

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

EMPYRA.COM, INC.,)
)
 v.)
)
 ALASKA PERMANENT FUND CORP.)
 _____)

OAH No. 06-0520-PRO
RFP No. APFC-013-FY06

NOTICE TRANSMITTING FINAL DECISION

Attached is the final decision in this matter, which took effect on December 19, 2006, by operation of law under AS 44.64.060(f), because the final decisionmaker did not act on the proposed decision within 45 days after its issuance. The proposed decision, therefore, has become the final decision.

Judicial review of the final decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the decision is mailed or otherwise distributed.

DATED this 12th day of January, 2007.

By: _____
Neil Roberts
Office of Administrative Hearings

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

Shanthy Subramanyam, AWG
Kathy Hatcher, Dept. of Revenue
Michael Barnhill, AWG

Signature _____ Date 1/12/07

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF
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EMPYRA.COM, INC.)

v.)

ALASKA PERMANENT FUND CORPORATION)

OAH No. 06-0520 PRO

RFP No. APFC-013-FY06

DECISION

I. Introduction

This is a protest appeal. It concerns Request for Proposals AFPC-013-FY06, issued by the Alaska Permanent Fund Corporation for the services of a professional contractor to host, develop and maintain the corporation's website.

The request for proposals was issued on May 19, 2006. Two responsive proposals were received, from Applied Microsystems and Empyra.com, Inc., [Empyra], an Ohio corporation. On June 22, 2006 the corporation issued a notice of intent to award the contract to Applied Microsystems. Empyra filed a timely protest asserting that its proposal had been scored unreasonably low and that Applied Microsystems, as the incumbent contractor, had an unfair competitive advantage. The protest was denied on July 3, 2006. Empyra filed a supplemental protest alleging bias on July 10, 2006, which was also denied. Empyra filed an appeal with the commissioner of the Department of Administration on July 19, 2006. The commissioner referred the matter to the Office of Administrative Hearings. The assigned administrative law judge conducted a telephonic hearing on August 28, 2006.

Because Empyra has not shown that the incumbent contractor had an unfair competitive advantage, that the proposal evaluation committee was biased, or that evaluation was unreasonable, the appeal is denied.

II. Facts

A. Agency Needs

The Alaska Permanent Fund Corporation [“the corporation”, or “APFC”] is a public corporation created by law¹ to manage the constitutional Alaska Permanent Fund,² which has a current market value in excess of \$35 billion.³ The corporation operates a web site that is hosted on a server⁴ operated by a contractor and whose content is managed by the corporation’s employees, using the contractor’s content management system.⁵ The web site received about 300,000 hits last year, the vast majority from users residing in Alaska.⁶ The web site is an important component of the corporation’s public mission:

APFC...has a very broad constituency that includes the general public, government, Fund managers, media and researchers. The APFC’s public-facing web site, apfc.org, is one of the most effective means of communicating with that constituency. The web site is a vehicle to present Fund news, to publish reports and data, to educate on Fund-related topics and matters, to promote programs, to send information and receive comments.⁷

Both users and the corporation’s employees access the web site over the Internet. The corporation’s employees, using passwords, are able to update, edit, and otherwise manipulate the content of the web site through the use of the host’s content management system. The host’s content management system is a key element in the successful

¹ AS 37.13.040.

² Alaska Constitution, Article IX.

³ apfc.org (accessed October 27, 2006).

⁴ A web site “host” provides the portal for Internet access to the web site. The host is located on a “server.” A server is a computer system that receives requests, accesses the appropriate web site page, and sends that page back out to the user. Multiple servers may be included in the system, such as an applications server and a database server. See <http://www.reference.com/browse/crystal/16571> [Internet]; <http://www.reference.com/browse/crystal/36688> [Internet service provider]; <http://www.reference.com/browse/wiki/Website> [web site]; [http://www.reference.com/browse/wiki/Server_\(computing\)](http://www.reference.com/browse/wiki/Server_(computing)) [server]; all retrieved October 29, 2006.

⁵ RFP §4.01.

⁶ Mr. Kendziorok testified that the web site receives about 300,000 hits per year; however, in response to vendor questions, the corporation stated that it receives 300,000 hits per month. MK 0:36, 0:45; APFC Response to Question 5 (May 31, 2006). [References to testimony at the hearing are to the initials of the witness, followed by the hour and minute of the digital recording at which the testimony may be found.]

