate competition notwithstanding the allegedly restrictive specification, and in this case the pool of timber sale administrators with helicopter experience in addition to the other minimum requirements was limited and there was only one responsive proposal submitted.<sup>63</sup>

The office emphasized its trust obligations, suggesting that its fiduciary responsibilities warrant more stringent minimum requirements than would be appropriate for other purchasing agencies. The office suggests that it was appropriate, in that light, to structure the minimum requirements in a fashion that would make only the "most qualified" potential contractors eligible. This rationale is inconsistent with the

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<sup>61</sup> No documentary evidence dating from prior to the issuance of the request for proposals was submitted to indicate why helicopter experience was made a minimum requirement. The only explanations in the record for including that requirement were prepared after the fact, when it was challenged by the evaluators and later by Mr. Sanders. After the fact explanations are less persuasive than documentation in the record. *See, e.g., Neeser Construction Inc.*, No. B-285903 (GAO, October 25, 2002).

<sup>62</sup> The office's concern was that the administrator should have sufficient knowledge of the economics of helicopter logging to make informed judgments about the viability of such operations, in order to ensure that such operations, if approved, would be profitable on the layout proposed. The primary economic factors mentioned in testimony were species value and mechanical factors (*e.g.*, turnaround time, load factors). Any experienced forester would be aware of species values, and all of the testimony (including Mr. Campbell's) was to the effect that the mechanical aspects of helicopter logging have not changed. In light of the testimony, it is not clear that even the lesser requirement of one recent helicopter sale (that Mr. Campbell testified he had intended) was necessary.

<sup>63</sup> The testimony at the hearing suggests that there may be several foresters in Alaska who would meet the minimum requirements of the request for proposals. However, Mr. Doig is the only one of them who has ever responded to a Trust Land Office request for proposals for timber service administration, so far as the record shows.

Procurement Code's general purposes.<sup>64</sup> If the office's fiduciary obligations make it inappropriate to purchase certain services primarily on the basis of price, the office should seek a statutory exemption from the Procurement Code, or on a case-by-case basis request permission to lower the price component applicable to a solicitation or to conduct a limited competition procurement. But in the absence of any special statutory exemption, and having failed to request an exception for this particular solicitation, the office is bound to establish minimum requirements using the same statutory standards that apply to all other agencies.

In this case recent helicopter experience may have been desirable, but the office did not establish that it was "reasonably necessary to meet the agency's actual needs." The minimum requirement of three prior sales with a helicopter component within the last five years referenced in the protest decision was clearly mistaken, and was unduly restrictive.

C. Sanders Did Not Establish Bad Faith

In the absence of a showing of actual bias or prejudice, procurement officials are presumed to act in good faith and to exercise honest and impartial judgment.<sup>65</sup> To overcome the presumption, a protestor must provide direct evidence of actual bias or prejudice, rather than speculation and inference,<sup>66</sup> or of a sufficient appearance of impropriety to warrant intervention.

In this case, there is no direct evidence of bad faith. In the protest, Mr. Cooney alleged that Mr. Campbell told him that "he had to 'set the bar' high enough to exclude Bob Girt," but Mr. Campbell, under oath, denied making that statement and Mr. Cooney did not testify that such a statement was made to him. In the absence of direct evidence to the contrary, Mr. Campbell is presumed to have acted in good faith.

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<sup>64</sup> "The [Procurement Code] shall be construed and applied to promote its underlying purposes and policies. The underlying purposes and policies of [the Procurement Code] are to: ... (5) ... maximize to the fullest extent practicable the purchasing value of state funds; (6) foster effective broad-based competition..." Sec. 1, ch. 106 SLA 1986.

<sup>65</sup> Bruner v. Petersen, 944 P.2d 43, 49 (Alaska 1997); Earth Resources v. State, Department of Revenue, 665 P. 2d 960, 962 n. 1 (Alaska 1983).

<sup>66</sup> Navistar International Transportation Corp. v. United States Environmental Protection Agency, 941 F.2d 1339, 1360 (6<sup>th</sup> Cir. 1989).



In the absence of direct evidence of actual bias, a sufficient appearance of impropriety may warrant discretionary remedial relief. In determining whether there is sufficient evidence to warrant relief:

...the purchasing agency should consider the degree to which there is an appearance of impropriety in relation to [these] factors: (1) subjective bad faith by the procurement officials; (2) the basis for the administrative decision; (3) the degree of discretion involved; and (4) applicable statutes and regulations. In addition, the agency should consider the degree to which the outcome of the solicitation could have been affected.<sup>67</sup>

In this case the evidence and the testimony indicate that to the extent that the minimum requirements were set too high, it was not because of bias or favoritism. Rather, it was because with 60% of the evaluation being based on price, the office was not confident that it would obtain the "most qualified" person to do the job. The reason the bar was raised was to ensure that only the "most qualified" persons would meet the minimum requirements. If the bar was too high, it was because the office failed to follow appropriate procurement practice, not because of bad faith.

