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

AETNA LIFE INSURANCE and)
AETNA,)
)
v.)
)
DIVISION OF GENERAL SERVICES.) OAH No. 06-0230-PRO
) RFP No. 2007-0200-5946

FINAL DECISION AND ORDER

I. Introduction

A. Nature of the Proceeding

Aetna[1] responded to a solicitation for competitive sealed proposals to provide claims administration and related services for two state health plans. After an "atypical" review process,[2] the Department of Administration's Division of General Services (referred to hereafter as "the division") gave notice of its intent to award the contract to Premera Blue Cross, another bidder. Aetna timely filed a protest of the award and requested a stay.[3] The division denied both the protest and the stay request.[4] On March 28, 2006, Aetna initiated this appeal under AS 36.30.590. The following day, the Commissioner of the Department of Administration referred the matter to the Office of Administrative Hearings. He delegated final decisionmaking authority to the Chief Administrative Law Judge, authorizing re-delegation to the assigned administrative law judge; the chief judge re-delegated to the undersigned.

After the taking of evidence and argument from Aetna, Premera, and the division, this document is the Department of Administration's final agency action in this matter.

B. Evidence Taken

Aetna and the division agreed at the first prehearing conference that the case could be heard without the taking of live testimony. Premera subsequently sought leave to file a Statement of Position within the framework set up by the other participants, but did not contend

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1 In keeping with Aetna's own practice, this decision refers to Aetna Inc. and its affiliates simply as "Aetna."

2 Protest Report at 5. *See also* Transcript, Senate Labor & Commerce Committee, March 23, 2006, at 10 (testimony of Vern Jones). The transcript is Attachment 12 to Aetna's Appeal of Denial of Contract Protest, the initial pleading in this proceeding. Aetna's attachments are hereafter abbreviated as "Att."

3 Att. 9 (Protest and Request for Stay of Award).

4 Att. 10 (denial letter of Walt Harvey, Contracting Manager).

that a live hearing was needed. Accordingly, the matter has been submitted on the basis of affidavits and copies of documents. No party has objected to admission of any item submitted by another participant.[5]

The division did not formally compile and transmit the record supporting the decision under appeal, as required under AS 44.64.060(b). However, in a request dated May 7, 2006, the administrative law judge requested the essential contents of this record, insofar as it had not been offered up to that time by a party, and the missing items were received on May 10, 2006. These items have been admitted without objection.

This office issued a proposed decision dated May 16, 2006, in response to which the parties were permitted to file "proposals for action" under AS 44.64.060(e). The division and Premera offered several new exhibits with their proposals. At the time of oral argument on the proposals, without objection, the administrative law judge reopened the record as permitted by AS 44.64.060(e)(2) and admitted the new exhibits. At the same time, brief live testimony was taken from Chief Procurement Officer Vern Jones regarding a single newly-raised issue.

The present ruling is not a summary adjudication or other disposition of the case by motion. Testimony received by affidavit, exhibits, and the agency record may be weighed and considered as they would be in the course of a live hearing.

C. Summary of Resolution

For reasons explained in Part II of this decision, the protest must be sustained on one of the two grounds Aetna has offered.

The ground upon which the protest will be sustained is the division's use of an improper method for comparing final proposals. After significant preliminary irregularities in this procurement, the agency, Aetna, and Premera sought to salvage the process by entering into a written agreement governing the competitive scoring by which the bidders' best and final offers would be compared. In scoring those offers, however, the agency did not follow the agreement, and the method it used produced an essentially random or capricious result rather than a considered weighing of the merits of the proposals.

Aetna offered a second ground for the protest, focusing on seemingly unequal treatment of the vendors with respect to proposal discussions between initial and final offers. Although a minor irregularity did occur, the second ground did not provide a basis to sustain the protest.

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[5] The division has objected to "the analysis" contained in the McGinnis affidavit, but not to admission of the affidavit.

Part III of this decision describes the selection of a remedy for the improper consideration of Aetna's proposal. In light of all the circumstances, the contract with Premera will be left in place but will be limited to its initial three-year term, with a new procurement to take place for services after June 30, 2009. Aetna will be reimbursed for the reasonable costs of preparing its proposal in the 2005-2006 bidding process.

II. Aetna's Protest

A. Facts

1. Overall History of the Procurement

The Alaska Department of Administration oversees two health plans, one for approximately 5,500 active state employees and their dependents and one for about 29,000 retirees and their dependents.[6] Including dependents, the two plans cover roughly 68,000 individuals.[7] The state is presently self-insured. It employs a third-party administrator to process and pay claims and otherwise to manage the health benefits offered to this population.[8]

In one form or another, Aetna or entities acquired by Aetna have administered the state health plans for 24 years.[9] Most recently, Aetna has performed as third-party administrator under a contract that expires on June 30, 2006.

On November 30, 2005, the Department of Administration issued Request for Proposals (RFP) No. 2007-0200-5946, soliciting proposals for "claims administration and pharmacy benefit management" to replace the expiring Aetna contract.[10] The RFP provided for a potentially two-tiered selection process, with a round of best and final offers to follow the initial submissions, as allowed under 2 AAC 12.290(c).[11] It provided that the proposals received would be scored under a detailed 5000-point scoring system to determine the winning proposal, with non-cost "technical" factors predominating in the selection.[12]

The RFP permitted proposals to be formulated on any of three bases: a comprehensive "All Services" proposal following the questionnaire format in section 7 of the RFP, and two less comprehensive options following sections 8 and 9 of the RFP.[13] Although Aetna submitted

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6 Att. 12 at 3 (testimony of Scott Nordstrand,, Commissioner of the Department of Administration).
7 *Id.* at 4.
8 *Id.*
9 *Id.* at 5-6; [First] Affidavit of Mike Wiggins (Aetna Vice President of National Account), ¶ 3.
10 Affidavit of Vern Jones (Chief Procurement Officer for the State of Alaska), ¶ 2.
11 RFP at 16.
12 *Id.* at 77, 117-130.
13 *Id.* at 43-116.

proposals of all three varieties, this protest appeal relates only to the consideration of Aetna's "All Services" proposal under section 7.[14] Section 7 of the RFP was a detailed questionnaire divided into subsections 7.01 through 7.26.[15] Of these, twenty (7.03 through 7.22) were to be scored as technical factors.[16]

Victor Leamer, a procurement specialist in the Department of Administration's Division of Administrative Services, acted as procurement officer of record for the RFP.[17] The department received bids from Premera Blue Cross, Aetna, Coresource, and Walgreens.[18] The Coresource and Walgreens bids were only for the pharmacy portion of the RFP.[19] Premera Blue Cross, like Aetna, submitted a comprehensive proposal.

Aetna's proposal, submitted well in advance of the bidding deadline, consisted of four binders. One, labeled "Questionnaire," was six inches thick and contained the core of the proposal, addressing nearly all of the questions in Section 7;[20] another, labeled "Financials," contained the monetary bid and was expressly identified as the answer to questionnaire section 7.23;[21] another contained exhibits; another contained samples and brochures.[22] Aetna provided ten copies of each binder.[23] The ten copies of the Questionnaire binder apparently filled four banker's boxes.[24]

Upon receiving the bids, Mr. Leamer secured them in a locked storeroom in the Division of Retirement and Benefits area on the sixth floor of the State Office Building in Juneau.[25] Shortly after the procurement deadline of January 6, 2006, Leamer reviewed the bids for responsiveness to the RFP.[26] He determined that the Coresource and Walgreens proposals were nonresponsive.[27] He also decided that the Aetna proposal was nonresponsive because he

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14 Appeal of Denial of Protest (March 28, 2006), at 6-7 & n.5.
15 RFP at 43-77.
16 *E.g., id.* at 43-44.
17 Affidavit of Vern Jones, ¶ 3.
18 Att. 8 (Final Notice of Intent to Award a Contract, February 28, 2006).
19 Att. 12 at 8 (Nordstrand testimony).
20 A copy is found in the division's May 10, 2006 evidentiary filing with OAH.
21 The binder contained responses to 7.23, 8.19, and 9.08, the last two being elements of the non-comprehensive proposal formats that are not relevant to this appeal.
22 Att. 10 (Letter of Walt Harvey denying protest and request for stay) at 3.
23 Fourth Affidavit of Mike Wiggins, ¶ 2.
24 [First] Affidavit of Mike Wiggins (Aetna Vice President of National Account), ¶ 13; Att. 9 (Protest) at 3. If placed on a shelf, the ten copies would occupy five feet of shelf space.
25 Att. 12 at 17 (testimony of Vern Jones).
26 Att. 10 at 3.
27 *Id.*; see also Att. 8. The determination regarding these two bidders was based on "AS 36.30.120(e)." Att. 6; Att. 8. There is no such statute. The division was likely relying on AS 36.30.210(e).

"determined that critical sections were missing."[28] Although no report or testimony from Mr. Leamer has been submitted in this proceeding, one can infer from other evidence that when Mr. Leamer made this determination, the "critical sections" that he determined were "missing" were the items contained in the Questionnaire binder.[29]

Mr. Leamer selected a Proposal Evaluation Committee (PEC).[30] Apparently, the PEC was presented with the Aetna bid, but received only the three ancillary binders, not the Questionnaire binder.[31] There is no evidence that the PEC took any action regarding the Aetna proposal at this stage.

On January 31, 2006, observing that Mr. Leamer was overloaded with work, Chief Procurement Officer Vern Jones appointed a new procurement officer for RFP No. 2007-0200-5946.[32] His selection was Walt Harvey, a contract manager from his own staff in the Division of General Services with extensive procurement experience.[33] Upon taking over the leadership, Mr. Harvey personally reviewed the three Aetna binders in hand and deduced, in his words, that sections were "apparently missing."[34] Insofar as the use of the word "apparently" implies any uncertainty, the administrative law judge finds that no reasonable procurement officer could review the "Financials," "Exhibits," and "Samples & Brochures" binders of the Aetna proposal and not know to a certainty that the set must encompass at least one additional binder.[35]

In its proposal for action submitted in response to the proposed decision in this matter, the division confirmed that it now contends that Mr. Harvey could not have known there was a binder missing, responding to the preceding finding as follows:

> There is no basis for this conclusion and it, again, is contrary to the basic tenent [sic] of public contract law that procurement officials are presumed to act in good faith. The Aetna proposal without the questionnaire binder comprised several hundreds of pages. It simply

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28 Att. 10 at 3.

29 *See, e.g., id.*

30 Affidavit of Walt Harvey (procurement officer), ¶ 4.

31 Att. 12 at 17 (Jones testimony).

32 Affidavit of Vern Jones, ¶¶ 3-4; Att. 12 at 12, 15-16 (Jones testimony); Affidavit of Walt Harvey, ¶ 2. Leamer remained at least somewhat involved in the procurement process during February, Att. 4a at 20 (e-mails copied to Leamer), but he relinquished his leadership role.

33 Affidavit of Vern Jones, ¶ 4.

34 Att. 10 at 3.

35 The contents of the binders are in the portion of the record filed on May 10, 2006 with the "Notice of Filing of Requested Documents with Office of Administrative Hearings and Service of Notice on Parties."

> was not clear to the procurement officers involved in this matter that there was more material.[36]

The basis for the determination that a procurement officer such as Mr. Harvey must have known the binder set was incomplete is as follows. RFP section 7 addressed the "All Services" solicitation with 22 sequentially numbered information requests. Aetna's bid came in meticulously organized binders with tables of contents. Two of the binders Mr. Harvey had in hand were plainly ancillary materials, labeled "Exhibits" and "Samples & Brochures." The third, "Financials," is a detailed answer to RFP question 7.23 (with separate tabs devoted to questions 8.19 and 9.08, which were parallel elements of the non-comprehensive proposal formats). When one reviews the RFP, observing the position and the relative prominence of the various information requests, it is not plausible that a highly experienced competitor such as Aetna would prepare an elaborate answer to question 7.23, but prepare no answer at all to information requests 7.03-7.22 and 7.24.

Although he must have known that the binder set was incomplete, Mr. Harvey did not know whether Aetna had actually delivered all of the binders to Mr. Leamer as required by the RFP.[37] Mr. Harvey "directed Mr. Leamer to ensure that no sections of Aetna's proposal had been overlooked or misplaced."[38] Mr. Leamer is said to have performed a search and "assured Mr. Harvey there were no other sections of Aetna's proposal in the state's possession."[39]

Mr. Harvey directed the PEC to determine whether Premera's bid was "reasonably susceptible to award."[40] On February 2 and 3 the PEC scored the proposal using the detailed matrix contained in the RFP, whereby twenty non-cost factors were allocated weighted point scores, after which cost and an Alaska bidder's preference were added in by formula.[41] Scoring of the non-cost items was subjective. The scoring methodology used throughout this procurement was simply to average the scores of the individual PEC members participating in that round. The members of the PEC whose scores were counted toward this determination were

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36 Division's Proposal for Action at 11-12 (citations omitted). The division cites "Aff. of Harvey" as support for the final factual contention in the quotation, but gives no paragraph reference. The administrative law judge has read the entire Affidavit of Walt Harvey and has been unable to find any support for the division's statement.