⁷ RFP §4.01.

operation of the corporation's web site: speed, ease of use, options, and intuitive visual appearance are important characteristics of a desirable content management system.⁸

Another key element in the successful operation of the corporation's website is reliable, high performance connectivity. Electronic data flows between the corporation's web site and the Internet (and ultimately to users) through various electronic connections, including wire, fiber optic cable, microwave, and satellite.⁹ Alaska's geographic location limits the number and variety of Internet connections between Alaska the Lower 48. A fiber underwater optic cable carries traffic from Alaska to the Lower 48, with a branch connection to Juneau. In the event of a disruption of service to that cable, Internet traffic between Alaska and the Lower 48 is carried by satellite transmission or by microwave transmission, which are of lower quality than fiber optic cable. In order to avoid disrupted or degraded service to users resulting from the limited connectivity between Alaska and the Lower 48, the corporation needs to have its host server physically located in Alaska. Servers, wherever located, must be in a secure, environmentally controlled facility, with backup power.¹⁰

B. Solicitation Preparation and Requirements

Kathy Thatcher is an administrative officer for the corporation who oversees all the corporation's procurement activities.¹¹ Ms. Thatcher was the procurement officer for this solicitation.¹²

The request for proposals was issued on May 16, 2006. Section 1.03 (RFP Purpose) of the request for proposal includes the statement, "The host server must be located in Alaska and maintained 24 hours per day by the Offeror." Section 1.05 (Location of Work) states, "The Offeror will host the server on their premises." Section 5.02 (Deliverables) states, "The Offeror will host [the] AFPC web site on the Offeror's servers."

Under Section 7 of the request for proposals, each proposal was to be scored on four factors: Experience (15 points), Methodology/Management Plan (15 points), Work

⁸ SL 1:42; JC 1:25, 1:47.

⁹ MK 1:53.

¹⁰ MK 1:00.

¹¹ KT 0:03.

¹² Moctar Diouf assisted Ms. Thatcher in a training capacity. KT 0:03; 0:05.

Samples (10 points), and Fee Proposal [Cost] (60 points), with an additional Alaska Offeror's preference of 10 points. Under the first three factors, the request for proposals list a variety of questions that it stated would be given "primary consideration."

For the Experience factor, the request for proposals asked offerors for, among other things, a description of the offeror's "experience maintaining a data center," addressing "issues such as redundancy, maintenance, [and] support"; for Methodology/Management Plan factor, it asked for a "detailed discussion of the Offeror's approach and methods to be used to accomplish the objectives and tasks listed in section five of this RFP"; and for the Work Samples factor, the request for proposals required "[g]raphical examples of key pages of URLs to any live websites that showcase samples of the Offeror's work product/s", and "[g]raphical examples, and/or a description and/or a URL link to the Offeror's C[ontent] M[anagement] S[ystem]."¹³

The request for proposals expressly authorized, but did not require, discussions between the corporation and offerors after proposals were submitted, in accordance with Alaska law.¹⁴

Before submitting a proposal, Empyra asked for clarification regarding sections 1.03 and 1.05 of the request for proposals, suggesting they were in conflict.¹⁵ The corporation responded that it saw no conflict: "the servers [must] be located and maintained in Alaska per section 1.03 and the servers must be on the premises of the vendor per section 1.05."¹⁶

C. Content and Evaluation of Proposals

The corporation received two timely proposals, from Applied Microsystems (the incumbent contractor) and Empyra.

Empyra's proposal included servers in Alaska and in Ohio,¹⁷ effectively creating two web site locations. The primary servers were in Ohio, and the secondary servers

¹³ RFP §6.01.

¹⁴ See AS 36.30.240; 2 AAC 12.285, -.290. See generally, In Re Aetna Life Insurance, OAH No. 06-0230-PRO, at 33-37 (May 25, 2006).

¹⁵ Email J. Syphard to M. Diouf, 6/12/2006 at 4:29 p.m.

¹⁶ Email, M. Diouf to J. Syphard, 6/13/2006 at 5:52 p.m.

¹⁷ Empyra Proposal at 10-11.

were to be located in Alaska.¹⁸ Under the proposal, changes to the web site by the corporation's employees using the content management system would be provided to both servers simultaneously.¹⁹ In the event that either of the web sites went down, traffic would be diverted to the other web site.²⁰ The proposal did not describe the physical location of the Alaska servers other than to say they would be in Alaska, it did not include any description of alternatives or plans for locating those servers, and it did not describe the architecture of the proposed Alaska server.

