

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS  
ON REFERRAL BY THE ALASKA COURT SYSTEM**

In the Matter of	)	
	)	
Bid Protest of Universal Floor	)	OAH No. 06-0006-PRO
Care, Inc.	)	Contract ITB #PAL-S-05-0015
_____	)	

**RECOMMENDATION**

**I. Introduction**

Universal Floor Care, Inc., an unsuccessful bidder, protests the award of the 2006 janitorial services contract for the Palmer Courthouse to H&S Professional Building Maintenance. The court system referred Universal's protest to the Office of Administrative Hearings ("OAH") for a hearing and recommendation. Pursuant to AS 36.30.030, both the bidding process and this appeal are governed by the Alaska Court System Procurement Guidelines ("Guidelines").

Universal contended in its written protest that court system staff showed poor judgment and possible favoritism to H&S by giving its representative a "private tour" of the courthouse prior to submission of bids. At the hearing, Universal sought to add a second basis for its protest, arguing that its own bid was improperly rejected as nonresponsive. Evidence was received on both issues.

Because there was no violation of applicable procurement procedures and no appearance of impropriety, this Recommendation concludes that the contract award ought to be upheld.

**II. Facts**

*A. Material Facts<sup>1</sup>*

The facts in this case are not disputed. On November 29, 2005, the Alaska Court System issued an invitation to bid for the Palmer Courthouse janitorial contract to commence

---

<sup>1</sup> All findings below are drawn from the testimony at the recorded hearing unless a Bates number appears in parentheses following the sentence, in which case the finding is drawn in whole or in part from the cited page of the court system's procurement file.

January 1, 2006. (00036) The invitation announced a pre-bid conference on December 8, 2005 at the courthouse, but did not indicate that the conference was mandatory, nor that a tour of the courthouse would be offered at the conference. (00036) The deadline for submitting bids was December 20, 2005. (00036) The invitation went on to specify that bids with “minor informalities”<sup>2</sup> could be accepted, but that a bid not accompanied by a bid guaranty of five percent of the estimated annual amount of the contract “shall be rejected.” (00037) The proposed service contract was also available to bidders (00037); this document specified that “A submission of [a bid] by the Contractor is considered a representation that the Contractor has visited the site, has carefully examined the site and is satisfied as to the conditions to be encountered in performing the work . . . .” (00047)

Two individuals attended the optional pre-bid conference on December 8: Mr. Delia of Universal, who had been the incumbent for twelve years, and an unidentified woman who ultimately did not bid. Neither of the two officials conducting the procurement—the Contracting Officer and the Project Manager—attended the conference. Instead, Clerk Teresa Shaw conducted the conference, which consisted primarily of a walk-through of portions of the premises lasting ten minutes or less. Mr. Delia was already intimately familiar with the building, but he participated in the walk-through. He attended the pre-bid conference to size up the competition for the contract and to listen to their questions, rather than to satisfy any uncertainties of his own regarding the contract.

About a week later, Mr. Kuczmariski visited the courthouse alone and asked for a tour. He had missed the pre-bid conference because he had not collected his mail and seen the invitation to bid until after the conference had occurred. Ms. Shaw gave him a brief, partial walk-through similar in scope to the one given at the pre-bid conference. She was not knowledgeable about the bid solicitation and was unable to answer any substantive questions about the procurement.<sup>3</sup> She did not mention the tour to the Contracting Officer or Project Manager until after the bidding and award were complete.

---

<sup>2</sup> Guideline 2-202.10.3 defines minor informalities as mistakes of “form rather than substance, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible.”

<sup>3</sup> Mr. Kuczmariski subsequently followed up with a telephone call to the court system Facilities Manager’s office in Anchorage, in which he obtained the dollar value of Universal’s prior contract. Universal acknowledges that it was appropriate for the court system to respond to this inquiry, and does not make an issue of the telephone contact.