A finding that Mr. Harvey knew he was looking at an incomplete set of binders is not a finding of bad faith.

37 *See* RFP at 8.

38 Affidavit of Vern Jones, ¶ 5. *See also* Att. 10 at 3.

39 *Id.*

40 Affidavit of Walt Harvey, ¶ 4. Only bids "reasonably susceptible of being selected" could advance to the next steps of the process, *i.e.*, "discussions ... with responsible offerors" and submission of "best and final offers." AS 36.30.240; *see also* 2 AAC 12.290.

41 *E.g.*, Att. 5c at 1-2.

Sheri Gray, Kerry Jarrell, Freda Miller, and Mike Williams.[42] The PEC scored Premera's bid at 3,990 of a possible 5,000, and based on this score Harvey determined that the bid was "reasonably susceptible to award."[43]

As would be expected in any subjective grading process, the scoring styles of the four raters varied significantly. At this stage of the proceeding, Mr. Williams and Ms. Gray were relatively generous graders, scoring 22 and 14 percent above the group average, respectively. Mr. Jarrell and Ms. Miller were relatively conservative graders, scoring 13 and 22 percent below the group average, respectively.[44]

Between February 6 and 17, Harvey and the PEC conducted extensive written discussions with Premera aimed at clarifying and improving its proposal.[45] These led initially to a best and final offer from Premera on February 13 with revised terms and a price of about $34 million.[46] Substantial additional discussions continued after the February 13 submission.[47] The record does not contain a written finding by the Chief Procurement Officer or the commissioner with respect to continuing the proposal discussions after submission of the best and final offer on February 13.[48]

On February 16 and 17, the PEC scored Premera's February 13 best and final offer, as further clarified, at 4,619 points.[49] Only Gray, Miller, and Williams participated in this PEC; Jarrell did not.[50] Because the changes to the Premera proposal were pervasive, the rescoring addressed each of the twenty technical categories, and at least one evaluator changed Premera's

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[42] Att. 5c at 1-2 (scoring tally). A fifth individual, Patrick Shier, began scoring Premera's first bid but did not complete the process. Att. 5c at 114-135 (Shier's evaluation form).

[43] Affidavit of Walt Harvey, ¶¶ 5-6. Notwithstanding Harvey's direction to the PEC, the testimony is that Harvey, not the PEC, made this determination.

[44] The group average for the technical factors the PEC graded was 1487 of a possible 2500. *See* Att. 5c at 1-2.

[45] Affidavit of Walt Harvey, ¶ 7; Att. 4a , 4b. PEC involvement in these discussions can be seen, for example, at Att. 4a at 20.

[46] Att. 4c. A more complete copy of the February 13 submission is found in the division's May 10, 2006 evidentiary filing with OAH, about 5/8 inch into the Premera stack. The division did not number or tab the documents or otherwise facilitate reference to them in this decision; as a result, this decision describes where they can be located by reference to their position in the stacks of papers the division placed in the record.

[47] *E.g.*, Att. 4b at 3-6; *see also* February 14, 2006 10:57:28 e-mail from Walt Harvey to Barbara Russell of Premera, with attachment (found in the division's May 10, 2006 evidentiary filing with OAH, about ½ inch into the Premera stack).

[48] Insofar as the division has submitted the procurement record as required by AS 44.64.060(b), it does not seem to contain written authorization from any source for these additional discussions. *Cf.* 2 AAC 12.290(c).

[49] Affidavit of Walt Harvey, ¶ 8; Att. 5a.

[50] Att. 5d at 1-2 (tally sheet).

score in each category.[51] The relative positions of the remaining scorers changed, with Miller more favorable to Premera than Williams in the second round.

Because Premera's bid was rescored from top to bottom, with the average score recomputed in every category,[52] there was no residual effect in the scoring of Mr. Jarrell's participation in the February 2-3 round of review. The elimination of his relatively low scoring style may partly explain the scale of the improvement in Premera's average score.

On Saturday, February 18, Mr. Harvey issued a "Notice of Intent to Award a Contract," selecting Premera's proposal as the "most advantageous proposal" and indicating that the other three bids were nonresponsive.[53] On the morning of Tuesday, February 21, while Aetna still did not know the basis on which it had been rejected, Aetna lobbyist Reed Stoops asked Harvey by telephone for copies of the proposals received as permitted by AS 36.30.230(a).[54] Stoops and Harvey discussed arrangements for obtaining the copies (although copies were not provided at that time).[55] During the course of the conversation Mr. Harvey revealed to Aetna the approximate amount of Premera's bid, albeit without supplying details of the proposal.[56]

The afternoon of the same day, February 21, Harvey had a telephone conversation with Mike Wiggins of Aetna regarding the deficiencies that led the division to declare Aetna's bid nonresponsive. In Wiggins's perception, the two of them reviewed the Aetna material Harvey had in his hands and determined that the principal binder was missing.[57] In fact, as noted above, Mr. Harvey had already been fully aware that the binder set was incomplete,[58] and hence the conversation with Wiggins may not have added to his knowledge. The conversation did, however, trigger a search.

Harvey initiated a search for the missing binder. Within one hour, the ten copies Aetna had submitted were located.[59] They were found in the sixth-floor storeroom where all of the bid materials had been housed.[60]

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[51] Att. 5c at 1-2; Att. 5d at 1-2. The changes to the proposal are collected in the first inch of the second bound packet of the division's Premera stack.

[52] *Id.* In its critique of the proposed decision in this matter, the division insisted at footnote 5 that the proposal was not rescored from top to bottom. It provided no evidentiary citation. At oral argument, the division's counsel was not able to articulate a basis for his objection to this finding.

[53] Att. 6.

[54] Att. 20 (Note to Procurement File, February 22, 2006). The disclosure was to the nearest million dollars.

[55] *Id.*

[56] *Id.*

[57] [First] Affidavit of Mike Wiggins, ¶ 12; Affidavit of Walt Harvey, ¶ 11.

[58] Att. 10 at 3; *see also* finding at text accompanying notes 35-37 above.

[59] [First] Affidavit of Mike Wiggins, ¶ 13.

Harvey immediately faxed all bidders an announcement that the February 18 notice of intent was rescinded.[61] The same afternoon (still February 21), Harvey met with Jones, other members of Department of Administration management, and state attorneys to discuss how the state could evaluate Aetna's proposal.[62] The group determined that the original PEC could not be reconvened in a timely manner and that there was insufficient time to convene a wholly new PEC to review both proposals.[63] They decided that the state must meet with Aetna and Premera to seek "a mutually acceptable process that would allow the evaluation of Aetna's proposal to proceed."[64]

The conversations with the two responsive bidders took place over the following two days. Mr. Jones led the discussions.[65] He disclosed to Premera the loss and rediscovery of Aetna's bid.[66] He disclosed that the approximate dollar amount of Premera's bid had been provided to Aetna. He stated that one member of the PEC that had reviewed Premera's bid, Sheri Gray, was on vacation out of state.[67]

In ensuing negotiations, a central concern expressed by Aetna was "that the review team be as close as possible to the old team."[68] Aetna wanted the scores to be "as comparable as possible."[69]

Mr. Jones proposed a solution entailing the use of a reconstituted PEC. He noted that one member of the PEC would be different from the team that scored the Premera proposal, explaining that Judy Porter would replace the absent Sheri Gray.[70] He mentioned the names of the new PEC—Freda Miller, Pat Shier, and Judy Porter—and he described their job titles and responsibilities.[71] He did not reveal that Mr. Shier had had no role in the scoring of the Premera

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60 Affidavit of Vern Jones, ¶ 6. The parties sometimes casually refer to the binders as "misplaced." Because, according to the evidence submitted, the binders were found where they were supposed to be, it is not accurate to say that they were misplaced.

61 Att. 7 (Amended – Notice of Intent to Award a Contract).

62 Affidavit of Vern Jones, ¶ 7.

63 *Id.*

64 *Id.*

65 Affidavit of Vern Jones, ¶ 9.

66 Affidavit of Jeff Davis (General Manager and Vice President of Premera Blue Cross), ¶ 7.

67 Affidavit of Mike Robinson (Aetna's Regional Vice President, National Accounts), ¶ 7; [First] Affidavit of Mike Wiggins, ¶ 16; Affidavit of Reed Stoops (Aetna lobbyist), ¶ 6; Affidavit of Vern Jones, ¶ 11.

68 Fifth Affidavit of Mike Wiggins, ¶ 7. The carefully worded division and Premera affidavits do not controvert this point.

69 *Id.*

70 Affidavit of Reed Stoops, ¶ 6; Affidavit of Mike Robinson, ¶ 7; Affidavit of Vern Jones, ¶ 11.

71 Affidavit of Jeff Davis, ¶ 10.

proposal, having dropped out of the process before completing his review of the first of the two Premera offers.[72]

Aetna and Premera eventually substantially accepted Mr. Jones's proposal.[73] The final agreement was put in writing and signed by representatives of both bidders, as well as by Mr. Jones in his capacity as Chief Procurement Officer, on February 23 and 24, 2006.[74]

The agreement provided that the Aetna evaluation and scoring process, by then already underway, was to be conducted "by the reconstituted [PEC] which consists of three members, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process." The evaluation by this committee would determine whether Aetna's proposal was "both responsive and reasonably susceptible for award." If it was, Aetna's three-year price would be disclosed to Premera. Aetna and Premera would then have one day of proposal discussions with the state, after which they would submit best and final offers. At that point, the agreement provided—using the future tense—that "both proposals will be scored."

As noted previously, the reconstituted PEC in fact consisted of only one evaluator (Miller) who had scored the Premera proposal; the other evaluators were either new to the process (Porter) or had dropped off the Premera committee before even the first of its two offers was scored (Shier). This was a departure from the written agreement. The division contends that it did not depart from the agreed procedure because it claims that Shier, having had some preliminary association with the first PEC, was indeed a member of the evaluation committee "that scored Premera's proposal." The division's litigation-driven reading of the parties' agreement is not a fair one. The phrase "two of whom were on the original PEC that scored Premera's proposal" indicates that two people who scored Premera will now evaluate Aetna. In the context of the parties' negotiations on February 22-23, in which the division withheld from Aetna the knowledge that Shier had not been part of the scoring, the language must be given its ordinary, common-sense import.

The reconstituted PEC reviewed Aetna's complete proposal and gave it a score of 4,032, on the basis of which Mr. Harvey determined that it was both responsive and reasonably

[72] *E.g.*, Affidavit of Mike Robinson, ¶ 7. The carefully worded division and Premera affidavits do not controvert this point.

[73] [First] Affidavit of Mike Wiggins, ¶ 16; Affidavit of Jeff Davis, ¶¶ 11, 13.

[74] Counterparts of the agreement are found at Exhibits A and B to the Affidavit of Vern Jones, and for convenience have been attached to this decision. Premera's counterpart includes a handwritten reservation, seemingly not shared with Aetna, that does not appear to be material to the present controversy.

susceptible for award.[75] Accordingly, Aetna was not harmed at this initial stage by the departure from the agreed procedure.

Pursuant to the agreement, the division next disclosed Aetna's exact three-year price to Premera and disclosed Premera's exact three-year price to Aetna.[76] The purpose of this disclosure was to ameliorate the imbalance in knowledge caused by the prior disclosure of Premera's approximate price to Aetna.[77] Each side would know the other's most recent price going into the final round of bidding.

There followed one day of proposal discussions under AS 36.30.240. The division's review of Aetna's proposal had yielded three pages of questions and instructions to clarify in the next round of bidding.[78] There were also a few follow-up issues with Premera growing out of Premera's mid-February "best and final" offer.[79]

Just before noon on February 28, Aetna and Premera submitted new, sealed best and final offers.[80] Premera's cost proposal was found to be lower than Aetna's by just over $1 million over the three-year term of the contract.[81] Scores were assigned to the monetary bids according to a mathematical formula, Premera receiving 2,000 cost points and Aetna 1,931.[82] Turning to the non-cost factors, Mr. Harvey directed the PEC, still consisting of Miller, Shier, and Porter, to "score the changes to the proposals."[83] According to Mr. Harvey's Protest Report, the evaluation proceeded as follows:

> Proposed costs for each BAFO [best and final offer] changed and were therefore objectively scored according to the RFP cost evaluation criteria. The sections of Aetna's best and final offer that altered its technical proposal were scored, resulting in a 21.5 point total increase. It was not necessary to score the best and final changes to Premera's

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75 Affidavit of Walt Harvey, ¶ 13. The scoring may actually have been completed before the agreement was reached. Although the bidders were told that the scoring of Aetna's proposal was "underway" on February 23 (Att. 2, unsigned agreement showing fax time from division of 3:20 p.m. and reciting that "process is underway"), the documentary record suggests that the scoring had been done on the 22nd. Att. 5b at 4, 51, 100 (dated evaluation pages). However, it is possible that some element of the process, such as tallying, remained to be completed on the 23rd.

