

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

PAYROLL CITY	)	
	)	
v.	)	
	)	
DEPARTMENT OF ENVIRONMENTAL	)	
CONSERVATION	)	OAH No. 05-0583- PRO
_____	)	DEC RFP No. 2006-1800-5506

**PROPOSED DECISION**

**I. Introduction**

This is a protest appeal. It concerns Request for Proposals No. 2006-1800-5506, issued by the Department of Environmental Conservation, Division of Water, for force account labor payroll services.

The request for proposals was issued on May 19, 2005. On July 6, 2005 the department issued a notice of intent to award the contract. Payroll City filed a protest on July 15, 2005. The department denied the protest and awarded the contract. Payroll City filed an appeal, which the commissioner referred to the Office of Administrative Hearings.

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

**II. Facts**

The Department of Environmental Conservation receives grants from the Department of Agriculture and uses the grants to fund a variety of village water and sanitation construction projects. Prior to 2005, the department had issued a contract for the provision of project accounting services to recipients of grant funding, including invoice paying, payroll, and data reporting.

On February 11, 2005, the department issued Request for Proposals 2005-1800-5234 for payroll services for force account labor only. The request solicited a contractor

to “perform all payroll services for force account workers in villages and communities who have been awarded capital funds for water and sanitation projects.” The request for proposals did not define “force account labor.” Experience performing “similar work” was identified as a factor for evaluation, including experience with force account labor payroll.<sup>1</sup>

Five responsive proposals were submitted, including one from Payroll City. Of the five proposals, Payroll City was the highest-priced and was the second-lowest ranked on the non-price components (understanding, methodology, and experience of firm, account manager, and key personnel). Overall, Payroll City was the lowest ranked of the five proposals.

Before issuing a notice of intent to award the contract, the department determined that the terms of the solicitation had not been in the state’s best interests, and that the solicitation should be cancelled. The department issued a new solicitation, Request for Proposals No. 2006-1800-5506, on May 19, 2005. The new solicitation included a specific minimum requirement for experience in force account labor payroll services.<sup>2</sup> The scope of work states, “Force account construction laborers are the employees of a village (community).”<sup>3</sup> Offerors were required to submit information regarding “ALL force account labor clients within the last 5 years.”<sup>4</sup> Performance of force account labor payroll services was central to the experience and past performance factor (35%) in the evaluation.<sup>5</sup>

Following a pre-proposal conference, the department issued a notice advising potential offerors that “force account construction” is “construction done by an establishment engaged in a business other than construction, for its own account and use, and by its own employees.” The notice quoted from Alaska Administrative Order No. 199, which states that force account labor “occurs when the grantee employs its own

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<sup>1</sup> ¶7.03(d).

<sup>2</sup> ¶2.08(b): “The firm must have done payroll for force account labor for at least 2 years within the past 5 years. At least 2 members of the project team listed in the proposal for this RFP must have been on the force account labor payroll team during the two years experience listed to satisfy this requirement.”

<sup>3</sup> ¶5.01.

<sup>4</sup> ¶6.05(b)(2).

<sup>5</sup> ¶7.01.

workers to perform publicly-financed construction instead of contracting with a private contractor.” The department added: “In practical terms, the distinguishing characteristic between force account payroll and regular payroll is the ‘clueless’ factor of the employer – the employer is not in the construction business and is not aware of stipulations specific to construction payroll.”

Payroll City submitted a proposal. The proposal certified that Payroll City “has provided payroll services according to the ‘force account labor’ requirement as specified in the RFP and the supplemental definition as outlined in the Pre-Proposal conference Q & A’s.” The proposal listed 19 entities for whom Payroll City asserted it had provided force account payroll services over the past five years.<sup>6</sup> However, Payroll City’s description of the services provided did not specifically identify any payroll services involving work performed by employees outside of the normal course of business for their employer, or any work involving construction.<sup>7</sup>

The department asked Payroll City to identify which of its references involved force account labor. Payroll City responded that it “hasn’t provided force account payroll services under the exact circumstances and in the manner that this contract mentions.” However, Payroll City noted that it has provided payroll services to entities that are “clueless” with respect to payroll services, and it argued that providing payroll services to an entity that is “clueless” regarding payroll generally is equivalent to providing force account payroll services to an entity that is “clueless” regarding construction force account payroll services in particular. Payroll City objected that the requirement of force account payroll experience was unreasonable.

The department found that the Payroll City proposal was non-responsive, because the proposal did not demonstrate that the offeror met the minimum requirement of the solicitation with respect to prior experience in force account payroll services.