As the procurement officer, Ms. Thatcher reviewed the solicitations for responsiveness. She determined that both were responsive and submitted them to the proposal evaluation committee for review. Ms. Thatcher had selected a proposal evaluation committee consisting of three of the corporation's employees to evaluate the proposals. She chose Marshall Kendziorek (the corporation's information technology manager) to provide technological expertise.²¹ In addition, she selected Joan Cahill and Shawn Lew. Ms. Cahill is an administrative officer for the Alaska Permanent Fund Corporation. She had been the contract manager for Applied Microsystems' contract with the corporation since 2001,²² and was listed as a reference in Applied Microsystems' proposal. In addition to managing the web hosting contract, Ms. Cahill was the corporation's web content manager, with day-to-day responsibility for keeping the web site current and working with the contractor to address operational and design issues.²³ Ms. Lew was in training to take over the content management duties.

D. Protest and Appeal

Empyra filed a protest on June 26, 2006. The protest raised two claims: first, that Empyra's proposal had been given an unduly low score in the evaluation, and second, that Applied Microsystems had an unfair competitive advantage. In support of the first claim, Empyra pointed out that one of the scores on the methodology and management plan factor was grossly disproportionate to the other two scores (2, as compared with 8 and

¹⁸ Empyra Proposal at 13 ("secondary servers in Alaska").

¹⁹ Empyra Proposal at 13.

²⁰ Empyra Proposal at 13.

²¹ KT 0:06.

²² Applied Microsystems Proposal at 9, 29; JC 1:09.

²³ See RFP §4.02; KT 0:06.

10), and that the Empyra proposal had been scored consistently lower across the board than the Applied Microsystems proposal.²⁴ In support of the second claim, Empyra asserted that as the incumbent contractor, Applied Microsystems had “inherent knowledge” resulting in a built-in advantage in the solicitation.²⁵

Ms. Thatcher denied the protest in a decision approved by the corporation’s chief executive officer. The decision noted that Ms. Thatcher had interviewed the members of the proposal evaluation committee, and that the “prevalent reason” for Empyra’s low scores was “the lack of detailed information...relating to the requirement of the host server being based and maintained by the offeror in Alaska.”²⁶ She concluded that the evaluators’ scores were reasonable in light of the request for proposals and the information in the proposals. She noted that the scores of the evaluators were generally consistent with one another, and that there did not appear to be any indication of bias or prejudice. With respect to Applied Microsystems’ status as the incumbent contractor, the decision noted that “we do not have the option to automatically award points to other bidders to compensate for [the incumbent’s] inherent knowledge,” as Empyra’s protest had suggested.

Empyra supplemented its protest on July 10, 2006, asserting that the scores were biased and that inclusion of Ms. Cahill in the proposal evaluation committee was inappropriate, in light of the fact that she was listed as a reference for Applied Microsystems. Although the allegation concerning bias was untimely, Ms. Thatcher considered the information provided by Empyra and declined to alter her prior decision.

Empyra appeals.

III. Discussion

A. Applied Microsystems Did Not Have an Unfair Competitive Advantage

Empyra makes two central arguments. First, Empyra argues that the incumbent contractor had an inherent advantage in this solicitation. Second, Empyra contends that structuring the performance evaluation committee to include only the corporation’s

²⁴ Protest at 1.

²⁵ Protest at 2.

²⁶ Decision at 2.

employees gave the incumbent contractor an additional advantage in the evaluation process.

1. The Incumbent Contractor Did Not Have an Unfair Advantage

A fundamental requirement of the public procurement process is that solicitations must not provide an unfair competitive advantage to particular prospective vendors.²⁷ This fundamental requirement exists in tension with the possibility that in any solicitation, the incumbent contractor, by virtue of its role as the contracting entity, may have superior knowledge regarding the manner in which the services can be provided in accordance with the purchasing agency's preferences, at a relatively low cost.²⁸

The tension between the requirement of equal treatment and the inherent advantages that may accrue to an incumbent contractor warrants attention by the procurement officer conducting a solicitation, but typically does not create any impropriety:

In general, work performed as an incumbent contractor, or under other contracts, that provides prior relevant experience, economies of scale, or other similar advantages (assuming no disqualifying conflict of interest or inside information exists) is not objectionable. In such cases, the contractor may have a competitive advantage, but it is not the result of any action by the purchasing agency and it is not an unfair or unreasonable competitive advantage.^[29]