Only Universal and H&S submitted bids on the contract. Universal's bid, though about five percent lower than H&S's in the relevant categories, failed to include the required guaranty. (00017, 00022, 00000) Mr. Delia acknowledges that this was an oversight on his part. During the day on December 22, 2005, Katherine Murray of the court system informed Mr. Delia by telephone that his bid had omitted the guaranty. At 4:30 p.m. that evening, the court system rejected Universal's bid as nonresponsive. (00000) The court system issued a Notice of Intent to Award a contract in the amount of \$41,850 to H&S. (00009)

*B. Procedural Facts*

Universal delivered its protest to the court system on December 30, 2005, raising the single issue of whether the separate premises tour given to Mr. Kuczarski rendered the procurement unfair. (00015) Administrative Director Stephanie Cole denied a stay of the award. (00060-62) On January 5, 2006, the court system designated OAH to conduct the hearing required under Guideline 4-401.03.1. Following Guidelines 4-401.03.1 and 4-401.03.6, an informal hearing was held on January 9, 2006, within ten days of Universal's protest. Attending the hearing were Patrick S. Delia, President and Treasurer of Universal; Joseph J. Kuczarski, sole proprietor of H&S; Kit Duke, Facilities Manager of the Alaska Court System; and Natalie Finn, counsel for the court system staff. Delia, Kuczarski, Duke, and Palmer Clerk of Court Teresa Shaw testified under oath at the hearing and were subject to cross-examination by the other parties. The single exhibit offered at the hearing, admitted without objection, was the court system's procurement file for this contract, which has been Bates-numbered from 00000 through 00062 in the OAH file. There is a digital recording of the hearing.

**III. Discussion**

Universal initiated this appeal to question whether it was proper for Mr. Kuczarski to receive his separate tour of the premises. Partway through the hearing—during Mr. Delia's testimony—Universal raised a second issue: the company contends that its bid should not have been declared nonresponsive. Part A below addresses the initial basis for the protest. Part B addresses the second basis.

In each instance there is a threshold issue to address before turning to the merits. In the case of the challenge to the tour, the threshold issue is whether a bidder whose bid has been found nonresponsive has standing to challenge the conduct of the successful bidder. In

the case of the challenge to the nonresponsiveness determination, the threshold issue is whether the challenge was timely raised.

A. *Kuczmariski's tour*

1. Standing to raise issue

Standing is a concept that, in general, requires parties coming to a judicial or quasi-judicial proceeding to have a direct stake in the outcome—to be actually affected by the result of the case.<sup>4</sup> A challenge to Universal's standing would contend that since the company's own bid allegedly was defective (Universal failed to submit the required guaranty with its bid) and it could not have been awarded the contract, it is not a proper party to challenge the award to someone else. In other words, the argument would be that since Universal's bid would have had to be rejected in any case, its own position would not be improved by invalidating H&S's bid for impropriety.

In this case, the Guidelines define who has standing. They afford a right to protest to "an interested party,"<sup>5</sup> and define "interested party" as "an actual or prospective bidder . . . whose economic interest might be affected substantially and directly by . . . the award of a contract . . ."<sup>6</sup> Universal was an actual bidder. Universal's economic interest would be substantially improved by cancellation of the award to H&S because, even if Universal's own bid was defective, cancellation would lead to a re-bid in which Universal could try again. Universal therefore meets the Guideline for standing to pursue a protest. At the hearing, counsel for the court system appropriately agreed that Universal has standing.<sup>7</sup>

2. Whether the tour was improper

Two sources of law govern the merits of this appeal. First, the procurement must comply with the Guidelines, which have been given legal status equivalent to regulations through AS 36.30.030. Second, the procurement must comply with overall principles of competitive bidding that have been developed through case law in Alaska.

The Guidelines contain no restriction against allowing a prospective bidder to view the subject matter of the procurement at a time other than the pre-bid conference. Further, the Guideline governing pre-bid conferences does not make the conference mandatory; on

---

<sup>4</sup> See, e.g., Black's Law Dictionary (5<sup>th</sup> ed.) at 1260.

<sup>5</sup> Guideline 4-401.01.

<sup>6</sup> Guideline 8-801.11.

the contrary, it supplies a means for obtaining an audio recording or summary of the conference, suggesting that attendance is voluntary.<sup>8</sup> That Guideline does not mention a physical tour as part of a pre-bid conference, nor make provision for the sort of recording (presumably a videotape) that would make it possible for those not attending the conference to gain the information imparted in a tour. In short, nothing in the Guidelines establishes that the pre-bid conference is the exclusive vehicle for obtaining the careful examination of the premises that the proposed contract required.