76 Att. 10 at 7.

77 Att. 12 at 24 (Nordstrand testimony).

78 Att. 3 (clarification questions to Aetna).

79 Att. 4b at 2 (clarification questions to Premera, final round).

80 The deadline for submissions was noon on the 28th. Premera's offer arrived at 8:17 a.m. and Aetna's at 11:21 a.m.

81 Att. 8.

82 Protest Report at 15; Att. 5b at 3.

83 Affidavit of Walt Harvey, ¶ 14.

proposal since such changes would have only affected scoring in an immaterial manner . . . ."[84]

As to the last observation, Mr. Harvey has explained that "Premera was already ahead of Aetna in scoring" and the few technical changes to Premera's final proposal were improvements generally not addressed in the scoring criteria.[85]

Using the Premera score calculated by the earlier PEC and the Aetna score awarded by the new PEC, the division assigned the following scores to the February 28 offers:[86]

Premera:

Technical factors	2118.5
Cost proposal	2000.0
Alaska offeror's preference	500.0
Total:	4618.5

Aetna:

Technical factors	2055.0
Cost proposal	1931.1
Alaska offeror's preference	500.0
Total:	4486.1

Five hours and seven minutes after receiving Aetna's proposal, Mr. Harvey issued a Final Notice of Intent to Award a Contract to Premera.[87]

2. Analysis of the Final Scoring Round

The February 23-24 agreement promised that if an additional bidding round proved necessary, "both proposals will be scored."[88] On its face, this language suggested a scoring process—for "both proposals"—that would occur in the future. Were the intent to compare the Aetna score to a Premera score that entirely (or entirely except for a few last-minute changes to the proposal) had been generated by a different PEC in the past, the selection of future tense language would not be apt. Three additional contextual clues confirm that the reasonable import

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84 Protest Report at 16.

85 Att. 10 at 9 ("these items were not specifically addressed in the PEC evaluation form and scoring criteria in RFP Attachment 1, except for possibly the immaterial addition of 45 additional training hours").

86 These figures have been taken from the actual scoring tallies at Att. 5b at 1-3 and Att. 5d at 1-2, which agree with the Final Notice of Intent to Award at Att. 8, except that a minor computation error on the Aetna tally has been corrected, resulting in a higher average for technical factors. Note the finding regarding line 7.13 of that tally in note 98 below. The Affidavit of Walt Harvey, ¶ 15, gives numbers that are slightly more favorable to Premera and less favorable to Aetna, but the differences are small.

87 Att. 8 (faxed at 4:28 p.m.); Affidavit of Walt Harvey, ¶ 16.

88 Affidavit of Vern Jones, Ex. A and B.

of this language was that Premera's final proposal would be scored in its entirety by the new PEC.

The first clue is found within the agreement itself. The agreement tentatively set the deadline for best and final offers at noon on February 28, but set the date for notice of intent to award at "on or before March 2, 2006."[89] This two-and-a-half day window left sufficient time for a PEC familiar with at least one proposal to rescore them side by side. The complete scoring of Aetna's first proposal seems to have taken one or perhaps a little more than one day (since it could not have begun before February 22, the evaluation forms were filled out on February 22, and it was completed on February 22 or 23),[90] and hence two and a half days would be about the right window for rescoring the complete proposals.[91]

The second contextual clue is the RFP itself, which had provided that "An evaluation committee . . . will score written proposals according to predetermined criteria."[92]

The third contextual clue is generally accepted principles of procurement. While procuring agencies have broad discretion to choose evaluation methods and select evaluators, the standard practice to ensure fairness is to "[h]ave the same evaluators review each proposal or portion of a proposal."[93] The principle is axiomatic and is common in purchasing manuals from around the country.[94] An evaluation agreement departing from this generally accepted principle could be expected to say so explicitly.

In light of these contextual clues, coupled with the plain language in future tense that both proposals "will be" scored, the administrative law judge finds that a reasonable person

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[89] *Id.*

[90] *See* note 69 above, discussing this sequence. By the 24th, the scoring was complete because the division had already moved to the next stage, proposal discussions. *E.g.*, Att. 4b at 1-2.

[91] The division challenges this finding in its proposal for action, asserting without citation, "The PEC had sufficient time to do what it did (score the Aetna proposal and entertain Best and Final Offers from both offerors), and nothing more." Division's proposal for action at 9. The division overlooks two facts. First, the two and a half days were set aside solely for the evaluation of best and final offers. The scoring of Aetna's first offer had already taken place before the two and a half day period commenced. Second, for the PEC to "do what it did" took only five hours and seven minutes.

[92] RFP at 10 (emphasis added).

[93] The quotation is from the Albemarle County, Virginia Purchasing Manual (2001), at 15-2.

[94] *See, e.g.*, U.S. Dep't of Health and Human Services, DHHS Project Officers' Contracting Handbook (2003), at IV-7 ("Whenever continuity of the evaluation process is not possible, and either new evaluators are selected or a reduced panel is decided upon, each proposal which is being reviewed at any stage of the acquisition shall be reviewed at that stage by all members of the revised panel unless it is impractical to do so because of the receipt of an unusually large number of proposals."); Lubbock Power & Light, Purchasing Policies & Procedures Manual, at 39 ("The committee shall remain intact throughout the evaluation process to avoid unbalanced scoring"); State of Utah Division of Purchasing, Request for Proposal (RFP) Manual (2006), at 3-6 (members must read each proposal); *see also* 48 C.F.R. § 315.305(a)(3)(ii)(E)(4).

would conclude from the words of the division's offer that the division was promising to score both proposals, in their entirety, with the new PEC, that is, with the agreed PEC that was to be in existence at the time in the future when the proposals were to be scored.

The division observes that its standard practice in scoring best and final offers is to "score the changes," so that if a particular element of the best and final offer is identical to the same element in an earlier offer, the score previously calculated for that item is used.[95] Nothing in the record, however, indicates that the division has ever had a practice (still less a practice made known to the negotiating parties) of scoring "the changes" with a different PEC from the one that reviewed the first offer, or of scoring one bid with one PEC and another bid with a different PEC. Limiting the understanding of the division's standard practice to the tradition described in the first sentence of this paragraph, I find that the agreement was not necessarily inconsistent with standard division practice. Although the agreement, read literally, calls for scoring of both proposals in the future, it may have been reasonable and within the spirit of the agreement for the committee to rely on *its own* prior work, performed during the term covered by the agreement. Thus I make no finding as to whether the division had undertaken to rescore, after February 28, sections of the Aetna offer that were completely unchanged from the February 22-23 evaluation and that had already been scored by the same Miller-Shier-Porter PEC. What is clear is that in the end both proposals were to have been scored, in all respects, by the new PEC.

The evaluation actually conducted did not accord with the agreed procedure. Notwithstanding the promise that "both proposals will be scored," the Premera proposal was not scored at all after the promise was made. As a result, instead of being scored by a common committee, the competitors' best and final offers received scores from committees that had only one member in common.

The single common evaluator was Freda Miller.[96] Ms. Miller scored the technical elements of final Premera proposal at 2,160 points out of a possible 2,500.[97] She scored the same elements of the final Aetna proposal at 2,450 points.[98] The spread between her Aetna score and her Premera score is 290 points in Aetna's favor. This exceeds the 69-point advantage that

95 *E.g.*, Affidavit of Walt Harvey, ¶ 14.

96 Att. 5b at 1; Att. 5d at 1.

97 Att. 5d at 2.

98 Att. 5b at 1-2. This total incorporates a finding that, more likely than not, her score on line 7.13 was adjusted upward from 90 to 100 in response to Aetna's clarifications relating to that element. *Compare* Att. 5a, p. 1 *with* Att. 5b, p. 1. Hence the score used here is ten points higher than the one assumed by the parties in their briefing.

Premera had in cost factors. Accordingly, were Ms. Miller the only evaluator or were all evaluators to view the *relative* merits of the offers as she did, Aetna would have won the contract award. The scores would have been:

Premera:

Technical factors	2118.5
Cost proposal	2000.0
Alaska offeror's preference	500.0
Total:	4618.5

Aetna:

Technical factors	2450.0
Cost proposal	1931.1
Alaska offeror's preference	500.0
Total:	4881.1

Of course, Ms. Miller was to participate in a three-person committee of evaluators that was supposed to score both proposals. Her 290-point spread would become part of an average technical grade, where all three scores would be added together and then divided by three. Since her scores would be divided by three in this calculation, the net effect of her 290-point spread on the final technical score is one-third of 290, or 97. That is, it improves Aetna's final position *relative to Premera* by 97 points. What is notable is that the 97-point improvement is greater than Aetna's 69-point deficit in the cost score. It functions, by itself, to erase the small advantage Premera enjoyed on cost. After tallying the Miller score and the cost score (which are the only two actual inputs to the final score that accord with the February 23-24 agreement), Aetna has, in effect, an 18-point overall advantage over Premera in the scoring.

The other evaluators were not common to the two scoring processes. Their scores for the final offers were as follows:

Evaluators of Premera only:[99]

Gray	2207
Williams	1990

Evaluators of Aetna only:[100]

Porter	2120
Shier	1585

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99 Att. 5d at 2.

100 Att. 5b at 1-2.

The enormous disparity between the Shier score for Aetna and the Gray score for Premera is the primary reason Aetna's final average score was lower. By way of illustration, the gap between Shier and Gray was 622 points. Consider, hypothetically, that instead of counting Gray's Premera-only score the process had encompassed a Premera score from Shier himself—still rating Premera as superior—in which the gap was large but not enormous, 202 points instead of 622. The outcome of the scoring would have been as follows:

Premera:

Technical factors	1978.5
Cost proposal	2000.0
Alaska offeror's preference	500.0
Total:	4478.5

Aetna:

Technical factors	2055.0
Cost proposal	1931.1
Alaska offeror's preference	500.0
Total:	4486.1

Apart from the fact that the single common evaluator thought the Aetna offer to be superior, there is no evidence to suggest how Gray and Williams would have graded the Aetna offer had they been given an opportunity to do so. There is likewise no evidence as to how Porter would have rated the Premera offer.

With respect to Shier, there is some evidence of how he viewed the two vendors in relative terms. Shier did, at one time, begin scoring the first of the Premera offers, although his scoring was incomplete and was not counted. He scored the first 15 technical categories with a total score of 1370.[101] When he scored Aetna's first offer, his total for these 15 items was 1190, giving Premera a 180-point lead for that portion of the scoring.[102] This lead might have grown in the context of the best and final offers, where Premera's proposal was improved. The last five items, which he did not score in the Premera bid, are wholly different from the first 15, and one cannot speculate whether he would have preferred one vendor or the other on those items simply because he leaned toward Premera on the earlier items.[103] However, only 550 points are

[101] Att. 5c at 113-135 (Shier score sheet).

[102] Att. 5b at 1-2.

[103] To assume otherwise would be to concede bias on Shier's part. Moreover, Shier had already scored Aetna above Premera in three categories (management plan, reporting, flexible spending account); he might have done so again had he scored the last five categories.

available in the last five categories,[104] and hence even if Shier (like Miller[105]) had preferred Aetna in those final categories, it would be difficult to erase a deficit of 180 or more points from the first 15 categories. It is more likely than not that had he scored both proposals, Shier would have scored the Premera proposal above the Aetna proposal.

The degree by which Shier would likely have preferred Premera is wholly impossible to gauge from the evidence, however. We know that Shier rated the early sections of Premera's first proposal less favorably than did Williams,[106] and that Williams ultimately rated Premera's second proposal at 1990 points. This might suggest that if Shier had rated Premera, he would have assigned a score two or three hundred points above the 1585 he gave Aetna, not as high as Williams's 1990—perhaps counterbalancing Miller's 290-point swing in favor of Aetna, perhaps not.[107] The reliability of any speculation in this regard is low.

In short, the evidence shows that had the reconstituted PEC scored the Aetna and Premera proposals side by side on February 28-March 2, as agreed, Aetna would have enjoyed a small advantage on the basis of the Miller technical scores, which erased Premera's small edge in cost. The outcome of the procurement would then have turned on whether, when Shier and Porter scored Premera's bid, the advantage remained with Aetna or would have swung back to Premera. The evidence is insufficient to determine how strongly Shier would have preferred Premera, and is likewise insufficient to determine whether Porter would have preferred Premera or Aetna. Because of Aetna's advantage growing out of the Miller evaluations, however, I find that there is a strong possibility that Aetna would have emerged from scoring with a higher overall score than Premera.