Similarly, an incumbent contractor may have superior knowledge of the purchasing agency's needs and preferences that comes from working as the incumbent contractor, ancillary to the performance of the contract. Such "inherent knowledge" may provide the incumbent contractor with a competitive advantage, but this is not necessarily unfair.³⁰ The incumbent contractor's inherent knowledge may provide an unfair competitive advantage if it is material information that is not publicly available ("inside

²⁷ See, e.g., McBirney & Associates v. State, 753 P.2d 1132, 1136 (Alaska 1988) ("[C]ourts have guarded against the award of a public contract to a bidder who has received an unfair competitive advantage over other bidders.") [citation omitted].

²⁸ See generally, In Re Alaska Archives, No. 97-005 at 4-6 (Department of Administration, September 25, 1997).

²⁹ In Re Sanders, OAH No. 05-0240-PRO, at 21 (December 22, 2005) [citation omitted].

³⁰ See Government Business Services Group, No. B-287052.3 (Comptroller General, March 27, 2001), citing LaQue Center for Corrosion Technology, No. B-245296 (Comptroller General, December 23, 1991); Harbor Branch Oceanographic Institute, Inc., No. B-243417 (July 17, 1991).

information”). But routine operational information is not material, and a solicitation cannot reasonably be structured to purge any possibility that the incumbent contractor will take competitive advantage of its “inherent knowledge,” born of an ongoing contractual relationship, of the purchasing agency’s needs and the manner in which they may best be met.

In this case, Empyra has not suggested, much less attempted to prove, that Applied Microsystems had inside information. Indeed, Empyra has not pointed to any particular reason why the incumbent contractor in this case has an unfair competitive advantage, other than the “inherent knowledge” that comes from having performed the contract previously. Because Empyra has not shown that the incumbent contractor had inside information, and status as the incumbent contractor is not an inherently unfair competitive advantage, Empyra’s appeal regarding this issue is denied.

2. *The Performance Evaluation Committee Was Not Biased*

In general, an evaluator’s prior knowledge of the past performance of an incumbent contractor, good or bad,³¹ is not grounds for disqualification:

Individual evaluators serving on a [proposal] evaluation committee are not acting in a quasi-judicial adjudicative capacity. They are not required to approach the evaluation process with a blank slate. Rather, they are required to consider the proposals ‘honestly and fairly.’ ... The fact that individual evaluators have independent knowledge regarding the manner in which an existing contractor has performed does not prevent them from considering all [proposals] ‘honestly and fairly.’ They are entitled to exercise their independent judgment...regarding the past performance of the existing contractor even though it is based on personal knowledge, rather than on an independent assessment by the agency, an outside auditor, or a third party.^[32]

Ms. Thatcher testified that including only the corporation’s employees on the evaluation committee was preferable because the employees have direct knowledge of the

³¹ In this case, it may safely be assumed that Applied Microsystems’ performance had been, at the least, satisfactory. Several of the witnesses stressed that the corporation is results-oriented, that it continually reviews its contractors’ performance, and that contractors who do not perform have been discharged.

³² Alaska Archives at 5, note 8 [citation omitted]. See also, e.g., Forest Regeneration Services LLC, No. B-290998 (Comptroller General, October 30, 2002), citing Arctic Slope World Services, Inc., No. B-284481, B-284481.2 (Comptroller General, April 27, 2000).

corporation's needs, and they can be made available to review solicitations more readily than others.³³

To the extent that evaluators have personal knowledge of a purchasing agency's needs or of a prospective vendor's abilities, there is a risk of conflicts or gaps between their knowledge, and the terms of the request for proposals or the contents of a proposal. When one of the prospective vendors is the incumbent contractor, this risk is magnified. Under these circumstances, a proposal evaluation committee restricted to employees of the purchasing agency may have "inherent knowledge" that is shared by the incumbent contractor, but that is not available to potential competitors. Even if the "inherent information" does not rise to the level of materiality, it may nonetheless affect the content of a proposal, as well as the evaluators' perceptions.

Given these risks, it may be sound procurement practice to include a non-employee in a performance evaluation committee where the incumbent contractor is one of the offerors, in order to bring to the evaluation process a perspective similar to that of a non-incumbent offeror, whose knowledge of the purchasing agency's needs and practices is necessarily restricted to the terms of the request for proposals and the content of the proposals. But while this may be sound procurement practice, it is not a requirement of law or regulation, nor is it inherently unfair not to so structure the performance evaluation committee. In short, the procurement officer has discretion to restrict the evaluation committee to employees of the purchasing agency, even when the incumbent contractor is one of the offerors. In this particular case, Empyra has not shown an abuse of discretion.