The case law of procurement contains governing principles not codified in the Guidelines. Where there are separate contacts between bidders and the procuring agency, as occurred in this case, the case law places some restrictions on the interaction: It is forbidden for the agency to conduct private negotiations with a prospective bidder, or to impart nonpublic information that gives the bidder a competitive advantage.<sup>9</sup>

In a procurement for a janitorial contract, knowledge of the premises and their particular characteristics, such as floors to be waxed, bathrooms to be cleaned, is essential to making an informed bid. Accordingly, the proposed contract supplied to bidders made submission of a bid “a representation that the Contractor has . . . carefully examined the site.” (00047) At the same time, attendance at the pre-bid conference was not made mandatory, and the conference was not advertised as the opportunity to conduct the required careful examination. It was therefore appropriate for Mr. Kuczmariski to request, and for Ms. Shaw to grant, a separate walk-through of the premises. At the same time, the case law summarized above requires that a viewing of this kind not become an occasion for negotiations or for the release of nonpublic information to a single bidder. The testimony at the hearing made it clear that nothing of that kind occurred during Mr. Kuczmariski’s tour. His viewing of the premises was essentially just that—an opportunity for personal observation in which the information he gained was essentially what he could observe with his own eyes. Universal had had the same opportunity. Notably, independent viewings in

---

<sup>7</sup> The agreement does not encompass the issue of whether Universal’s bid should, in fact, have been deemed nonresponsive, and therefore that related issue is revisited in subpart III-B below.

<sup>8</sup> Guideline 2-202.04.

<sup>9</sup> See *McBirney & Assoc. v. State*, 753 P.2d 1132, 1137 (Alaska 1988).

which different prospective bidders tour a job site separately are not uncommon in competitive bidding.<sup>10</sup>

Mr. Delia's testimony showed that his primary concern was not that his competitor might have learned nonpublic information in the tour he received from Ms. Shaw, but rather that allowing bidders to obtain their viewings of the premises at different times deprived him of the opportunity to, in his words, "size up" the competition and tailor his bidding strategy accordingly. While his interest in knowing whom he is bidding against is not improper, it is not an interest the law of competitive bidding protects. The Alaska Supreme Court has held that the requirement of public bidding is ultimately for the benefit of taxpayers, and not for the benefit of bidders.<sup>11</sup>

In short, the evidence supports no finding of actual impropriety under the law. This does not quite conclude the evaluation of the Kuczmariski tour, however. It is sometimes necessary to provide relief based on the appearance of impropriety, even though there has been no showing of actual impropriety:

The sanctity of the public contracting process is too vital a concern to require proof of actual irregularity. The perception that any one procurement was contrived to thwart or avoid the competitive bidding process fundamentally maligns the integrity of the public procurement process. The law of public contracting is clear: Procedures or devices which lead the public to believe it was denied the benefits of public advertising and bidding, which lead contractors to feel cheated of a fair and equal bidding opportunity, or which lead the public to believe itself deprived of its right to have public officials conduct public affairs with propriety simply cannot be tolerated.<sup>12</sup>

On the other hand, in considering allegations of appearance of impropriety, the purchasing agency must weigh the interests and perceptions not only of the protestor, but also of the proposed contractor. The procurement process sets up an implied contract of full and fair consideration that "imposes an obligation on purchasing agencies not to undermine the integrity of the procurement process by providing relief for insubstantial or immaterial allegations of impropriety."<sup>13</sup>

---

<sup>10</sup> See, e.g., *Hoffman Constr. Co. of Oregon v. United States*, 40 Fed. Cl. 184, 188 (Ct. Cl. 1998), *aff'd in part*, 178 F.3d 1313 (Fed. Cir. 1999); *Granite Constr. Co. v. United States*, 24 Ct. Cl. 735, 742 (1991).

<sup>11</sup> *McBirney*, 753 P.2d at 1136.

<sup>12</sup> 1985 Op. Att'y. Gen. No. 3 at 16-17 (July 2, 1985); see also, e.g., *Paul Wholesale, B.V./Hols Trading, GMBH, J.V. v. State, Department of Transportation and Public Facilities*, 908 P.2d 994, 1003-1004 (Alaska 1995).