Apart from the allegation that the minimum requirements were set too high, Sanders' claim of bad faith is based on a circumstantial evidence of varying degrees of persuasiveness and relevance.<sup>68</sup> To the extent Sanders alleges that the office favored FLMI, the evidence establishes that FLMI had a longstanding contractual relationship with the office, and that the office considered FLMI's performance highly satisfactory. But Sanders had successfully competed with FLMI for another contract, and his central allegation concerning bad faith is that the minimum requirements were unduly restrictive, which is an independent ground for relief without regard to bad faith.

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<sup>67</sup> Appeal of J & S Services, Inc., No. 02.01 at 9 (Department of Administration, September 17, 2002). See also Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974); see generally Paul Wholesale v. State, Department of Transportation, 994 P.2d 1000-1004 (Alaska 1995); Dick Fisher Development v. Department of Transportation, 838 P.2d 263, 267 (Alaska 1992); KILA, Inc. v. State, Department of Administration, 876 P.2d 1102, 1105 (Alaska 1994); McBirney & Associates v. State, 732 P.2d 1132, 1137-38 (Alaska 1998).

<sup>68</sup> Sanders' various speculations are set forth in his Post Hearing memorandum. Among other things, Sanders points to Ms. McGinnis's initial determination that FLMI had a disqualifying conflict of interest, and asserts that the project manager in bad faith dissuaded her from maintaining that position. Sanders argues that the minimum requirements were tailored to meet FLMI's prior experience with the office. Sanders points out that the project manager, despite his personal knowledge of Sanders' experience on the Kenai and Seldovia/Tyonek sales, declined to acknowledge that experience in his formal memorandum of

In this case: (1) there is no direct, admissible evidence of subjective bad faith;<sup>69</sup> (2) the office provided a reasonable explanation for most of the various actions complained of; (3) the decisions involved were discretionary in nature; and (4) minimum requirements are addressed by the Procurement Code. All of these factors augur against finding an appearance of impropriety of sufficient strength to warrant canceling the underlying contract, notwithstanding that the alleged violations impacted the outcome of the solicitation.

D. FLMI Did Not Have a Conflict of Interest

In this case, Sanders alleges that FLMI has a professional conflict of interest as a result of its obligations under the timber asset management contract.<sup>70</sup> The office, as it should have, recognized the potential for a conflict of interest,<sup>71</sup> but concluded that no actual or disqualifying potential conflict of interest existed.

Cases of professional conflict of interest tend to arise out of existing or prior contracts with the purchasing agency and fall into three broad categories: (1) where the potential contractor has the opportunity to skew the solicitation in its own favor; (2) where the potential contractor has access to inside information; and (3) where the potential contractor would be in the position of evaluating its own performance.<sup>72</sup>

(1) The evidence and testimony are undisputed that the office's procurement officials drafted the request for proposals independently of FLMI. While FLMI provided information to the office that was used by the office in the preparation of the request for

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March 10, 2005. He argues that the project manager did not set a minimum number of field visits, because he knew that Girt would be able to provide any given number of visits at a lower cost than FLMI.

<sup>69</sup> An appearance of impropriety does not exist when the appearance is supported only by suspicion and innuendo, rather than "hard facts." See, Universal Automation Labs, Inc. v. Department of Transportation, 1992 WL 302872 at p. 20 (G.S.C.B.A., July 7, 1993).

<sup>70</sup> A professional conflict of interest may arise where: (1) a potential contractor is engaged in activities, or is a party to contractual or other relationships with third parties, that may render it unable to render impartial assistance or advice to the purchasing agency; (2) a potential contractor's objectivity in performing services under the contract may be otherwise impaired; or (3) a potential contractor has an unfair competitive advantage. FAR §2.101. See, e.g., Appeals of Make It Alaskan, Inc. and Alaska Creations, Nos. 01.09/01.10, at 10 (Department of Administration, August 12, 2002)

<sup>71</sup> Cf. FAR §9.504 *et seq.* (establishing requirement for federal agencies to identify and address potential conflicts of interest in advance of the solicitation and to take appropriate steps to mitigate or eliminate improper conflicts).