B. There is No Appearance of Impropriety

In the absence of a showing of actual bias or prejudgment, procurement officials are presumed to act in good faith and to exercise honest and impartial judgment.³⁴ To overcome the presumption, a protestor must provide direct evidence of actual bias or prejudgment, rather than speculation and inference,³⁵ or of a sufficient appearance of impropriety to warrant intervention.

³³ KT 0:05.

³⁴ Bruner v. Petersen, 944 P.2d 43, 49 (Alaska 1997); Earth Resources v. State, Department of Revenue, 665 P. 2d 960, 962 n. 1 (Alaska 1983).

³⁵ Navistar International Transportation Corp. v. United States Environmental Protection Agency, 941 F.2d 1339, 1360 (6th Cir. 1989).

In this case, there is no allegation or evidence of bad faith. Nonetheless, Empyra contends that because Ms. Cahill was listed as a reference by Applied Microsystems, she had a “borderline conflict of interest” creating an appearance of impropriety.

In determining whether there is an appearance of impropriety:

...the [commissioner will] consider the degree to which there is an appearance of impropriety in relation to [these] factors: (1) subjective bad faith by the procurement officials; (2) the basis for the administrative decision; (3) the degree of discretion involved; and (4) applicable statutes and regulations. In addition, the agency should consider the degree to which the outcome of the solicitation could have been affected.^[36]

Ms. Cahill testified that she has no personal or financial interest in Applied Microsystems, and that she was listed as a reference without her prior knowledge, presumably because she had managed the contract and had personal knowledge of Applied Microsystems’ past performance. In this case: (1) there is no evidence of subjective bad faith;³⁷ (2) Ms. Cahill’s evaluation was consistent with the other evaluators (Empyra’s primary objection is to Mr. Kendziorek’s scoring, not Ms. Cahill’s); (3) the evaluation of the technical merits of a proposal is necessarily subjective and is highly discretionary in nature; and (4) Ms. Cahill had no actual or apparent conflict of interest, and no statute or regulation precluded her participation in the evaluation. Furthermore, even if Ms. Cahill’s score were omitted, Empyra would still not be the highest-ranked proposal. In light of these considerations, there is no appearance of impropriety.

C. The Evaluation Was Not Unfair

Empyra contends that the evaluation was unfair. Empyra makes a variety of arguments in support of that contention. First, as a general proposition, Empyra contends that the evaluation was overly subjective and failed to identify with sufficient particularity

³⁶ Appeal of J & S Services, Inc., No. 02.01 at 9 (Department of Administration, September 17, 2002). See also Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974); see generally Paul Wholesale v. State, Department of Transportation, 994 P.2d 1000-1004 (Alaska 1995); Dick Fisher Development v. Department of Transportation, 838 P.2d 263, 267 (Alaska 1992); KILA, Inc. v. State, Department of Administration, 876 P.2d 1102, 1105 (Alaska 1994); McBirney & Associates v. State, 732 P.2d 1132, 1137-38 (Alaska 1998).

³⁷ As previously observed, a person’s personal knowledge of an offeror’s past performance does not disqualify that person from participating on a proposal evaluation committee. *Supra*, at 8-9. An appearance of impropriety does not exist when the appearance is supported only by suspicion and innuendo, rather than “hard facts.” See, Universal Automation Labs, Inc. v. Department of Transportation, 1992 WL 302872 at p. 20 (G.S.C.B.A., July 7, 1993).

the weight to be afforded particular matters. Second, as an example of such subjectivity, Empyra asserts that the evaluators in general, and Mr. Kendziorek in particular, placed too much emphasis on the location of the servers, in light of the fact that the proposal did not specifically identify that as a scoring criterion. Third, Empyra contends that the evaluation of its content management system should have been based on a dynamic demonstration, rather than solely on static work samples. Fourth, Empyra contends that the evaluators' scores for Applied Microsystems were based on their prior knowledge, rather than on the contents of the proposal. Fifth, Empyra suggested at the hearing that the request for proposals had not provided sufficient information regarding the server location requirement.