3. Integrity of Freda Miller's Scores

The next section of findings addresses a new factual issue, relevant both to sustaining or rejecting the protest and to remedy, that developed only in the last days before this final decision

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[104] *Id.* at 2.

[105] In the last five categories, Miller felt Aetna was superior in pharmacy benefit management and clinical programs, but that Aetna and Premera were equivalent in retail network, mail order, and high deductible health plan/HAS experience. Att. 5b at 2; Att. 5d at 2.

[106] Protest Report at 12.

[107] In his protest report, Mr. Harvey has contended that if Shier had rated both Premera and Aetna as the agreement indicated he would, Premera's scoring advantage would have increased. Protest Report at 11-12. This factual argument is inapposite because it simply adds imputed Shier scores to the existing mix of Premera-only raters, whereas if the agreement had been followed the Gray and Williams scores would not be part of the mix. Thus, to conduct his mathematical exercise Mr. Harvey needed to replace a Gray or Williams score with an imputed Shier score. In the end, the process becomes too speculative to support a factual finding.

was issued. To understand this issue, it is necessary to briefly review the procedural context in which it arose.

The proposed decision issued in this case on May 16, 2006 included the preceding findings substantially as they appear above, and also posited a remedy that involved a rescoring of the parties' February 28 best and final offers using the original scoring committee that scored Premera's February 13 offer. The committee would have consisted of Sheri Gray, Freda Miller, and Mike Williams. This proposed remedy had been selected largely without the benefit of any briefing from the division, which had up to that time elected not to analyze, nor to submit evidence relative to, the statutory factors considered in selection of a remedy.[108]

OAH invited the parties to comment on the proposed decision, including the proposed remedy. Written comments were due on May 19, 2006, with oral argument set for May 22. On May 18, 2006, Chief Procurement Officer Vern Jones initiated a contact with Freda Miller, one of the putative members of the selection committee in the proposed remedy.[109] He explained to her certain concerns, detailed below, regarding her participation in this procurement.[110] He told

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[108] In its proposal for action, the division faults OAH for addressing remedies before the division was ready for it to do so. The division has explained its failure to address remedies in its main brief in two ways. First, it says that the "past practice" of OAH has been to take briefing and evidence on remedies only after the merits of a procurement protest have been decided. Division's Proposal for Action at 2. Second, it suggests that requiring the division to address remedies before the merits are decided "undermines its position on appeal" and thereby may "unduly tread on the Division's due process right to have an opportunity to be heard." *Id.*

In support of the first contention, the division points to a single example, *In re Bachner Co. and Bowers Investment Co.*, Dep't of Administration (DOA) No. 02.06/.7, a case heard by a Department of Administration hearing officer before the establishment of OAH. The procedural history of *Bachner* was complex. The consideration of remedies was deferred to some degree, owing to the initial absence from the proceeding of the winning bidder, but consideration of remedies began before the merits were resolved. The general practice in cases of this kind has been to consider all aspects of the case together, unless there is a specific request for bifurcation. Examples include *In re J& S Services* (DOA No. 02.01, September 16, 2002) (remedy of bid prep costs and administrative actions by Chief Procurement Officer imposed at time protest sustained); *In re Waste Mangagement of Alaska, Inc.* (DOA No. 02.08, April 24, 2002) (continue existing contract month to month, issue new solicitation); *In re Make It Alaskan, Inc.* (DOA No. 00.11, April 30, 2001) (continue contract month to month, issue new solicitation).

The division cites no authority for its second contention. Addressing remedies along with the merits is standard in virtually all kinds of litigation, and it does not undermine appeal rights nor deprive parties of due process.

A party desiring OAH to defer consideration of remedies to a separate, subsequent proceeding should request bifurcation at the prehearing conference. In this case, the prehearing conference was held after Aetna had filed its initial brief, addressing remedies in detail. A review of the record of the prehearing conference in this case shows that the division did not request bifurcation, nor did it otherwise request permission to defer responding to Aetna's opening submission in its entirety.

[109] Testimony of Vern Jones, May 22, 2006.

[110] [Second] Affidavit of Vern Jones (May 19, 2006), ¶ 6.

her that recusal "was an option for her."[111] Ms. Miller recused herself from further participation in the procurement.[112]

The division's written filing of the following day, May 19, raised, for the first time in this proceeding, three bases to challenge the integrity of Ms. Miller's scoring and/or to impute a potential conflict of interest to her. These will be reviewed in turn in the next few paragraphs.

The division contends that Ms. Miller used an improper scoring method. Evaluators were supposed to start their evaluation of each category with a "neutral score" of half of the available points, and then score the category by adding or subtracting points according to aspects of the relevant portion of the offer that were better or worse "than neutral."[113] According to the division, Ms. Miller did not do this. However, at oral argument the division's counsel was not able to demonstrate how he determined this from her score sheets. Moreover, with the single exception of evaluator Mike Williams, he conceded that he had not established whether any of the other scorers did or did not use the prescribed method. Further, he conceded that the procurement officers are supposed to make sure scoring is done by the approved method. There is no evidence in this case that either Leamer or Harvey detected any problem with the scoring method used by any evaluator. Finally, and most significantly, there is no contention by any party that Ms. Miller used different scoring methods when comparing different bidders. In light of these considerations, I find that it has not been established that Ms. Miller used an improper scoring method, nor that she used varying methods to the detriment of any party, nor that her method differed from that of other evaluators.

The second new issue the division raises regarding Ms. Miller is her prior employment. Ms. Miller worked for Aetna before coming to the Alaska Department of Administration in 2004.[114] The division stops short of saying that this represents an actual conflict of interest, but Mr. Jones says that he would have disqualified Ms. Miller from participation on the PEC had he been aware of the prior relationship with Aetna.[115] Premera likewise stops short of alleging that an outright conflict has been established,[116] but says that there is an appearance of impropriety directly parallel to that found in *In re J & S Services, Inc.*[117]

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111 Testimony of Vern Jones, May 22, 2006.
112 [Second] Affidavit of Vern Jones (May 19, 2006), ¶ 6.
113 Ex. C to division's proposal for action (Victor Leamer memorandum to PEC members, January 9, 2006).
114 [Second] Affidavit of Vern Jones (May 19, 2006), ¶ 3.
115 Testimony of Vern Jones, May 22, 2006.
116 Premera's proposal for action at 9.
117 DOA Case No. 02.01 (September 16, 2002) (cited at oral argument).

The division and Premera, however, have left the facts largely unexamined regarding Ms. Miller's connection to Aetna. Nothing in the record shows what sort of job Ms. Miller held with Aetna, nor the section of Aetna's vast corporate family she worked in, nor the circumstances of her departure, and Mr. Jones does not seem to have inquired into these matters when he spoke with her on May 18.[118] All we know is that the Department of Administration, Division of Retirement and Benefits knew of Ms. Miller's prior employment with Aetna and that the Department nonetheless placed her on a PEC to evaluate an Aetna bid.[119] We do not know whether Victor Leamer, the original procurement officer, evaluated this relationship, still less what, if anything, he determined.[120] No circumstances remotely akin to those found in *In re J & S Services, Inc.*[121] have been established.

The fact that a state employee has previously worked for a private entity does not, without additional context, disqualify the employee from making or contributing to decisions regarding that entity. Although Ms. Miller's prior employment with Aetna is potentially significant, the record has not been developed sufficiently to support a finding that any impropriety or appearance of impropriety existed, nor that the prior employment had any relationship to her scoring.

The third issue the division has raised is the fact that Ms. Miller told Mr. Jones that she has a "401k pension" with Aetna.[122] Again, the division identifies this as a potential conflict of interest and a "potential deficiency" in the procurement.[123] Notwithstanding its professed concern, however, the division has never asked whether the account or accounts consist of Aetna stock or are merely portfolios handled or managed in some way by Aetna.[124] It has offered no evidence of their size. The record does not support a finding that the account or accounts created a conflict or appearance of a conflict, nor a finding as to whether they could plausibly have influenced Ms. Miller's scores.

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118 Mr. Jones testified that he had been aware of the prior employment relationship since March, but did not discuss it with Ms. Miller until May 18, even though he had several conversations with Ms. Miller about this procurement. This fact, coupled with the division's failure to disclose Ms. Miller's prior employment to Premera between March and May notwithstanding the pendency of a challenge to Premera's contract award, suggest that the division did not immediately consider the prior employment a material fact with reference to this procurement.

119 These facts were conceded by the division's counsel at oral argument.

120 At oral argument counsel for the division did not know, and had not inquired, whether procurement officer Victor Leamer knew of the prior employment relationship.

121 In *J & S*, a bidder and a member of the PEC had had a close personal relationship since rooming together in college. During the consideration of the bids, they had extensive *ex parte* communications about the solicitation.

122 The quotation is from the May 22 testimony of Vern Jones.

123 Division's proposal for action at 13.

124 Jones testimony, May 22, 2006.

The division said at oral argument that it does not mean to "sling mud" at Ms. Miller, who apparently is a valued and respected administrator in the Division of Retirement and Benefits. In the context of this litigation, the division has sole unfettered access to Ms. Miller and to the procurement officers she worked with. It could, with minimal additional inquiry, have determined whether the concerns to which it alludes are real or not. It did not do so. Notwithstanding this gap in knowledge, it made a public filing of written materials strongly implying wrongdoing by Ms. Miller.[125]

4. Unequal Discussions Aimed at Clarifying or Improving Offers

The initial factual discussion, in the interest of continuity, touched only briefly on the content of the proposal discussions under 2 AAC 12.290 between the division and the two responsive bidders. This section returns to that issue in more detail.

Between the submission of its initial offer in December and its best and final offer on February 28, Aetna had a single day of proposal discussions with the division. These took place on February 24. There were three pages of questions for Aetna.[126] About half related to trivial matters or apparent typographical errors.[127] More significantly, the division asked for a more comprehensive response on vision benefits, queried whether Aetna had intended to depart from its current practice on pursuing refund of overpayments, and clarified a question in the RFP about mechanisms to encourage direct insurance billing by providers, so that Aetna could respond more informatively.[128] Aetna's responses to these three items subsequently changed its technical score in three of the twenty technical scoring areas and caused its overall technical score to go up by about 25 points.[129] Finally, and no doubt most significantly, the division conveyed its confusion over the fact that Aetna had submitted a dual cost bid, instructing without elaboration that "Aetna must submit a single cost proposal."[130]

Premera had two sets of proposal discussions with the division. One was the February 24 discussion accorded to both bidders.[131] In Premera's case, that round of discussion involved fewer questions than were posed to Aetna, although as will be seen one of the questions was

[125] *See especially* [Second] Affidavit of Vern Jones.
[126] Att. 3.
[127] *E.g., id.* at 2 (need 5 rather than 4 references); *id.* at 3 (Zoloft and Lipitor priced differently in different tables).
[128] *Id.* at 1-2.
[129] Att. 5b at 1-2. Owing to a tallying error the scoring increase was recorded as only 21.5 points.
[130] Att. 3 at 3.
[131] Att. 4b at 1-2.

more significant than any Aetna was posed. Premera was also directed to "submit a single cost proposal."[132]

Prior to the February 24 discussion round, Premera had had lengthy proposal discussions with the division during mid-February while the Aetna proposal was still lost. These began with 18 pages of questions encompassing each of the 20 technical scoring areas of the RFP.[133] In general, Premera's first proposal seems to have been much less polished and complete than Aetna's, and Premera required prompting or assistance in every category. The nature of most of the queries and suggestions is not fundamentally different, however, from the much smaller number of queries and suggestions to Aetna. The mid-February proposal discussions, because they touched on so many scoring elements, enabled Premera to raise its technical score from 1489 to 2118.5 between its initial and its February 13 offers.[134]

An aspect of the early round of proposal discussions requires special attention. Premera submitted what both the division and Premera perceived as its last best and final offer on February 13.[135] Proposal discussions continued for several days afterward, until February 17.[136] The record contains no written determination that it was in the state's best interest to conduct additional discussions following the best and final submission.[137]

Finally, running through both sets of proposal discussions with Premera—both the 12-day discussion in mid-February and the single day on February 24—is an interchange about network access costs. There was no parallel interchange with Aetna. That interchange is the subject of the remainder of this section.

Both Aetna and Premera have entered into Preferred Provider Organization (PPO) agreements in which health providers write off a portion of their charge for services rendered to covered insureds.[138] There are administrative costs associated with such networks, called network access fees, which carriers typically recapture by sharing in a portion of various discount mechanisms.[139] As one corporate entity throughout the country, Aetna's PPO

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132 *Id.* at 2.