<sup>13</sup> *Appeal of J&S Services, Inc.*, No. 02.01 at 9 (Department of Administration, September 17, 2002).

In this case, there is no significant potential for the appearance of impropriety. Mr. Kuczmariski met only with the Clerk of Court, who was not running the procurement and had essentially no inside knowledge to impart, nor any capacity to negotiate or to alter the outcome. He received a tour of the premises that was not only allowable, but that was made effectively mandatory by the contract documents. There is no likelihood that public or bidder confidence in the integrity of the process will be undermined.

*B. Responsiveness of Universal's bid*

A key element of the outcome of this procurement was the determination that Universal's bid was nonresponsive. Had the two bids been considered side by side, Universal, with its slightly lower bid, might well have been awarded the contract, regardless of the propriety of the Kuczmariski tour.

1. Timeliness of Universal's protest

Universal's appeal of the responsiveness issue was not properly made. Under Guideline 4-401.02.2, a party protesting an award must provide a written statement of reasons for the protest. Universal's written statement (00015) is unequivocally limited to the issue of the Kuczmariski tour. Universal likewise failed to mention the issue in the prehearing conference. Universal did not contest the finding that its bid was nonresponsive until the testimony phase of the hearing itself. It is not fair to the other parties to raise a wholly different issue at the hearing. Advance notice to other parties allows them to consider the issue and develop the arguments and evidence they wish to offer in response.

Universal had notice of the importance of the nonresponsiveness issue before it initiated this protest. It has offered no explanation for electing not to raise it in advance. It is therefore recommended that the protest as to the nonresponsiveness determination not be entertained. However, since an apparently complete record was assembled on the issue, this recommendation will proceed to an evaluation of the merits of the issue.

2. Whether Universal's bid was nonresponsive

If the issue had been properly raised, the evidence indicates that Universal could not prevail in its contention that its bid should have been deemed responsive. The Invitation to Bid was explicit in its direction that bids failing to include the required guaranty "shall be rejected." (00037) While both the Guidelines<sup>14</sup> and the invitation (00037) permit the

---

<sup>14</sup> Guideline 2-202.10.3(1).

consideration of bids with minor informalities—that is, with mistakes of “form rather than substance, or insignificant mistakes that can be waived or corrected without prejudice to other bidders”<sup>15</sup>—the invitation reflects a determination in advance, communicated to all, that omission of the guaranty would not be so classed.

The guaranty is important to the integrity of the procurement process, because it ensures the seriousness of bids and provides the court system with recourse should a successful bidder fail to follow through with the contract. In AS 36.30.120(c), part of the Alaska Procurement Code, the Legislature classed complete failure to comply with bid security requirements as a non-waivable informality. This demonstrates its importance to the procurement process. AS 36.30.120 is not directly applicable to this court system procurement, but it is notable that the court system referenced that provision in its own Guideline on bid security, 2-201.06.1.

In light of these principles, the court system staff was correct in deciding, at the time it weighed the two bids, not to waive the deficiency in Universal’s bid.

**IV. Conclusion**

Universal Floor Care, Inc. has standing to pursue this protest.

The procurement did not contravene the Alaska Court System Procurement Guidelines, nor the common law of procurement in Alaska. The procurement did not present the appearance of impropriety.

Universal Floor Care, Inc. failed to timely raise its objection to the rejection of its own bid as nonresponsive. Even if the objection is considered, it should not be sustained because the bid of Universal Floor Care, Inc. was materially deficient and nonresponsive, and was properly rejected as such.

Under section 4-401.04.1 of the Alaska Court System Procurement Guidelines, I therefore recommend that the Administrative Director reject the protest.

DATED this 13th day of January, 2006.

By: \_\_\_\_\_  
Christopher Kennedy  
Administrative Law Judge

THE UNDERSIGNED CERTIFIES THAT ON THIS DATE AN EXACT COPY OF THE FOREGOING WAS PROVIDED TO THE FOLLOWING INDIVIDUALS:

S. Cole, Administrative Director  
Alaska Court System

<sup>15</sup> *Id.*