1. *Scoring Methodology*³⁸

The Procurement Code, AS 36.30.210(c), provides that:

A request for proposals...must provide a description of the factors that will be considered by the procurement officer when evaluating the proposals received, including the relative importance of price and other evaluation factors.

2 AAC 12.260(b) further provides that:

The evaluation must be based only on the evaluation factors set out in the request for proposals. The relative importance or weighting of each evaluation factor shall be set out in the request for proposals. Numerical rating systems may be used, but are not required. If a numerical rating system is not used, the procurement officer, or each member of the evaluation committee, as applicable, shall explain his or her ranking determination in writing.

Within the limits of these provisions of law, a purchasing agency has substantial discretion in structuring the manner in which proposals are scored. While the request for proposals must describe each important factor to be considered in the evaluation, it need

³⁸ To the extent that Empyra's argument is that the scoring methodology as set out in the request for proposals was flawed, its protest is untimely. However, Empyra's objection may be read more broadly, as a challenge to the scoring by the evaluators, rather than as a challenge to the contents of the request for proposals. Furthermore, there may be good cause to consider an untimely issue when that issue raises significant issues of procurement policy. *See, e.g., In Re Payroll City*, OAH No. 05-0583-PRO at 5 (December 20, 2005); *Celadon Laboratories, Inc.*, No. B-298533 (Comptroller General, November 1, 2006). Because the objection may be read broadly, and because the structure of the scoring component of a request for proposals is an important issue for purposes of procurement policy, Empyra's point is addressed on its merits.

not specifically list each matter that may be considered in relation to those factors.³⁹ When a proposal identifies a general factor for consideration, assigns a point total to that factor, and lists specific questions or considerations to be taken into account in connection with that factor, the evaluators need not rate each subsidiary issue separately and award points to each.⁴⁰ In light of these principles, there is no merit to Empyra's general objection to the scoring methodology used in this case.

2. *Weight Afforded to Server Location*

In this case, all of the evaluators testified at the hearing that they downgraded the Empyra proposal because it lacked information regarding the server to be located in Alaska. Although neither Ms. Cahill's nor Ms. Lew's scores indicate that was a serious deficiency, Mr. Kendziorek awarded only two points on the Methodology/Management Plan factor, and he testified this was largely because of the lack of information regarding placement of a server in Alaska.

Empyra's protest specifically objected to Mr. Kendziorek's score on this factor, and on appeal Empyra continued to assert that its score on that factor was unreasonably low. Empyra argues that the evaluation was unfair, because the scoring factors and subsidiary questions listed in the request for proposals did not specifically address the location of the server as a matter to be considered in the evaluation.

An evaluation must be based solely on the factors identified in the request for proposals.⁴¹ In general, specific questions listed in a request for proposals under each general factor "reflect the criteria that the [evaluators] were to consider in reaching an inherently subjective judgment regarding the relative merits of the proposals with respect to each broad factor."⁴² In the absence of any express limitation, evaluators are not limited to consideration of the specific listed questions, and they may consider any

³⁹ In Re Make it Alaskan, Inc., No. 00.11 at 4-5, 8-9 (Department of Administration, May 1, 2001, reconsideration denied, May 18, 2001); *see also*, Novavax, Inc., No. B-286167, B-286.167.2 (Comptroller General, December 4, 2000).

⁴⁰ *See* In Re World Wide Movers, Inc., No. 97.004 at 3 (Department of Administration, September 19, 1997).

⁴¹ AS 36.30.250(a); 2 AAC 12.260(b).

⁴² In Re World Wide Movers, Inc., at 3, *citing* Waste Management, Inc. v. Wisconsin Solid Waste Recycling Authority, 267 N.W. 2d 659, 668 (Wis. 1978).

matters that were within the scope of the general factors identified.⁴³ In reviewing the weight afforded to particular subsidiary issues, the question is not whether the point scores can be directly tied to particular items mentioned as within the scope of a general factor, but rather whether the weight afforded to any particular matter “was within the reasonable expectations of an offeror, based on the contents of the RFP as a whole.”⁴⁴

In this case, information regarding the manner in which Empyra proposed to meet the requirement that the server be located on its premises in Alaska is clearly within the scope of the general factors for Experience and Methodology/Management Plan, as well as the particular questions identified as the primary considerations for those factors. The location of the server was specifically identified as a requirement of the request for proposals, and a reasonable offeror would have understood that was an important component of the proposal, even the offeror did not know of the specific reasons why the corporation had identified it as such. More importantly, the request for proposals expressly required detailed information regarding the server and its associated data center, and this plainly would have encompassed the server to be located in Alaska. The Empyra proposal wholly omitted any of that information regarding the Alaska server.