133 Att. 4a

134 Att. 5c at 1-2; Att. 5d at 1-2.

135 Att. 4c. A more complete copy of the February 13 submission is found in the division's May 10, 2006 evidentiary filing with OAH, about 5/8 inch into the Premera stack.

136 *E.g.*, Affidavit of Walt Harvey, ¶ 7.

137 Because Aetna's appeal challenged the scope of the proposal discussions with Premera, any written finding of this kind would be among the documents the division would submit as the record supporting its action under AS 44.64.060(b).

138 Affidavit of Matt McGuinness, ¶ 13.

139 *See* Premera Statement of Position at 27.

agreements have nationwide coverage.[140] Premera does business through numerous state and regional affiliates, so its PPO agreements have only statewide coverage.[141]

The RFP did not call for network access fees to be included in a bidder's cost proposal.[142] Bidders were, however, asked to identify whether there would be "any additional fee" for using their networks.[143] Premera's original offer acknowledged its intent to charge network access fees as a portion of its "monthly claim costs,"[144] not as an administrative fee. It also did not disclose the actual price for network access.[145]

The first of a series of increasingly pointed questions to Premera about the actual cost of its network access fee appeared in Walt Harvey's 18-page list of discussion items on February 7.[146] In reference to RFP Section 10.13(d), he asked Premera to "describe the access fees for using Premera's network providers nationwide and in Alaska."[147]

Premera answered this question in its February 13 best and final offer. Premera described its method of recouping network costs, but still it did not specify the actual cost of its network access fee:

> Access fees are the charges assessed by Blue Cross Blue Shield plans for use of their contracted provider network. Access fees are included in the network costs and guarantee of $100.00 per employee per month.[148]

The reference to "guarantee of $100.00 per employee per month" related to a performance standard explained earlier in the same document:

> Premera Blue Cross Clue Shield of Alaska will guarantee network savings of $100 per employee per month resulting from the use of Premera's Alaska and Washington networks and the national Blue Cross Blue Shield BlueCard network program.

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140 Affidavit of Matt McGuinness, ¶ 14.

141 *Id.*

142 RFP § 7.23 at 76.

143 RFP § 7.15(d) at 55.

144 Claim charges are those health care costs incurred by doctors or other service providers who seek payment for services rendered to insureds. Third affidavit of Mike Wiggins, ¶ 5.

145 Premera's December 28, 2005, Questionnaire at 41. The document can be found in the division's May 10 evidentiary submission in the Premera stack.

Though not at issue here, Aetna also has a plan to recoup network access costs. It would recoup the cost of using its National Advantage Program network through two components: first, a fee of 30% of actual savings attained, which the company estimated at $2,423,506, based on its 2005 figures; and second, a bonus of up to 5% of medical fees for exceeding the network savings guarantee. Aetna estimated this would total $977,622 for three years, so its total retained discounts under the three-year contract would be $3,401,128. Affidavit of Matt McGuinness, ¶ 29.

146 Att. 4a.

147 *Id* at 13.

148 Att. 4b at 38.

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> Network savings in excess of $100 per employee per month will be shared between the State of Alaska and Premera Blue Cross Blue Shield of Alaska. The State of Alaska will retain 88% of the amounts over $100 per employee per month; Premera Blue Cross Blue Shield of Alaska will retain 12%. In the event that the savings are less than $100 per employee per month, Premera Blue Cross Blue Shield of Alaska will reimburse the State of Alaska 24% of the difference between that savings amount per employee per month and 100.00 (sic) per employee per month.[149]

On February 14, the procurement officer transmitted additional questions to Premera. Apparently not enlightened by the previous day's response, Harvey asked:

> Provide in dollars the BlueCard access fees and administration fees expected to be charged annually by the State of Alaska for use of the Blues network for our population? Is there a cap on these fees?[150]

Later on February 14, Premera at last identified the specific amount of the network access fee:

> As outlined in the Performance Guarantee section of the RFP, there is an access fee charge for the use of the BlueCard network. The access fee is charged as a claim charge. The guaranteed access fee is $5.51 per employee per month. As the fee is guaranteed as a per employee per month charge, the cap is $5.51 times the number of employees per month times 12 months.[151]

Specifically, Premera planned to include the network access fees in the network provider allowable charges.[152] At $5.51 per employee per month, Premera's charges for network access fees would total approximately $6.88 million over the course of the three-year contract.[153]

At some point, the State's Benefits Manager became concerned that Premera's network access fee of $5.51 per employee per month "would artificially inflate the actual cost of claims and cause reporting issues" because Premera's bid sought to include the network access fee in claims charges.[154] On February 24, during the final discussion round that now included Aetna, Walt Harvey submitted a further query on this topic to Premera's Barbara Russell in preparation

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[149] *Id.* at 33.

[150] February 14, 2006 10:57:28 e-mail from Walt Harvey to Barbara Russell (division's May 10 submission, Premera stack, ¼ inch from top).

[151] Premera's February 14, Clarification Questions at 2.

[152] With the context provided by the February 14 response, this can now be gleaned from the single line at the bottom of the table in Premera's clarification response regarding performance standards. Att. 4b at 34.

[153] According to the RFP that there would be 33,592 lives covered in the first year of the contract, 34,913 lives covered in year two, and 35,556 covered in year three. RFP at 76. Multiplying the number of lives covered times $5.51 times 12 months equals $2,221,103 for the first year, $2,308,447.50 for the second year and $2,350,962.70 for the third year. The grand total is $6,880,513.20.

[154] Protest Report at 23.

for a teleconference that was scheduled for 1 p.m. the same day. He asked Premera to consider treating the network access fee differently:

> Premera proposed a network access fee of $5.51 per employee per month that is billed as a claim charge. This fee is associated with Premera's network discount. Is it possible for Premera to bill this fee or cost in a different manner, rather than adding the amount to a claim?[155]

In the final round of offers on February 28, Premera "restructured the package" in response to this concern.[156] It completely eliminated the network access fee.[157] At the same time, it increased its percentage of retained network savings if savings exceeded $100 per employee per month by 2 ½ times to 30%, rather than the 12% it planned to retain in its February 13 offer.[158] Partially offsetting this increase was an increase in the compensation it would pay the state if it failed to achieve the $100 benchmark, from 24% of the shortfall (as offered on February 13) to 30% of the shortfall.[159]

The financial effect of this restructuring is unclear.[160] The division did not reevaluate Premera's technical proposal during its brief deliberation on February 28, and seems to have been unaware that a significant financial change had been made in the technical proposal.[161]

5. Competitiveness of the Aetna Offer and Effect of Disclosure of Premera's Price

In evaluating a remedy for the departure from the February 23-24 agreement, it will be relevant to take a broader view of the procurement to determine whether, had Aetna's bid never been lost and the procurement conducted flawlessly throughout, Aetna would have had a chance of selection. The division and Premera contend, as a factual matter, that Aetna would have lost in a standard head-to-head competition.

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155 Att. 4b at 1-2 (emphasis added).

156 Premera's Statement of Position at 28.

157 Premera's February 28, 2006 Best and Final Response (division's May 10 evidentiary submission, Premera stack, top document) at 1.

158 *Id.* at 9.

159 *Id.* This alteration is also addressed in the Affidavit of Jeff Davis, ¶ 18, but the offsetting shortfall element is described erroneously.

160 Aetna's perception is that the new arrangement is less favorable to the state than the February 13 offer; its view of the effect is found in the graph at Exhibit 2 to the Affidavit of Matt McGuinness. Premera's position is that the new arrangement is more favorable to the state than was the February 13 offer. Affidavit of David Braza, Ex. 1. All parties appear to agree that the differing interpretations cannot be, and need not be, resolved on the present record.

161 *See* Att. 9 at 10. Harvey appears to have noted the elimination of the fixed fee but not the counterbalancing change.

They reason as follows. Aetna's first bid, when submitted in December, had a much higher cost component than Premera's first bid.[162] Premera's proposal had more weaknesses on the technical side, but these were remediable through proposal discussions prior to best and final offers. If one takes Aetna's first cost proposal and assigns it the numerical score to which it is entitled under the mathematical formula in the RFP, and then one adds to it a hypothetically perfect technical score, Aetna would still have fewer points than Premera achieved with its best and final offer.[163] They contend that it was the good fortune of learning Premera's cost bid on February 21 that enabled Aetna to be genuinely competitive, realizing that it needed to lower its price by about $10 million in its best and final offer. Had the procurement been conducted flawlessly, Aetna would not have had that good fortune.

The division and Premera are correct that the disclosure of Premera's approximate cost proposal was significant. In a procurement involving sealed proposals leading to a best and final round, disclosure of the initial cost proposals benefits the trailing bidder by giving it a target to achieve in the second round. To be sure, the parties' submissions show that pricing of third party administrator health plans is complex, so that without knowing the details of the services included and the manner in which rebates and other dollar inputs may have been addressed in elements of the bid apart from the "price," knowledge of a competitor's price is of less value than it would be in a simple competitive bidding process.[164] Nonetheless, this was a procurement in which a specified bundle of costs was to be scored by a mathematical formula. Knowledge of the number Premera had achieved for that specified bundle of costs informed Aetna of the need to remix or lower its own costs to reach a similar level for that particular bundle.

It does not follow that Aetna's bid would have been doomed to failure in a standard procurement process, without the unfortunate disclosure. One must recall that Aetna's first proposal, in spite of its higher costs, actually achieved a higher overall screening score than Premera's first proposal. Many imponderables affect whether Aetna could have carried overall superiority through the final round, including:

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[162] The cost proposals are found in the division's May 10 evidentiary filing.

[163] Division's proposal for action at 3, 13. The division's mathematical calculation assumes that Aetna would not have lowered its cost proposal by a single dollar in the best and final round, an assumption that is probably counterfactual in almost any scenario.

[164] *E.g.*, Affidavit of David Braza (Premera Vice President of Actuarial Services), Ex. 2; Affidavit of Matt McGuinness (Aetna Underwriting Manager), ¶ 25 & *passim*.

--whether Aetna might have decided independently to lower its cost proposal in the second round, once it learned that a strong competitor had submitted a first-round bid;[165]

--whether the division would have devoted twelve days to top-to-bottom clarifications of Premera's bid, greatly improving its technical score, had it not been operating under the mistaken belief that it had to make the Premera proposal work because there was no other responsive proposal.

In short, one can find that the disclosure of Premera's price was very useful information to Aetna in approaching the February 28 bidding round, but it would be speculative to find that Aetna would not have been competitive in this procurement but for the errors that occurred in the procurement.

6. Handling of the Protest

After the division turned around the bidders' best and final offers in only five hours, issuing a notice of intent to award to Premera at 4:28 on February 28, Aetna apparently questioned the division about how the offers were scored.[166] This inquiry brought to light, in the early days of March, some of the divergence between the written agreement of February 23-24 and the actual scoring method used on February 28.[167] Aetna immediately expressed its dismay and urged the division to give a fair hearing to its concerns.[168] On March 10, Aetna detailed its concerns in a protest and request for stay directed to Mr. Harvey.[169] On March 13, 2006, the division executed a contract with Premera.[170]

On March 21, Harvey notified Aetna that its protest and request for stay were "denied in total."[171] The denial was hostile in tone, and lacked a dispassionate evaluation of the content of the February 23-24 agreement. The ruling sought to shift blame to Aetna for the loss of the core of Aetna's bid, stating, "It was unfortunate that Aetna's binders were not labeled in a manner that would have informed the state as to the total number of binders constituting Aetna's offer (i.e., Aetna Proposal Binder 1 of 4, etc.)."[172] As noted previously, Mr. Harvey had known from the

165 The parties seemed to agree at oral argument that once a deadline for proposals has passed, the bidders in a procurement of this type generally are aware of who has submitted a proposal.

166 *See* Protest Report Ex. 1 (March 6 letter from Wiggins to Harvey referring to prior correspondence).

167 *Id.*

168 *Id.*

169 Att. 9.

170 Affidavit of Walt Harvey, ¶ 17.

171 Att. 10 at 20.

172 *Id.* at 3 n.1.

outset of his review that one of Aetna's binders was missing; his suggestion that he would have needed additional labeling to be "informed" of this fact is not a fair rendering of the circumstances under which this procurement went awry.

This appeal followed.

B. Discussion

Aetna's protest, as presented in this appeal, rests on two grounds. One is the method used to score the February 28 offers. The second is the inequality in the scope of the proposal discussions between the division and the two vendors.

The loss of Aetna's first offer is not an independent ground for the protest. Aetna essentially settled its potential protest on that ground when it entered into the February 23-24 agreement. Nonetheless, the history provides relevant context for many aspects of this challenge.