### **III. Discussion**

Payroll City does not meet the minimum requirement for the solicitation as stated in the request for proposals and more specifically addressed in the pre-proposal conference. Payroll City failed to object to the minimum requirement prior to the due

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<sup>6</sup> Payroll City proposal, at 7-8.

date for submitting proposals, but it argues that its protest regarding the minimum requirement should not be dismissed as untimely. To the extent it is not rejected as untimely, Payroll City's protest raises three issues: (1) Is the minimum experience requirement contrary to federal law?<sup>8</sup> (2) Does the minimum experience requirement unduly restrict competition?<sup>9</sup> (3) Does the minimum cost component of the solicitation unduly restrict competition?

A. Timeliness

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...". This requirement is an important one:

Timely protests concerning specifications provide a procurement officer with the opportunity to correct an erroneous or defective RFP before the submission of proposals. Excusing untimeliness could enable an unsuccessful proposer to obtain a second opportunity in the selection process and may substantially disrupt the procurement process. For these reasons, the requirement of timely filing of protests based on defective solicitations is an important one: it avoids unnecessary expense, disruption and delay in the procurement of goods and services.<sup>[10]</sup>

An untimely protest may be accepted for good cause.<sup>11</sup> In this case, the protest decision indicates that the purchasing agency did not consider whether there was good cause to accept the untimely protest. (The decision states that the agency had "no choice but to disallow the issues you raise about the content of the RFP" because they were untimely). When the purchasing agency does not address whether there is good cause to accept an untimely protest, the commissioner will exercise independent judgement regarding acceptance of the untimely protest.<sup>12</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> Payroll City's protest ("Part 1") references FAR 9-104-1(c) and 9-104-3(d).

<sup>9</sup> Payroll City's protest ("Part 3") asserts that the requirement for force account labor experience "worked to prohibit fair and equitable competition." Minimum requirements must not unduly restrict competition, and the substance of Payroll City's objection is that this particular requirement was unduly restrictive.

<sup>10</sup> In re Scientific Fishery Systems, Inc., No. 98.08 at 3 (Department of Administration, July 22, 1999).

<sup>11</sup> AS 36.30.565(b). *See generally* In re Electronic Data Systems, Inc., No. 02.23 at 6-11 (Department of Administration, December 27, 2003).

<sup>12</sup> In re Electronic Data Systems, Inc., No. 02.23 at 7 (Department of Administration, December 27, 2003).

Good cause to accept an untimely protest includes both sufficient reason for the delay and other circumstances that warrant consideration of the merits.<sup>13</sup> In deciding whether to accepting an untimely protest, important factors to be considered include: (1) the timing of the protest;<sup>14</sup> (2) the nature of the objections raised;<sup>15</sup> and (3) the strength of the evidence presented.<sup>16</sup>

B. Federal Requirements

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>17</sup> In this case, determining the applicability of federal law to a procurement conducted with federal grant funding is an important issue with broad implications for the state procurement process, and the purchasing agency elected to address that issue in its decision on the protest and on appeal. Under these circumstances, there is good cause to consider the issue on appeal.

Payroll City argues that the minimum experience requirement is contrary to a provision in the Federal Acquisition Regulation, 48 C.F.R. §§1.000-53.301. Payroll City relies on 48 C.F.R. §9.104-1(c), which states: "A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2." (§9.104-2 allows a contracting agency to develop special standards of responsibility, which "may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance.") Payroll City also relies upon 7

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<sup>13</sup> See generally Appeal of Scientific Fishery Systems, Inc., No. 98-08, at 2-7 (Department of Administration, July 26, 1999).

<sup>14</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), *reversed on other grounds*, Bachner Company, Inc. v. State of Alaska, Department of Administration (Superior Court, No. 4FA-02-02674 CI, December 2, 2005), hereinafter cited as Bachner.

<sup>15</sup> See Bachner at 12; Appeal of Spectrum Printing, Inc., No. 98.14, at 8 note 9 (Department of Administration, April 29, 1999).

<sup>16</sup> See Appeal of Electronic Data Systems, Inc., No. 02.23, at 7 (Department of Administration, December 30, 2002).

<sup>17</sup> See Appeal of Waste Management of Alaska, Inc., No. 01.08 at 11-13 (Department of Administration, April 25, 2002). 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).

C.F.R. §3016.36, the Department of Agriculture's regulation governing the administration of the grants involved in this case. In substance, Payroll City's argument is that the Department of Environmental Conservation cannot find Payroll City non-responsive on grounds that, under the Federal Acquisition Regulation, the department could not have found Payroll City non-responsive.