Mr. Kendziorek, as the panel’s technical expert, would have understood better than the other members of the evaluation committee why the requirement for a server to be located in Alaska was a significant performance concern, as well as the importance of the associated technical information regarding the server and the data center in which it was located. It is therefore understandable that his score was markedly lower than Ms. Cahill’s or Ms. Lew’s. The discrepancy between his score and theirs reflects the requirement that scores be determined independently, in light of each individual members’ own personal experience and judgment. Empyra’s protest was correctly denied, insofar as it asserted that the evaluators placed too much significance on the proposal’s lack of information regarding the server to be located in Alaska.

⁴³ See, e.g., Advanced Data Concepts, Inc., No. B-280967.8 at 4 (Comptroller General, June 14, 1999) (“While agency is required to identify the significant evaluation factors and subfactors, it is not required to identify the various aspects of each factor which might be taken into account, provided such aspects are reasonably related to or encompassed by the RFP’s stated criteria.”).

⁴⁴ In Re Make it Alaskan, Inc., No. 00.11 at 9 (Department of Administration, May 1, 2001).

3. *Demonstration of Content Management System*

Empyra asserts that the proposal evaluation committee should have requested a dynamic demonstration of its content management system, and that in the absence of such a demonstration its own content management system could not reasonably be compared to Applied Microsystems’.

This argument misconceives both the nature of the evaluation, and the relative responsibilities of the offeror and the evaluators. With respect to the first point, this committee, consistently with general practice in Alaska, was instructed to evaluate each proposal on its own merits against the criteria listed in the request for proposals, rather than to make a comparative evaluation of the merits of competing proposals.⁴⁵ Thus, whether the evaluative tools available to the committee were different for different proposals is immaterial: each proposal was judged separately, on the basis of the tools that were available for that particular proposal. Regarding the second point, an evaluation committee is under no obligation to go beyond the confines of the proposal in order to make an evaluation. Rather, it is the obligation of a prospective vendor to include in the proposal all of the information it deems appropriate for consideration in the evaluation process.⁴⁶

In this case, the request for proposals required the submission of work samples and expressly allowed the offeror to submit either static or dynamic samples. Empyra chose not to include a link to a live web site or to its content management system. Empyra asserts that in its experience, procurement officials typically seek additional information and may engage in discussions with prospective vendors. The request for proposals authorized, but did not require, such discussions. While it may be true that such discussions would have provided the corporation with a better basis for assessing the merits of the respective proposals, the corporation had discretion to limit its evaluation to proposals as submitted. Because Empyra has not shown that the corporation abused its discretion, Empyra’s appeal regarding the lack of a demonstration is denied.

⁴⁵ See, e.g., *In Re Aetna Insurance*, *supra*, at 19; RFP Evaluators Guide, “Comparing Offers”, <http://www.state.ak.us/local/akpages/ADMIN/dgs/policy.htm> (accessed October 30, 2006).

⁴⁶ See, e.g., *Sayed Hamid Behbehani & Sons, WLL*, No. B-288818.6 (Comptroller General, September 9, 2002).

4. Past Performance

(i) Past Performance Could Be Considered

As previously stated, an evaluator's knowledge of an incumbent contractor's past performance is not grounds for disqualification. Nonetheless, the evaluation is restricted to the criteria set forth in the request for proposals. Thus, the evaluator may take into account a particular contractor's past performance (based upon personal knowledge) only to the extent that the evaluation criteria as set out in the request for proposals permit.⁴⁷

The past performance of an incumbent contractor may be included as a consideration either explicitly or implicitly. In this case, Applied Microsystems' past performance as the incumbent contractor was implicitly included as a consideration in both the Experience the Methodology/Management Plan factors. This was entirely appropriate: the corporation seeks new and improved methods of delivering services through the competitive procurement process, but it cannot, nor should it, ignore or discount the established track record of the existing contractor in the evaluation process.⁴⁸

(ii) The Evaluation Was Reasonable

In determining whether an evaluation is reasonable, the question to be determined is "whether the...record discloses the basis for the evaluators' ratings and adequately demonstrates that they considered all of the important factors [as identified in the request for proposals]."⁴⁹ An evaluation is reasonable if "the objective facts...reasonably support [the] evaluations."⁵⁰

⁴⁷ See, In Re Alaska Archives, No. 97-005 at 4 (Department of Administration, September 25, 1997):

Procurement by competitive proposal when there is an existing contractor is always subject to criticism that the existing contractor has an unfair competitive advantage. Insofar as that advantage rests on its prior experience, its demonstrated performance capabilities, and its knowledge and understanding of the agency's needs, the advantage is not the product of anything illegal or unfair in the procurement process, so long as those elements are reflected in the factors and criteria for evaluation as listed in the [request for proposals]. [emphasis added].