<sup>72</sup> Mechanical Equipment Co., Inc., at 25, No. B-292789.2 (GAO, December 15, 2003), citing Snell Enterprises, Inc., No. B-290113, B-290113.2 (GAO, June 10, 2002). See 2 AAC 12.020.

proposals, that is generally not the type of involvement in the preparation of a request for proposals that is objectionable. In particular, there is no evidence that FLMI played any role in respect to the matters that Sanders primarily complains of: establishing the minimum requirements.

(2) While the initial solicitation was pending, Mr. Doig obtained inside information regarding the office's intent to require a higher degree of on-site supervision than it had previously indicated was necessary. If the office had proceeded under the initial request for proposals, that inside information would have disqualified Mr. Doig from participating. But the changes that were contemplated were clearly material and substantial with respect to the timber sale administrator's duties: the office could not have left the request for proposals unchanged, because its actual needs had so substantially changed that the initial request for proposals was no longer an adequate representation of its needs. Under the circumstances, cancellation and resolicitation was appropriate.<sup>73</sup> Once the solicitation was reissued, the "insider" knowledge became public. As a result, FLMI was not precluded from bidding on the second request for proposals.

(3) Sanders asserts that because FLMI had laid out the buffer boundaries and provided other timber sale layout services under the timber asset management plan, it should have been precluded from participation in the timber sale administration contract.

If FLMI had laid out the timber sale under a contract with the logging contractor, it would have had a conflict of interest. But to the extent FLMI laid out the sale and marked buffers, it did so under contract to the office, not on behalf of the logging contractor. There is no inherent conflict of interest in asking a party who drafted a sale layout on behalf of the office to subsequently enforce a contract incorporating that layout, also on behalf of the office.

When a contract (such as the FLMI timber asset management plan contract) or a solicitation provides for disqualification on the ground of a conflict, the purchasing agency has discretion to preclude participation in the solicitation when there is a material and significant actual or potential conflict of interest.<sup>74</sup> In this case, to show a conflict of

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<sup>73</sup> 2 AAC 12.850(3).

<sup>74</sup> Appeals of Make It Alaskan, Inc. and Alaska Creations, Nos. 01.09/01.10, at 10 (Department of Administration, August 12, 2002).

interest sufficient to warrant precluding FLMI from participation in the solicitation, Sanders must establish that FLMI's contractual duties under the timber asset management plan contract created a material and substantial actual or potential conflict of interest with the duties under the timber sale administrator's contract. Such a conflict would exist if work performed under the timber asset management plan would reasonably be viewed as inconsistent with the obligation to provide impartial and detached professional advice as the timber sale administrator.

In this case, the timber sale administrator's contract calls for "review" of the timber sale layout. But the timber sale contract places responsibility for the timber sale layout on the purchaser. Accordingly, the timber sale administrator's contract calls for review of a layout for which the logging contractor, not the timber asset manager, has responsibility. The logging contractor could have adopted Mr. Doig's layout without any changes, but under the express terms of the logging contract, the responsibility for that layout once operations began was with the logging contractor. As the contracts are structured, it was the logging contractor's layout, not Mr. Doig's, that the administrator was to review.

More fundamentally, it was up to the office to decide for itself whether it needed an independent review of the work performed under the timber asset management plan, or whether it was content to have Mr. Doig review his own prior work. Because the contracting agency is in the best position to assess the degree to which independent analysis is desirable, the existence of a potential conflict of this nature is reviewed deferentially, and the agency's discretionary determination should not be disturbed unless it is unreasonable.<sup>75</sup> In this case, the office had discretion to preclude Mr. Doig from participating in the timber sale administrator's solicitation (particularly in light of the specific provision in the timber sale management plan contract noting that the contractor might be barred from other work) in order to obtain an independent review of the pre-sale layout, but the office was not required to prohibit Mr. Doig from participating in order to protect the integrity of the solicitation. The purpose of the conflict of interest restrictions on participation in solicitations is to protect the integrity of the procurement process, not

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<sup>75</sup> See Snell Enterprises, Inc., No. B-290113 (GAO, June 10, 2002).

to limit an agency's discretion to define the scope of work. The office's determination that there was not a significant<sup>76</sup> and material conflict of interest was not unreasonable.

E. FLMI Did Not Have an Unfair Competitive Advantage

Sanders argues that FLMI's prior existing contracts give it an unfair competitive advantage, in that it has other timber administration contracts in the area that enable it to reduce its overall costs, and it had performed a portion of the work (*i.e.* timber sale layout, community outreach) under the timber asset management contract.

In general, work performed as an incumbent contractor, or under other contracts, that provides prior relevant experience, economies of scale, or other similar advantages (assuming no disqualifying conflict of interest or inside information exists) is not objectionable.<sup>77</sup> In such cases, the contractor may have a competitive advantage, but it is not the result of any action by the purchasing agency and it is not an unfair or unreasonable competitive advantage.