The administrative law judge reviews this matter under a delegation from the commissioner. The procurement code authorizes the commissioner to "audit and monitor the implementation of the [procurement] regulations and the requirements of [the Code] with respect to using agencies."[173] In so doing, the commissioner or his delegee applies independent judgment as to questions of law, and determines questions of fact *de novo*.[174] Discretionary decisions by the procurement officer within the limits of the law receive a some deference.[175]

1. Protest of Scoring Method

a. Legal Principles Applicable to the First Ground for Protest

The Alaska Supreme Court requires that competitive procurement be conducted with "fairness, certainty, publicity, and absolute impartiality," and notes that courts will guard "against the award of a public contract to a bidder who has received an unfair competitive advantage."[176] In keeping with this high standard, a procuring agency is generally required to tell bidders how their proposals will be evaluated and to abide by what it tells them.[177] Moreover, a protest will be sustained if the agency uses a scoring or evaluation system that is irrational or arbitrary.[178]

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173 AS 36.30.040(a).

174 *In re Waste Management of Alaska, Inc.*, Dep't of Admin. Case No. 01.08 (April 24, 2002), at 2.

175 *Id.*

176 *McBirney & Assoc. v. State*, 753 P.2d 1132, 1136 (Alaska 1988) (quoting prior authority).

177 *See, e.g., In re Make It Alaskan, Inc.*, Dep't of Admin. Case No. 00.11 (May 1, 2001).

178 *Beta Analytics Intern., Inc. v. United States*, 67Fed. Cl. 384, 406-7 (2005).

In general, for a protest to be sustained the protester must demonstrate prejudice from the error. There is no need to show conclusively that but for the error the protester would have been selected; it is enough that the protester would have been competitive and has been deprived of "a reasonable chance of receiving an award."[179]

b. Capricious Scoring

Let us now turn to Aetna's principal ground for its protest, its contention that its proposal was compared to Premera's by an improper and irrational rating process. To evaluate this contention requires some exploration of the nature of scoring.

Scoring complex service proposals is partly subjective. Individual raters vary widely in the numbers they assign to the same proposal. Mr. Harvey has ably demonstrated this phenomenon in his analysis of scoring styles in the Protest Report for this procurement.[180]

As an example, Mr. Harvey points to the recent procurement for 30,846 square feet of office space in Anchorage.[181] Five evaluators scored four offers. The scores broke down as follows:[182]

	Offer 1	Offer 2	Offer 3	Offer 4
Eval 1	18	18	25	13
Eval 2	18	18	27	22
Eval 3	20	22	26	23
Eval 4	21	21	26	14
Eval 5	19	23	23	16

In some cases, the variation in the scores assigned to a given offer varied by more than fifty percent. For instance, Evaluator Number 3 gave Offer Number 4 23 points, while Evaluator Number 1 gave the same offer only 13 points. Significantly, though, there was less variation in the order of finish—in the relative position in which the raters put the different offers. All, for example, rated Offer Number 3 at the top, although the raw scores they gave this offer varied.

Mr. Harvey's table teaches much more than the mere variability of subjective scores, however. An important principle of procurement can be illustrated by comparing Offers 1 and 2.

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179 *DBA Systems, Inc.*, B-224306, 86-2 Comptroller General Decisions ¶ 722 (1986); *see also Alfa Laval Separation, Inc. v. United States*, 175 P.3d 1365, 1367 (Fed. Cir. 1999) ("substantial chance").

180 Protest Report at 13.

181 *Id.*

182 *Id.*, Ex. 3.

Let us suppose these two vendors were competing in a two-bidder procurement. Using all five evaluators' scores, it is plain that Offer 2 would prevail over Offer 1. Three evaluators rated it equal to Offer 1, and two rated it superior. Not one rated it inferior.

However, if disparate evaluators are used to score Offers 1 and 2, the result becomes capricious. Suppose a team of Evaluators 1, 2, and 3 scores Offer 2, and a team of Evaluators 3, 4, and 5 scores Offer 1. Offer 2 will be credited with scores of 18, 18, and 22, averaging 19.3. Offer 1 will be credited with scores of 20, 21, and 19, averaging 20.0. Offer 1 prevails. This is so even though not one evaluator, comparing head-to-head, considers it superior to Offer 2.

Because of the random element that enters the process when the subjective scores of disparate evaluators are compared against each other, this kind of evaluation is widely disfavored. For example, federal Department of Health and Human Services contracting officers are told:

> To the extent possible, the same evaluators should be available throughout the entire evaluation and selection process to ensure continuity and consistency in the treatment of proposals.
>
> * * *
>
> Whenever continuity of the evaluation process is not possible, and either new evaluators are selected or a reduced panel is used, each proposal being reviewed at that stage of the acquisition should be reviewed by all members of the revised panel unless this is impractical because of the receipt of an unusually large number of proposals.[183]

The principle is logical. One should not inject a random element into a selection process that is supposed to choose based on merit, if the random element can be avoided.[184]

The principle takes on added importance in a procurement where, as here, there are myriad and complex elements that can be traded off against one another. If one bidder puts most

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[183] U.S. Dep't of Health and Human Services, DHHS Project Officers' Contracting Handbook (2003), at IV-7.

[184] The citations in the division's brief do not negate this widely recognized principle. For example, the chief case the division relies on is *In re PADCO, Inc.*, 1996 WL 97480 (Comp. Gen. 1996), which held that "[g]enerally, the composition of a technical evaluation board or committee is within the discretion of the contracting agency . . . even the fact that the composition of the evaluation committee or board changes during the course of a procurement does not automatically indicate anything improper . . . ." While the quoted language sounds favorable to the division, a review of the case itself shows that it has nothing to do with the issue of disparate evaluation. In *PADCO*, the RFP for a USAID project in Morocco specified that the PEC would include representatives of the Moroccan government. The Moroccan representatives proved to be unavailable, and so a committee of only USAID officers reviewed all of the proposals. The only "change" at issue was that the exact composition of the PEC changed between what was contemplated when the RFP went out and what was actually available when the PEC was appointed. *PADCO* did not involve changes to the composition of a PEC in midstream, with one PEC scoring bidder A and another scoring bidder B.

of its compensation into the cost component of the bid, and another shifts part of the compensation to an adjustment of rebates or discounts in the technical component, a common committee can keep track of the divergence and account for it in the scores. Disparate committees cannot.

With this principle of continuity of evaluation in mind, let us turn to the history of the procurement at issue in this case.

After the division lost Aetna's bid for two months under unsatisfactory circumstances, it faced a difficult situation. If it started the procurement over, there would be an unacceptable delay in selecting a vendor to begin performing on July 1. If it awarded the contract to Premera, Aetna would have an extraordinarily strong basis for a protest. It needed Aetna's cooperation in arriving at an agreed remedy. To its credit, Aetna did take a cooperative approach, agreeing to the division's proposal for a revived, expedited selection process building from the existing RFP and bids. But Aetna was concerned about minimizing randomness in the scoring process; it wanted a two-of-three overlap when the committee screened the Aetna bid against Premera's prior score to determine reasonable susceptibility for award, and when best and final offers were scored it wanted both vendors scored by the new committee. It signed an agreement that, fairly read, contemplated that procedure.

Against the background of the lost bid and the victim's cooperation, the division had a particularly strong obligation, in Justice Holmes's words, to "turn square corners" with Aetna as it moved forward.[185] Instead, it violated the reasonable import of its agreement with Aetna in two respects.

The first departure from the agreement was the use of a committee to screen Aetna for reasonable susceptibility for award that included only one, not two, of the Premera scorers. This departure had no immediate consequences, because Aetna was, in any event, successful in getting past the screening round.

The second departure occurred on February 28. Instead of taking the time, which had been set aside in the agreement, to have the new committee score the Premera proposal, the division decided the award of a $30 million contract in just five hours and seven minutes. The new committee did not score the Premera proposal at all. The restructuring of a multimillion-dollar element of Premera's technical proposal passed unnoticed, its financial consequences for

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185 *Rock Island, A. & L. R.. Co. v. United States*, 254 U.S. 141, 143 (1920).

the state unexplored. Instead, the new committee's scores for Aetna were stacked up against the scores of mostly different evaluators from an earlier Premera proposal. Even though the single evaluator who had actually scored both proposals thought Aetna's to be substantially better, the award went to Premera.

The division notes that it is standard practice, with best and final offers, to score only "the changes" and to rely on previously calculated scores for the unchanged elements.[186] This is likely entirely appropriate in standard procurements, where the same committee scores all offers throughout. It was not appropriate here where the state had agreed to do otherwise and where the mixing of disparate evaluations injected a random element into the selection.

At this stage, the first violation of the agreement compounded the harm from the second. If the division was not going to have the reconstituted PEC score the latest Premera proposal from beginning to end, at least some of the resulting comparison of non-comparable scores would have been eliminated if two, rather than one, of the evaluators had genuinely been authors of the Premera scores being used for comparison. Instead, scores from Gray and Williams were stacked up against scores from Porter and Shier.

As found in section II-A-2, there is a strong possibility that Aetna would have prevailed in the selection had the reconstituted PEC scored both proposals as required. This is a sufficient basis on which to sustain the protest.

After the above conclusion appeared in the May 16 proposed decision, two new arguments were offered against it that require brief attention. First, Premera appears to contend in its proposal for action that the protest should not be sustained because Aetna's proposal should have been rejected at the outset as nonresponsive.[187] The basis for this contention is that Aetna's first proposal listed four references, whereas the RFP called for five. The argument fails because the PEC and the procurement officer had discretion to, and did, deem the deficiency not to be material.[188] Premera's opening bid had similar errors and benefited from the same discretion.

Premera also contends that Aetna's first proposal should not have been found "reasonably susceptible for award" in the screening round by the Miller-Shier-Porter PEC,[189] comparing the offer unfavorably to its own February 13 best and final offer. However, Aetna's first proposal was rated higher than had been Premera's corresponding (first) proposal, and Premera's first

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186 Att. 10 at 8.
187 Premera's proposal for action at 21-22.
188 *See* 2 AAC 12.990(12); *Laidlaw Trans., Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1033 (Alaska 2005).
189 Premera's proposal for action at 22-23.

proposal had already been found reasonably susceptible to award. It would therefore have been an abuse of discretion for the PEC and the procurement officer to do as Premera advocates and to reject Aetna's bid at this screening stage.

2. Protest of Proposal Discussions

a. Legal Principles Applicable to the Second Ground for Protest

Alaska's procurement code and the implementing regulations set up parameters for the interaction with offerors at the various stages of a solicitation for competitive sealed proposals. The starting point for any analysis of these parameters is AS 36.30.240, a statute modeled on, and nearly identical to, § 3-203(6) of the Model Procurement Code.[190] Section 240 reads, in relevant part:

> As provided in the request for proposals, and under regulations adopted by the commissioner, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers.

On its face, § 240 contains a potential ambiguity. The "discussions" in the first sentence are plainly limited by purpose: they must be "for the purpose of clarification" of the solicitation requirements or the offer. The second sentence then sets out the principle that "any opportunity" for discussion must be offered on an equal basis. The question that the language does not resolve definitively is whether "discussions . . . for the purpose of clarification" are the only kind of discussions that can be held.

The Model Procurement Code commentary for MPC § 3-203(6) resolves this ambiguity. Comment 1 addresses the first sentence of the provision, and indicates that "clarification" means limited exchanges "for example, to resolve minor or clerical errors or ambiguities." It indicates that this kind of discussion is for situations where best and final offers will not be sought. Comment 2 addresses the second sentence, indicating that there is another variety of permissible "discussion"—not limited to the purpose of clarification—where the procurement officer does

[190] *See* letter opinion of Harold Brown, Attorney General, regarding HCS CSSB 341 (Fin) (June 5, 1986) (Aetna Ex. LHA-B) (noting use of MPC as model); Report of the Senate Select Interim Committee on Procurement Practices and Procedures (January 13, 1986) at 3-4 (Aetna Ex. LHA-A).

anticipate revision of the proposals or the solicitation of best and final offers. With the commentary to its model in mind, it is possible to conclude that § 240 authorizes substantive discussions, going beyond clarification, in the interval between determination of which offers are reasonably susceptible to award and the receipt of best and final offers.

Alaska's procurement regulations add some detail to this framework. The regulation at 2 AAC 12.285 authorizes preliminary communications "to clarify uncertainties or eliminate confusion concerning the contents of a proposal," provided the result is not a "material or substantive change" in the proposal. By its terms, this regulation is limited to communications "[i]n order to determine if a proposal is reasonably susceptible for award," and thus it applies only to the earliest stage of evaluating offers.

Once the proposals reasonably susceptible for award have been identified, 2 AAC 12.290 governs the discussions that may lead to best and final offers. The regulation does not alter the scope of those discussions as set out in AS 36.30.240. The regulation limits the discussions to a closely defined stage of the selection process. Once a best and final offer has been submitted, further discussions and changes to proposals "may not be allowed before award" unless the Chief Procurement Officer (Mr. Jones) or the agency head (in this case, the commissioner) makes a written finding that it is in the state's best interest to reopen the process preliminary to another round of best and final offers.[191]

The regulations go on to provide for selection of a contractor and issuance of a notice of intent to award.[192] After the notice of intent has been issued, 2 AAC 12.315 permits negotiation with the highest ranked proposer to obtain the most favorable terms for the state, provided the changes are reasonable and do not alter the ranking of the highest-ranked proposal.