⁴⁸ See, e.g., Madison Research Corporation, No. B-287960.2 (Comptroller General, April 25, 2005); TEAM Support Services, No. B-279379.2 (Comptroller General, June 22, 1998).

⁴⁹ In Re World Wide Movers, Inc., at 10, citing King v. Alaska Housing Authority, 633 P.2d 256, 263 (Alaska 1981); State, Department of Education v. Nickerson, 711 P.2d 1165, 1169 (Alaska 1985); Lower Kuskokwim School District v. Foundation Services, Inc., 909 P.2d 1283, 1388-89 (Alaska 1996).

⁵⁰ King v. Alaska State Housing Authority, 512 P.2d 887, 894 (Alaska 1973).

In this case, each of the evaluators testified at the hearing as to the basis for his or her scores. Each identified with specificity the aspects of the proposals relied on reaching a conclusion. Review of the proposals indicates that their reasons are based on objective differences in the proposals. Furthermore, a fundamental premise for Empyra's objection is flawed: only Ms. Cahill had a significant prior hands-on experience with Applied Microsystems' content management system, which was the primary area that Empyra identified as subject to bias as a result of prior knowledge. Ms. Lew was new to the content management functions, and Mr. Kendziorek had only been called upon for occasional technical input. Mr. Kendziorek had participated in annual performance evaluations and was aware of Applied Microsystems' performance from that perspective. His testimony, however, provided examples of specific differences in the proposals as submitted that supported his scores.

Because Empyra has not shown that the evaluators improperly relied on their personal knowledge of the past performance of the incumbent contractor, or that their scores were not reasonable in light of the proposals as submitted, its protest on this issue was correctly denied.

5. *Sufficiency of Request for Proposals*

A request for proposals must provide sufficient information "to enable offerors to compete intelligently and on a relatively equal basis."⁵¹

Testimony at the hearing indicated that Empyra understood the request for proposals to allow an offeror to propose a single level web page publishing (secondary) server in Alaska, with the content management "solution" at a multi-tiered (primary) server outside of Alaska, and that this was what it had intended to offer, while the corporation, by contrast, intended that the request for proposals be understood as calling for a multi-tiered server to be located in Alaska.

Before submitting a proposal, Empyra inquired regarding the server location provisions of the request for proposals, suggesting that there was a conflict between the requirements for the server to be located in Alaska, and the requirement that it be on the

⁵¹ Meridian Management Corporation, No. B-285127 (Comptroller General, July 19, 2000), *citing* J&J Maintenance, Inc., No. B-272166 (Comptroller General, July 29, 1996).

offeror's premises. In response, the corporation confirmed that the server must be both in Alaska and on the offeror's premises. Empyra made no further inquiries regarding the nature of the "server" to be located in Alaska, or what sort of "premises" would satisfy the requirement for placement on the offeror's premises.

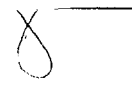
To the extent Empyra suggests that the request for proposals did not adequately explain the nature of the corporation's requirements regarding server location, it was aware of the potential for confusion at the time it submitted its proposal. Empyra was on notice that it needed to acquire some sort of "premises" in Alaska, and that its "server" must be located there. There were any number of ways in which a prospective vendor whose primary premises are located outside of Alaska might have attempted to meet the requirement for a server located on the offeror's premises in Alaska. Plainly, it was important for a prospective vendor to determine what the corporation's preferences were, and to clearly explain in its proposal how it intended to meet the express requirement of the request for proposals. A protest concerning the adequacy of the request for proposals in this regard is untimely.⁵²

IV. Conclusion

The purchasing agency did not abuse its discretion in the selection of the proposal evaluation committee, there is no appearance of impropriety, and the scoring was reasonable. For these reasons, the protest appeal should be denied.

DATED November 3, 2006.

Andrew M. Hemenway
Administrative Law Judge



⁵² AS 36.30.565(a); Request for Proposals §1.07.