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

COMPUTER TASK GROUP, INC.	)	
	)	
v.	)	
	)	
DIVISION OF GENERAL SERVICES	)	OAH No. 07-0147 PRO
	)	RFP No. 2007-0200-6813

DECISION ON SUMMARY ADJUDICATION

I. Introduction

This is a protest appeal. It concerns Request for Proposals No. 2007-0200-6813, issued by the Division of General Services to obtain "a variety of temporary information technology and management consulting professional services on an as-needed basis."[1]

The division issued a notice of intent to award the contract and Computer Task Group, Inc. [CTG] filed a timely protest. The division denied the protest and awarded the contract. CTG filed an appeal, which the commissioner referred to the Office of Administrative Hearings.

On appeal, CTG contends that the division erroneously credited another proposer, Dibon Solutions, Inc., [Dibon] with the Alaska bidder preference. The division contends that CTG did not timely raise this issue in its protest, and that in any event the point is without merit. Both parties have requested summary adjudication. Based on the record, the protest is sustained on appeal and this matter is remanded to the procurement officer to implement the appropriate remedy.

II. Facts

The Division of General Services issued Request for Proposals [RFP] No. 2007-0200-6813, seeking "a variety of temporary information technology and management consulting professional services on an as-needed basis." The RFP included 13 categories of services; more than one vendor could be selected in each category, with the highest

---

[1] RFP §1.03.

ranked vendor receiving largest portion of the work to be performed.[2] Offerors could submit proposals on any or all of the categories.[3] The RFP included a 5% Alaska bidder preference as provided by law.[4]

Computer Task Group, Inc., submitted a proposal offering services in more than one category. The division issued a notice of intent to award contracts in several of those categories to Dibon Solutions, Inc. On February 23, 2007, CTG filed a timely protest raising five issues. One of the issues asserted that Dibon is a foreign corporation that "has not registered with the State of Alaska...as a foreign corporation as legally required to conduct business within the State."[5] The protest asked that the Dibon proposal be declared non-responsive as a remedy with respect to that issue.[6] On March 12, 2007, the division denied the protest on this issue. The division agreed that Dibon, as a foreign corporation, is required to register prior to conducting business in Alaska, but concluded that the requirement to register was a matter of responsibility, not responsiveness, which could be attended to after contract award.[7]

CTG filed a timely appeal raising only one issue, which it stated was the same issue it had raised in the protest; however, in its appeal CTG characterized the issue as pertaining to the award of the Alaska bidder preference, rather than as pertaining to responsiveness, and as a remedy it asked not that Dibon's proposal be deemed non-responsive, but that it be rescored without the preference.[8]

On appeal, the material facts are undisputed: Dibon is a foreign corporation; it had maintained a place of business in Alaska for six months prior to submitting a proposal; it has been transacting business in Alaska for more than one year;[9] and at the time it submitted its proposal and at the time the proposals were opened, Dibon did not have a certificate of authority to do business in Alaska.

---

2 RFP §1.04.

3 RFP §1.10.

4 RFP §2.14. *See* AS 36.30.170; 2 AAC 12.260.

5 Protest Detailed Statement of Issues, page 6.

6 Protest page 2; Protest Detailed Statement of Issues, page 19.

7 Decision at 2.

8 Appeal at 1-2.

9 In addition to its physical presence in the state at a "place of business", Dibon's Proposal identifies three major Alaskan clients, First National Bank Alaska, the Alaska Railroad Corporation, and Wostmann

III. Discussion

There are three issues: (a) did CTG's initial protest encompass the issue raised on appeal; (b) if not, is there good cause to accept an untimely protest raising the applicability of the Alaska bidder preference; and (c) is a foreign corporation that transacts business in Alaska, but does not have the certificate of authority required by AS 10.06.705, entitled to the Alaska bidder preference?

In the absence of any dispute as to the material facts, summary adjudication is appropriate.[10]

A. CTG's Protest Sufficiently Raised the Issue Asserted on Appeal

Alaska Statute 36.30.565(a) states in part: "A protest based on alleged improprieties in...a proposed award of a contract must be filed within ten days after a notice of intent to award the contract is issued by the procurement officer." CTG's protest clearly identified Dibon's status as an unregistered foreign corporation as the factual basis for its protest. It did not, however, assert that Dibon was not entitled to the Alaska bidder preference, and the relief sought was a declaration of non-responsiveness rather than a rescoring of the proposals. The division argues that by identifying a new legal argument and requesting a different form of relief on appeal, CTG has in effect asserted an untimely protest.