The requirement of fairness and equal treatment extends to the discussions that occur leading up to best and final offers.[193] Agencies are not, however, compelled to conduct the same discussions, or even the same quantity of discussions, with each participant.[194] They can instead tailor their discussions to the particular weaknesses or ambiguities of a given offer.

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[191] 2 AAC 12.290(c).

[192] 2 AAC 12.300 - .310.

[193] *See* AS 36.30.240.

[194] *See Biospherics, Inc. v. United States*, 48 Fed. Cl. 1, 9 (2000).

b. Unequal Discussions

Premera benefited from proposal discussions with the division that greatly exceeded in volume those extended to Aetna. The Premera discussions spanned twelve days and dozens of pages of questions and answers during the period when Aetna was still on the sidelines. When Aetna rejoined the competitive process in late February, there was time for only a single day of proposal discussions, and in Aetna's case they involved only a few pages of correspondence, with nontrivial clarification to only three of the twenty technical areas of Aetna's proposal.

Despite the lopsided imbalance in the quantity of discussion, this pattern does not, by itself, represent unfairness. Aetna's vast experience in the Alaska market gave it a considerable advantage in framing a first proposal. Perhaps due to its lack of experience as the state's claims administrator, Premera's offer did not address all aspects of what the state required. It is permissible, and in the public's interest, for a procuring agency to foster competition by working with a bidder to crystallize its proposal. To the extent that Aetna's proposal needed the same kind of clarification—where it, like Premera, neglected to describe a range of services it was offering or misunderstood the significance of a check-box on the RFP—the division provided the same opportunity for clarification. In Aetna's case, the opportunity seems to have been needed in fewer areas.

While the quantitative difference in proposal discussions is not particularly troubling in the context of this procurement, there is a qualitative difference as well. The division's lengthy discussion with Premera about the network access fee started as an effort to clarify the proposal and pin the vendor down on exactly how the state fisc might be impacted by its handling of this expense. In the end, the effort changed into something more substantive. By February 24, the procurement officer was prompting Premera, not to clarify, but to restructure its proposal with respect to $6.88 million dollars.

As explained above, AS 36.30.240 does not limit discussions at the stage the procurement had reached on February 24—just before submission of best and final offers—to clarification. It was permissible for the division to address restructuring with Premera at this stage. In so doing, the division was obliged, however, to offer Aetna a "fair and equal . . . opportunity for discussion

and revision."[195] The record does not show that any of the discussions with Aetna went beyond clarification.[196]

Had Aetna been able show any aspect of its own proposal (either the treatment of network access or some other structural component) that would have benefited from a similar revision, Aetna would have a potentially sustainable protest on this ground. However, Aetna made no such showing. Aetna's own provision for network access had no parallel to Premera's unworkable notion to mix fees with claims. Without a showing of something the division could have discussed with it along the same lines as the network access restructuring, Aetna has failed to demonstrate that the "opportunity for discussion and revision" was anything less than "fair and equal."[197]

The proposal discussions with Premera were technically contrary to law in one respect. The division's regulation at 2 AAC 12.290(c) expressly prohibits proposal discussions between submission of a best and final offer and the notice of intent to award. The only exception is where the state's Chief Procurement Officer or a cabinet level official has made a special finding to authorize the reopener. In this case, the division took in a best and final offer from Premera on February 13, but without any special authorization continued proposal discussions until, by Walt Harvey's account, February 17.[198]

While the continuation of proposal discussions between the 13th and 17th was contrary to regulation, it likely did not have much impact on the Aetna-Premera competition since the same

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[195] AS 36.30.240.

[196] The most significant issue taken up with Aetna—the request that Aetna submit a single cost proposal rather than a confusing dual proposal—is probably a clarification, but may conceivably have involved restructuring. The record was not well developed on the nature of this change.

[197] *See* AS 36.30.240. Note that in any event, the importance of the restructuring to the result of this procurement is small. The truth of the matter is that the division did not score the revised proposal and did not notice the most important aspect of the restructuring for many weeks. The only potential significance is that had the division complied with the February 23-24 agreement and thus been compelled to spend more than five hours and seven minutes reviewing the bids, it might have discovered and evaluated the increase in retained network savings. This evaluation might have had an effect on Premera's score and thus contributed, in some measure, to a potentially different outcome of the procurement. The record does not provide a basis to determine whether the effect on Premera's score would likely have been upward or downward.

[198] Affidavit of Walt Harvey, ¶ 7. Documents in the record confirm extensive correspondence after the 13th. As to the date of the best and final offer, *see, e.g.,* fax cover sheet from Barbara Russell to Walt Harvey, February 13, 2006; letter of H.R. Bereton Barlow to Walt Harvey, February 13, 2006 (both in division's May 10 evidentiary submission, Premera stack); Att. 5a at 51 (offer scored on February 16). Harvey's affidavit says at ¶ 8 that the best and final offer was not submitted until the 17th, but the division's counsel has confirmed that ¶ 8 was in error.

The division contends that the February 13-17 discussions were held under 2 AAC 12.285. That regulation is limited to discussions for the purpose of determining if proposals are "reasonably susceptible for award," a determination that had already been made for Premera by February 13. To be adaptable to this kind of situation, 2 AAC 12.285 would require amendment.

discussions could have been held when proposal discussions reopened, with Chief Procurement Officer approval, on February 24. The technical error adds no appreciable weight to the procurement defect discussed in Part II-B-1.

C. Conclusion

The protest must be sustained on Aetna's first ground. The minimal irregularity identified in connection with Aetna's second ground would not be sufficient to sustain a protest on its own, because it could not meet the test for prejudice described in Part II-B-1-a above. As an adjunct to the first ground for the protest, it adds insignificant weight.

III. Remedy

A. Range of Possible Remedies

Alaska Statute 36.30.585 requires implementation of an "appropriate" remedy if a protest is sustained. In this case, Aetna proposes the following remedy:

i. February 28 proposals to be scored immediately by uninterested three-person team using point system in RFP, except as provided in iii;

ii. Team to include one consultant acceptable to all parties or, if no agreement among the parties, to be selected by the ALJ from the parties' nominees;

iii. Team to amend proposals to assemble all financial elements under the cost component, RFP section 7.23;

iv. If Aetna is selected, contract to be "issued" immediately without a notice of intent or negotiation process.

If the selected remedy entails or risks a delay in resolution beyond July 1, Aetna has indicated a willingness to continue to operate under its present contract on a month-to-month basis. Although that contract cannot be extended by ordinary means, a short-term extension is available to the Chief Procurement Officer under 2 AAC 12.485's provision for unanticipated circumstances, if he finds it within the best interest of the state.

The proposed decision of May 16 considered Aetna's proposal and similar variants, as well as wholly different potential remedies including (1) canceling the existing contract and permitting a new procurement process, with Aetna to carry on month-to-month in the meantime, and (2) permitting Premera to retain the contract but award bid preparation costs to Aetna. The proposed decision arrived at the following putative remedy:

i. The February 28 proposals of both Premera and Aetna were to be scored in their entirety, as soon as practicable, by the original evaluation team for Premera's February 13 offer: Sheri Gray, Freda Miller, and Mike Williams.

ii. If any member of this team were unavailable, the division was to notify OAH and the parties immediately. Any party could nominate a replacement.

iii. The scoring was to be completed no later than May 31, 2006.

iv. The scoring method set forth in the RFP was to be followed.

v. Additional proposal discussions were prohibited.

vi. The scoring team was to consider information developed in the protest about the handling of network access costs, and was permitted to consult with an expert to better understand that or any other issue.

vii. If Aetna was selected, the contract award was to proceed as provided in 2 AAC 12.300 – 12.315.

The recusal of Freda Miller makes this proposed remedy impossible, although similar variations using a different committee remain an option.

In its response to the proposed decision, while holding to its overall view that the protest should be denied and no remedy imposed, Premera supplied a thoughtful review of alternative remedies that it viewed as preferable to the one tentatively chosen. Among the alternatives Premera explored was allowing the contract to stand but limiting it to its initial three-year term, without exercise of extensions, with rebidding at its expiration. Premera stated that this remedy "would be supported by a balancing of the statutory factors," but "would also permit Premera to recoup its bid and implementation costs through performance, rather than those costs being simply a liability to the state."[199]

B. Statutory Factors

Under AS 36.30.585, the deciding officer must consider the circumstances surrounding the procurement, including six specifically enumerated factors:

> the seriousness of the procurement deficiencies, the degree of prejudice to other interested parties or to the integrity of the procurement system, the good faith of the parties, the extent the procurement has been

[199] Premera's proposal for action at 11.

> accomplished, costs to the agency and other impacts on the agency of a proposed remedy, and the urgency of the procurement to the welfare of the state.

These will be considered under the subheadings below.

1. Seriousness of the Procurement Deficiencies

The procurement deficiency regarding the evaluation of proposals was quite serious. It entailed not merely the selection of an inappropriate and capricious means of comparing proposals, but the selection of that means in contravention of an agreement with the bidders. It produced an outcome in which it is impossible to have any confidence that the right selection was made. Nonetheless, a procurement deficiency of this kind is not as serious as one that involves dishonesty or corruption.

The extension of proposal discussions between February 13 and February 17 was not, in the context of this procurement, a significant deficiency.

2. Prejudice to Other Interested Parties or to the Integrity of the Procurement System

To ignore these procurement deficiencies, or to impose a toothless or inadequate remedy, would harm the integrity of the procurement system. Administrative processes are not perfect, and crises akin to the one precipitated by the rediscovery of the Aetna bid will occur again in the future. Bidders who work with the agency to resolve these crises need to feel confident that the procedural solutions they agree to will be construed fairly and will be honored, and that the proposals they ultimately put forward will receive serious consideration. An adequate remedy will help to prevent that trust from being undermined.

On the other hand, Premera, which has no responsibility for the problems with this procurement, may be prejudiced by any remedy that entails a reopener of the evaluation process. Prejudice to Premera would occur if the selection process were reopened *and* Premera were not selected, or if the process were reopened in such a way that it delayed the start date for the new contract.

Premera reported that it expected to have spent or irrevocably committed $2.3 million in furtherance of the contract by mid-May, including the hiring of some staff and beginning the buildout of office space in Juneau.[200] There is not enough detail to assess whether all of this expense is both unrecoverable and solely attributable to this contract, but Aetna has chosen not to

[200] Affidavit of Jeff Davis, ¶ 21; *see also* Second Affidavit of Jeff Davis.

controvert Premera's evidence and one cannot doubt that Premera has incurred very substantial startup costs. If the contract were canceled, these costs would fall either on Premera or, if Premera were able to bring a successful claim against the state, on the public. In either case, the wasted expense of preparation is undesirable.

Part of the reason that Premera's investment is so far advanced is that this appeal has required eight weeks to resolve. The division elected not to staff this case in a manner that would have permitted it to be heard and decided in late April, as offered by this office and Aetna. The division also declined a March 3 invitation to explore a cooperative agreement to preserve the status quo, and denied a timely request for a stay of the contract award.[201]

The division faults Aetna for this state of affairs, arguing that Aetna should have sought a stay in the Superior Court. However, it is not fair for the division to fault Aetna for failing to get the division overturned in court; the division must live with the consequences of its own decisions.

On the other hand, Aetna faults Premera for proceeding with startup expenses even though a strong bid protest was pending. Again, the blame is unfairly placed. With the likelihood that it would need to serve 68,000 new customers beginning July 1 and with no stay in place, Premera did not have the option to wait for an outcome before beginning to prepare; nor would it be wise for the state to encourage an apparently successful contractor, in the absence of a formal stay, to defer preparations when the result might be disruption to the lives of many state retirees and employees.

The problem of lost startup costs would be avoided in a remedy that does not entail a reopening of the 2006 selection process, such as the remedy of allowing the contract to stand but requiring a new procurement in three years.

3. Good Faith of the Parties

The Alaska Supreme Court has indicated that this statutory factor relates to the subjective good or bad faith of, not merely the bidding parties, but also the procuring agency.[202]

There is no evidence in the case of bad faith on the part of Premera.

Premera contends that Aetna has acted in bad faith, relying primarily on an allegation that Aetna obtained Premera's cost bid on February 21 in a bad faith effort to gain advantage in a

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[201] Protest Report, Ex. 1. A stay would presumably have required the division to push back the start date of Premera's contract, extending Aetna's administration on a month-to-month basis.