The centerpiece of Payroll City's argument is 48 C.F.R. §9.104-1(c), which prohibits a finding of non-responsibility on the ground of "a lack of relevant performance history", which Payroll City argues is equivalent to a finding of non-responsiveness on the ground of "insufficient experience." But the Federal Acquisition Regulation, including 48 C.F.R. §9.104-1(c), does not apply to this procurement. The Federal Acquisition Regulation governs contracts awarded by the federal government, and the contract at issue in this case was awarded by the State of Alaska. Furthermore, even if the contract in this case had been between the federal government and the State of Alaska, the particular provision relied on by Payroll City would not apply to it. 48 C.F.R. §9.102(b) provides that "subpart [9.1] does not apply to proposed contracts with...State...governments."

Rather than being governed by the Federal Acquisition Regulation, the contract in this case is governed by 7 C.F.R. §3016.36, which establishes the procurement procedures applicable to contracts awarded by a state agency with grant funds provided by the Department of Agriculture. 7 C.F.R. §3016.36(a) provides:

When procuring...services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. ... Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

This section mandates the application of state procurement rules to all services acquired by the Department of Environmental Conservation using grant funding provided by the Department of Agriculture. Only "other grantees and subgrantees" must follow the detailed procurement procedures set out in subsections (b) through (i). Under 7 C.F.R. §3016.36(a), the Department of Environmental Conservation was required to follow standard state procurement procedures, which it did. The Federal Acquisition Regulation, relied on by Payroll City, does not apply.

C. Minimum Experience Requirement

Under Alaska law, the minimum requirements in a solicitation may not be unduly restrictive<sup>18</sup> and must be reasonably necessary to satisfy the purchasing agency's actual needs.<sup>19</sup> Payroll City asserts that it has provided payroll services to business entities that have no knowledge of how to perform payroll services themselves, and that this type of experience is equivalent to the experience required by the request for proposals. Payroll City argues its clients are just as "clueless" about payroll as the entities that it would be dealing with under this contract. Payroll City objects that it was unreasonable for the department to require identical experience, rather than similar experience. Payroll City's protest raised the issue of whether the minimum experience requirement was unduly restrictive.

Payroll City's protest on that issue was untimely, because it raises a question concerning the propriety of a term in the solicitation.<sup>20</sup> When an alleged defect in a solicitation cannot reasonably be identified prior to the due date for proposals, there may be good cause to accept an untimely protest.<sup>21</sup> In this case, Payroll City asserts that it did not know that its proposal would not be deemed responsive to the second solicitation, because it was responsive to the first solicitation and both solicitations called for exactly the same work to be done.

Payroll City's assertion ignores that fact that a purchasing agency must abide by the material minimum requirements set forth in the request for proposals. The purchasing agency cannot accept a proposal that does not meet the material minimum requirements as stated in the request for proposals. Whether Payroll City was responsive to the first solicitation is entirely irrelevant to the question of its responsiveness to the second solicitation, because the two solicitations had different minimum requirements.

Payroll City does not claim that the minimum requirement in the second solicitation was ambiguous or obscure: Payroll City could not reasonably have failed to take notice of that requirement. Given the wording of the second solicitation, Payroll

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<sup>18</sup> AS 36.30.060(c); AAM 81.470(1).

<sup>19</sup> Appeal of Scientific Fishery Systems, Inc., No. 98.07 at 7 (Department of Administration, July 26, 1999).

<sup>20</sup> AS 36.30.565(a).

<sup>21</sup> *See, e.g., Bachner*, at 11.

City could not reasonably rely on the fact that it had been found responsive to the first solicitation, with a different minimum experience requirement, as grounds for failing to file a timely protest to the second solicitation. Payroll City has not shown good cause to accept an untimely protest concerning the reasonableness of the minimum experience requirement. The protest on that issue was properly denied as untimely.

D. Minimum Cost

Payroll City's protest regarding the minimum cost component of the request for proposals was also untimely. The protest decision dismissed the objection to the minimum cost component as untimely, and the department did not address the reasons why a minimum cost component was included in the solicitation. Payroll City has not asserted any grounds for finding good cause to consider this issue. Because this issue was not raised in a timely manner, Payroll City has not established good cause to accept an untimely protest raising this issue, and the department did not address it, the agency's dismissal of the protest on that issue should be affirmed.

**IV. Conclusion**

There are no material facts at issue, and the protest appeal should be denied.

DATED December 20, 2005.

Andrew M. Hemenway    <sup>1)</sup>  
Administrative Law Judge



**ADOPTION**

The undersigned, on behalf of the Commissioner of Administration and in accordance with AS 44.64.060, 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: 1/30/06

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

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

Jeff Fox

AAC Hamilton Heest

Signature

Date

2.2.06