Alaska Statute 36.30.590 does not specifically preclude an appellant from asserting a new legal theory on appeal that is based on the identical facts identified in the protest as objectionable.[11] Similarly, the Model Procurement Code, upon which the Alaska Procurement Code is based,[12] does not specifically address the extent to which new legal theories may be raised on appeal. In absence of a specific Alaska statute or

---

Associates. Dibon touts "12 years in direct contact and interaction with the State of Alaska" as relevant experience. Dibon Proposal at 18.

[10] AS 36.30.610(b); 2 AAC 64.250.

[11] In this respect, AS 36.30.590 is notably different from AS 36.30.625(a), which expressly precludes new "theories of recovery" on appeal of a contract claim by a contractor of the Department of Transportation and Public Facilities. That the legislature has specifically precluded new theories in a particular form of appeal under the Procurement Code suggests that other appeals under the Procurement Code are not so limited. AS 36.30.590(b), which requires the appellant identify the legal errors in the protest decision, is not jurisdictional; it addresses the form of an appeal, not the timeliness of particular issues on appeal.

[12] *See, e.g.*, In re Aetna Life Insurance, OAH No. 06-0230-PRO at 33, note 190 (May 25, 2006);

regulation, and in the absence of any inconsistent federal statute or regulation, federal procurement decisions may provide useful standards for the application of the Procurement Code in specific factual situations.[13] The Comptroller General has articulated general principles governing the scope of issues that may be raised on appeal from an initial protest for purposes of federal law:[14]

> As a general rule, the timeliness of specific bases of protest raised after the filing of a timely protest depends on the relationship the later-raised bases bear to the initial protest. Where the later-raised bases present new and independent grounds for protest, they must independently satisfy [federal] timeliness requirements; conversely, where the later-raised bases merely provide additional support for an earlier, timely raised protest basis, [the Comptroller General] will consider the later-raised arguments.

In this case, the factual basis for both the initial protest and the appeal is identical: Dibon's status as an unregistered foreign corporation. On appeal, CTG specifically identified a legal argument that was implicit in the protest: thus, the appeal provides "additional [legal] support for an earlier, timely raised [factual] protest basis" rather than a "new and independent [legal and factual] grounds for protest." By bringing the operative facts to the attention of the procurement officer in a timely manner, CTG afforded an adequate opportunity for corrective action to be taken. A protest appeal and an attendant hearing provide an opportunity for both parties to clarify the facts and law applicable to a particular protest.[15]

While CTG's protest identified an inappropriate remedy, selection of an appropriate remedy is initially the procurement officer's responsibility.[16] Because the protest and the appeal rest on exactly the same factual ground, the availability of the

---

13 *See, e.g.,* In re Aetna Life Insurance, OAH No. 06-0230-PRO (May 25, 2006) at 30, note 184 (composition of proposal evaluation committee); In Re Flagship Development LLC, OAH No. 06-0249-PRO at 8, note 28 (August 8, 2006) (discussions with non-responsive proposer); In re Sanders, OAH No. 05-0240-PRO, at 18, note 72 (December 27, 2005) (professional conflicts of interest); *compare* In re Waste Management of Alaska, Inc., No. 01.08 at 12-13 (Department of Administration, April 24, 2002) (declining to follow Comptroller General decisions regarding standard of review).

14 Oceaneering International, Inc., No. B-284360 at 4 (Comptroller General, June 5, 2001).

15 *See* AS 36.30.670(b)(1), (2).

16 *See* AS 36.30.585(a).

Alaska bidder preference was implicit in the initial protest,[17] and only the remedy sought is different, the issue raised on appeal is within the scope of CTG's protest.

B. There is Good Cause to Accept the Protest, if Untimely

An untimely protest may be accepted for good cause.[18] In this case, the division asserts on appeal that there is not good cause to accept an untimely protest concerning the availability of the Alaska bidder preference. Good cause to accept an untimely protest includes both sufficient reason for the delay and other circumstances that warrant consideration of the merits.[19] In deciding whether to accepting an untimely protest, important factors to be considered include: (1) the timing of the protest; [20] (2) the nature of the objections raised;[21] and (3) the strength of the evidence presented.[22]

In this case: (1) the applicability of the Alaska bidder's preference was raised in a timely appeal; (2) a timely protest was filed based on identical facts; and (3) the facts are undisputed. Furthermore, the commissioner's statutory responsibility for statewide procurement oversight, in the context of procurement authority delegated to purchasing agencies, gives the commissioner discretion to issues raised on appeal that were not timely asserted in a protest, but that were considered by the procurement officer.[23] In this case, determining the applicability of the Alaska bidder preference to an unregistered foreign corporation that is transacting business in Alaska is an important issue, and the procurement officer considered CTG's argument in the protest report. Under these

---

17 *Cf*. In re Bachner Company, Inc., Nos. 02.06/.07, at 12 (Department of Administration, October 16, 2002), *reversed on other grounds*, Bachner Company, Inc. v. State, Department of Administration (Superior Court, No. 4FA-02-02674 CI, December 2, 2005); *appeal pending*, State, Department of Administration v. Bachner Company, Inc., No. S-12187 (Alaska Supreme Court) (hereinafter cited as Bachner) (untimely issues heard that is "inextricably linked" to timely raised issue).