[202] *See Lakloey, Inc. v. University of Alaska*, -- P.3d. -- , 2006 WL 829754 (Alaska 2006).

later bidding round. Among other defects, this claim is based on a faulty chronology of the events of February 21; Aetna learned the price before it could have surmised there would be another bidding round.[203] The allegation of bad faith by Aetna is not sustainable.

With respect to the agency, there are some parts of the history that might lend incomplete support to an inference of bad faith on the part of isolated personnel: the failure to look seriously for Aetna's missing binder, the quick departure from a fair reading of the February agreement, and the lack of deliberation on February 28. I am required by Alaska Supreme Court precedent to acknowledge such circumstances in evaluating a subjective state of mind such as bad faith.[204] However, the totality of the evidence indicates that the responsible individuals in the agency, while in some cases careless of Aetna's rights, were not motivated prior to March by a subjective intent to deprive Aetna of a fair opportunity to compete. There is a presumption (rebutable in some circumstances) of good faith on the part of agency decisionmakers;[205] however, I do not think it is necessary to resort to the presumption to find that the relevant state officials performed their duties in February with subjective good faith.

Once the decision for Premera was made, the division quite rapidly became hostile to Aetna as a potential litigation adversary. The tenor of the March 21 decision denying the protest, and particularly the effort to blame Aetna for the loss of the binder, suggests that some in the division may have difficulty regaining their objectivity regarding this selection process. This is not bad faith, but it is a basis for concern that any future remedy might require monitoring to ensure that it was administered fairly.

The division's and its counsel's actions relating to Freda Miller are described in section II-A-3 above. By meeting with Ms. Miller on May 18 and suggesting recusal to her, rather than presenting the new facts to the administrative law judge to be evaluated with participation of all the parties, Mr. Jones unilaterally took action to frustrate a remedy that was then under consideration in the AS 36.30.590 appeal process. Mr. Jones testified that he "was asked" by

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[203] Premera's proposal for action at 8-9. Premera's other bases for this allegation are insubstantial. Premera contends that Aetna failed in bad faith to disclose Miller's prior connection to Aetna. As noted in Part II-A-3, Premera has not shown that the connection was significant. Premera has also not shown that the Aetna negotiators on February 22-23 knew of this connection. As an additional argument for bad faith, Premera points to the fact that Aetna's counsel once quoted Commissioner Nordstrand out of context in a brief. If occasional use of quotations out of context by counsel were a basis to impute bad faith, the finding would have to extend to others besides Aetna.

[204] *Raad v. Alaska State Commission for Human Rights*, 86 P.3d 899, 909-10 (Alaska 2004).

[205] *E.g., Bruno v. Peterson*, 944 P.2d 43, 49 (Alaska 1997).

counsel to take this action. Bearing the presumption of good faith in mind, the present record does not support a finding that Mr. Jones was in bad faith when he took this action.

4. Extent the Procurement Has Been Accomplished

The procurement is complete. Performance on the contract has already begun in the sense of preparation to take over service to state employees, so that a reversal of course at this time would be expensive. However, if there were a rescoring of proposals at this time, either party, if it won, would still be in a position to go forward with the contract on July 1. The overall process is not so far accomplished that there is a risk that bringing in a new vendor would interrupt service to state employees.

5. Costs to the Agency and Other Impacts on the Agency of a Proposed Remedy

The agency has largely passed up the opportunity to provide evidence of costs or impacts of any remedy. It has opined that extending the current Aetna contract would cost $500,000 per month more than the Premera contract, but the record does not permit verification of the estimate. One cannot, however, ignore the possibility that a remedy that eventually results in award of the contract to Aetna could lead to significant monetary liability to Premera.

This consideration is partly or fully counterbalanced by two factors. First, if Aetna is denied a remedy that puts its proposal back into contention, Aetna will be entitled to bid preparation costs. Hence, costs to the state are a certainty, regardless of the remedy selected.

Second, if Aetna is chosen in a new round of scoring, it will be because Aetna has the better proposal. This could be because a more deliberate weighing of the bids might show that the Aetna proposal would leave the state in a better overall financial position, when network access expense recoupment and other matters are fully explored. It could be because Aetna might prove to have offered a better package of services, giving better value for money. In any case, one can be certain that Aetna would not succeed to this contract award unless there were at least some upside for the state—some improvement over the offer Premera has made.

The alternative remedy of requiring a new procurement round after three years, rather than permitting routine extension of the contract, entails some expense to the state in preparation of an RFP. No party has indicated that the expense is significant. The expense may well be counterbalanced by the opportunity to obtain a better contract through competition.

6. Urgency of the Procurement to the Welfare of the State

The procurement is urgent. A remedy of a kind that would significantly push back the start date of the new contract would cause disruption and uncertainty with state employees and retirees. If it involved a cancellation of the contract and an entirely new procurement, it would also run the risk of causing Premera to abandon the battle, leaving Aetna as the only viable competitor.

7. Other Considerations

AS 36.30.585 mandates the selection of an "appropriate" remedy in light of the full range of "circumstances surrounding the solicitation or procurement." In evaluating whether the situation calls for a limited remedy as opposed to a disruptive and expensive one, it makes sense to weigh the likelihood that, had there been no deficiencies, the protester would have won the procurement.

For the protest to be sustained in the first place required a focused showing of "prejudice," *i.e.*, that the protester would have been competitive and that the error at issue deprived it of "a reasonable chance of receiving an award."[206] In making that determination, the focus was narrowly upon the precise error being protested, that is, the use of an improper scoring system. Indeed, in that context Aetna substantially exceeded the "reasonable chance" threshold for a finding of prejudice. Had the February 28 offers both been scored and scored correctly, and all other aspects of the procurement left the same, it is a toss-up which bidder would have won.

At the remedy selection stage, the focus is no longer solely on the error at issue; one can consider the broader context. If, looking at the whole context, the protester would almost certainly have won in a properly-conducted procurement, there is added basis for an intrusive remedy that potentially reverses the outcome. If, on the other hand, the protester would have had only a less than even chance of winning a wholly proper procurement, the basis for a remedy that potentially imposes an outcome change is diminished.

In this case, looking at the procurement as a whole, one must return to the factual matters explored in Part II-A-5, which weighed Aetna's chances of prevailing in a bidding process where it did not, as a result of errors in the process that are not directly at issue in the protest, receive notice of its competitor's lower price. Part II-A-5 rejected the division's and Premera's contention that Aetna *could not* have prevailed in such a contest. However, it is inescapable that

[206] *DBA Systems, Inc.*, B-224306, 86-2 Comptroller General Decisions ¶ 722 (1986); *see also Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999) ("substantial chance").

Aetna would have faced a greater challenge. Instead of having certain knowledge that it must find a way to greatly reduce the formal cost component of its bid, Aetna would have been competing blind, and it may or may not have chosen the correct strategy.

With the benefit of knowing Premera's first bid, Aetna seems to have achieved rough parity with Premera. Without that knowledge, Aetna's chance of prevailing would have been lower—not an insubstantial chance, for the reasons explained in Part II-A-5, but less than the roughly even odds Aetna could achieve after the February 21 disclosure.

C. Selection of Remedy

This is a close case in many respects, including the selection of a remedy. The proposed decision of May 16, 2006 sustained the protest on both grounds, and it tentatively selected a remedy that was potentially quite expensive and disruptive because the statutory factors seemed to point toward that result. Since then, a vigorous process of considering the parties' proposals for action under AS 44.64.060(e) has led to significant adjustment of many findings of fact, as well as to a change of outcome on the second protest ground.

At this point, my best judgment is that a remedy entailing a rescore and a possible change of vendors is too disruptive and potentially costly to be applied to these facts. Nonetheless, the seriousness of the procurement deficiency and the possibility that the state chose the wrong vendor argues in favor of reopening competition at the earliest convenient time. One element of the remedy will therefore be a requirement that the contract be limited to its initial three-year term, with a new solicitation for proposals to occur at the end of the initial term.

Aetna's response to the RFP was an enormous technical document that could not have been prepared without significant expense. Because Aetna's proposal was lost and then was not fairly considered, Aetna is entitled to its reasonable costs of preparing the proposal.

IV. Order

The contract awarded to Premera Blue Cross on March 13, 2006 shall not be extended beyond its initial term.

This matter is remanded to the Division of General Services to determine and award to Aetna its reasonable proposal preparation costs under AS 36.30.585(c). The division shall notify

OAH when the award is entered. The undersigned retains jurisdiction for the limited purpose of reviewing the award entered on remand, should Aetna request review within 30 days of its entry.

DATED this 25th day of May, 2006.

By: ______________________
Christopher Kennedy
Deputy Chief Administrative Law Judge

Adoption

This Order is issued under the authority of AS 36.30.675, delegated pursuant to AS 44.64.030(c) to the Chief Administrative Law Judge by memorandum dated March 29, 2006 with authority to redelegate to the undersigned, and so redelegated by memorandum dated May 12, 2006.

The undersigned transmitted to the parties a proposed decision and order in the early morning hours of May 17, 2006. By means of a notice that accompanied the proposed document, the parties were given until May 19, 2006 to submit proposals for action under AS 44.64.060(e). The Division of General Services and Premera Blue Cross submitted proposals for action, requesting the revision of certain findings of fact and interpretations of law, as well as the revision of the proposed remedy. Each offered new evidence not previously presented. Pursuant to AS 44.64.030(e)(2), the matter has been taken back under advisement, the proffered evidence admitted, and the proposals for action have been granted in part. The revisions are incorporated in the text above.

The undersigned, on behalf of the Commissioner of the Department of Administration and in accordance with AS 44.64.060, adopts this Decision and Order 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 with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this 25th day of May, 2006.

By: ______________________
Christopher Kennedy
Deputy Chief Administrative Law Judge

The undersigned certifies that on May 25, 2006, at 7:30 p.m., this Notice Regarding Proposed Decision was distributed by fax and/or pdf to the following: Jon Tillinghast, James Sheehan, and Stephen Hutchings, counsel for Aetna; Marjorie Vandor and Michael Barnhill, Assistant Attorneys General, counsel for the Division of General Services; Robert K. Stewart, counsel for Premera.

C. Kennedy

Exhibit A

RFP No. 2007-0200-5946

Agreed upon process by State of Alaska (State), offeror Premera Blue Cross Blue Shield of Alaska (Premera), and offeror Aetna, per teleconference calls held between the parties' representatives on February 22 and 23, 2006:

Modified Evaluation Process Steps:

1. Thursday, February 23, 2006, Aetna proposal evaluation and scoring process is underway, and is anticipated to be completed by the reconstituted Procurement Evaluation Committee (PEC) which consists of three members, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process. All PEC members are State employees.

2. If, after Step 1, it is determined by the State that Aetna's proposal is both responsive and reasonably susceptible for award, the following will occur as to disclosure of Aetna's original price and Premera's price upon which the original notice of intent to award was based (now rescinded) so that the State may proceed to conducting discussions with both offerors under AS 36.30.240:

   a. Prior to release of Aetna's price, the State will ensure agreement with Aetna officials as to the accuracy of its offer (total figure) provided. Only the exact three-year price total provided in Aetna's proposal will be disclosed to Premera after confirmation from Aetna: and

   b. The State will obtain confirmation from Premera as to their exact three-year price total upon which the original notice of intent to award was based, and provide that figure to Aetna.

3. Discussions under AS 36.30.240 with Aetna and Premera will occur Friday, February 24. During discussions, a date and time will be set for receipt of best and final offers from both offerors (tentatively set for Tuesday, February 28, noon Alaska Time).

4. After receipt of best and final offers from Aetna and Premera, both proposals will be scored and a new notice of intent to award will be issued. The State anticipates the notice of intent to award will be issued on or before March 2, 2006.

5. The normal protest and appeal process will be available after the new Notice of Intent to Award is issued as set out in Step. 4.

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Exhibit A

The undersigned parties agree, and to take no exception to the process as set forth in Steps 1 through 5 above:

State of Alaska

By:

Vern Jones
Chief Procurement Officer

2/24/06
Date

Premera Blue Cross Blue Shield of Alaska

By:

Yori Milo
Chief Legal Officer

Date

Aetna

By:

Mike Robinson
Western Regional Head
National Accounts

2-23-2006
Date

RRP No. 2007-0200-5946

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DIVISION OF GENERAL SERVICES & SUPPLY

Exhibit B page 1 of 2

The undersigned parties agree, and to take no exception to the process as set forth in Steps 1 through 5 above: (Premera does not waive exception to a determination that Aetna proposal is responsive and reasonably susceptible for award).

State of Alaska

By: ______________________ 2/24/06
Vern Jones Date
Chief Procurement Officer

Premera Blue Cross Blue Shield of Alaska

By ______________________ 2/24/06
Yod Milo Date
Chief Legal Officer

Aetna

By: ______________________
Mike Robinson Date
Western Regional Head
National Accounts