In this particular case, Sanders argues that FLMI's work on the timber asset management plan contract gave it an unfair competitive advantage because it had already performed tasks that it would otherwise have been required to do in order to complete its duties under the timber sale administrator's contract. But this advantage, to the extent it existed, was an economic advantage: it reduced the amount of work that FLMI would have to do under the administrator's contract, and would therefore reduce the price component of the FLMI proposal. Thus, even if this was an unfair competitive advantage, it did not affect the outcome of the solicitation: Sanders' proposal was the highest-rated proposal. Whatever cost savings accrued to FLMI on the timber sale administrator's contract as a result of the timber asset management contract, they were not enough. Sanders lost the contract because of the minimum requirements, not because of any alleged advantages accruing to FLMI as a result of its work under the timber asset management contract.

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<sup>76</sup> Review of the layout constituted less than 10% of the value of the Sanders proposal.

<sup>77</sup> See, *e.g.*, Government Business Services Group, No. B-278052.3 (GAO, March 27, 2001).

F. Remedy

When a solicitation contains unduly restrictive specifications and the contract has already been awarded, if the contract is not cancelled the protestor's damages are limited to the costs of proposal preparation. However, the available remedies in a protest appeal are not limited to relief for the protestor. Various purely administrative remedies are also available, in the commissioner's discretion, including referral to the Attorney General for investigation under the Ethics Act, or to departmental personnel for disciplinary proceedings.<sup>78</sup>

In implementing an administrative remedy for a statutory protest, all of the circumstances must be considered, including:<sup>79</sup>

- (1) the seriousness of the procurement deficiencies;
- (2) the degree of prejudice to other interested parties or to the integrity of the procurement system;
- (3) the good faith of the parties;
- (4) the extent to which the procurement has been accomplished;
- (5) costs to the agency and other impacts on the agency of a proposed remedy; and
- (6) the urgency of the procurement to the welfare of the state.

In this case, Sanders failed to object to the minimum requirements in a timely manner. In addition, he failed to object at any time to the requirements for log accountability and reconciliation, under which he was separately disqualified, until that issue was raised by the office as an affirmative defense. Under these circumstances, an award of proposal preparation costs is not warranted, even though the minimum requirements for helicopter experience have been found unduly restrictive.<sup>80</sup>

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<sup>78</sup> See Appeal of J & S Services, Inc., No. 02.01 at 7-8 (Department of Administration, September 17, 2002).

<sup>79</sup> AS 36.30.685(b); see e.g. Appeal of Waste Management of Alaska, Inc., No. 01.08 at 17-20 (Department of Administration, April 25, 2002).

<sup>80</sup> Sanders, a certified log scaler, had been awarded contracts for administration of two prior timber sales involving log accountability and end of sale reconciliation, the Tyonek/Seldovia sale and the Kenai sale. In both sales, the office had found Sanders well qualified. In evaluating the proposals submitted by Mr. Sanders and Mr. Doig to administer the Southcentral sales, which included the same log accountability requirements as the Wrangell 8 Mile sale, Mr. Campbell observed, "[Sanders'] experience and professional qualifications are impressive and are equal to [Mr. Doig's]." Ex. U, ASP 2001-1000-2454, Evaluation Memorandum, D. Campbell to L. McGinnis, 5/21/2001.

Because Sanders did not challenge the log accountability requirement in his protest, whether the minimum requirement of three sales within the past five years was unduly restrictive need not be determined.

Furthermore, Sanders did not establish bad faith, and the underlying contract has been substantially completed. For these reasons, neither cancellation of the contract nor referral of the matter for disciplinary proceedings is appropriate.

**IV. Conclusion.**

The protest appeal should be denied.

DATED December 20, 2005.

Andrew M. Hemenway  
Administrative Law Judge

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS  
ON REFERRAL BY THE COMMISSIONER OF  
THE DEPARTMENT OF ADMINISTRATION

In the Matter of: )  
 )  
v. )  
 )  
RICHARD C. SANDERS, )  
 )  
Appellant. )  
\_\_\_\_\_ )

OAH No. 05-0240-PRO  
DNR RFP No. 2005-1000-5284

ADOPTION

The undersigned, on behalf of the Commissioner of Administration and in accordance adopts the Proposed Decision as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance within 30 days after the date of this decision.

DATED: December 22, 2005

By: \_\_\_\_\_  
Mike Tibbles  
Deputy Commissioner

The undersigned certifies that  
this date an exact copy of the  
foregoing was provided to the  
following individuals:

Landers  
Stewart  
MAC Fernandez

Signature

Date 12.27.05