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

19 *See generally* In re Scientific Fishery Systems, Inc., No. 98-08, at 2-7 (Department of Administration, July 26, 1999).

20 *See, e.g.*, Bachner at 12.

21 *See* Bachner at 12; In re Spectrum Printing, Inc., No. 98.14, at 8 note 9 (Department of Administration, April 29, 1999).

22 *See* In re Electronic Data Systems, Inc., No. 02.23, at 7 (Department of Administration, December 30, 2002).

23 *See* In re Payroll City, OAH No. 05-0583-PRO, at 5 (December 20, 2005); In re Electronic Data Systems, Inc., No. 02.23 at 13, note 7 (Department of Administration, December 27, 2003), *citing* Matter of DynCorp, 70 Comp. Gen. 38 (1990 WL 293790); In re Waste Management of Alaska, Inc., No. 01.08 at 11-13 (Department of Administration, April 25, 2002).

circumstances, there is good cause for the commissioner to consider the applicability of the Alaska bidder preference on appeal, regardless of whether that issue is within the scope of CTG's protest.

C. A Foreign Corporation Transacting Business in Alaska Must Hold a Certificate of Authority to Qualify for the Alaska Bidder Preference

Alaska Statute 36.30.170(b) provides that:

> 'Alaska bidder' means a person who
> (1) holds a current Alaska business license;
> (2) submits a bid...under the name as appearing on the person's current Alaska business license;
> (3) has maintained a place of business within the state staffed by the bidder or an employee of the bidder for a period of six months immediately preceding the date of the bid;
> (4) is incorporated or qualified to business under the laws of the state, is a sole proprietorship and the proprietor is a resident of the state, is a limited liability company organized under AS 10.50 and all members are residents of the state, or is a partnership under AS 32.05 or AS 32.11 and all partners are residents of the state; and
> (5) if a joint venture, if a joint venture, is composed entirely of ventures that qualify under (1)-(4) of this subsection.

In this case, it is undisputed that Dibon meets the first three criteria: it holds a current Alaska business license; it submitted a proposal under the name on the license; and it has maintained a place of business in the state staffed by an employee for more than six months, servicing Alaska clients over that period of time.

The division does not dispute that because Dibon lacked a certificate of authority, it was not "qualified to do business under the laws of the state" at the time it submitted a proposal and at the time the proposals were opened and evaluated. Assuming that the lack of a certificate at the time it submitted its proposal is a matter of responsibility, rather than of responsiveness,[24] the question on appeal is whether Dibon meets the criterion expressed in subsection (b)(4).

---

[24] On appeal, CTG has not argued that Dibon was required by law to obtain a certificate of authority before submitting a proposal. Arguably, submitting a proposal in response to an RFP constitutes "transacting business" within the meaning of AS 10.5.705 and requires a certificate of authority. If so, then possession of a certificate of authority at the time a proposal is submitted could be considered a matter of responsiveness, in light of the RFP's requirement that all offerors be in compliance with state law. *See* RFP §1.16[a].

The division argues that under the first clause of subsection (b)(4), "is incorporated or qualified to do business under the laws of the state," an entity is qualified if: (1) the entity is incorporated under the laws of any state; or (2) the entity is qualified to do business under the laws of Alaska. CTG contends an entity is qualified if: (1) the entity is incorporated under the laws of Alaska; or (2) the entity is qualified to do business under the laws of Alaska.

Determining which of these readings is correct is an exercise in statutory construction:

> The purpose of statutory construction is "to give effect to the intent of the legislature, with due regard for the meaning that the statutory language conveys to others." Statutory construction begins with the language of the statute construed in light of the purpose of its enactment. If the statute is unambiguous and expresses the legislature's intent, statutes will not be modified or extended by judicial construction. If we find a statute ambiguous, we apply a sliding scale of interpretation, where "the plainer the language, the more convincing contrary legislative history must be." [25]

The legislative intent may be derived from consideration of the statutory provisions and the legislative history,[26] including the broad structure of the applicable statutes,[27] legislative changes to the relevant statutes over time,[28] and any express indications of legislative intent.[29]

In addition to considering the legislative history, the courts will interpret an ambiguous statute in light of any applicable administrative interpretations. When construction of the statute does not involve agency expertise, an agency interpretation, particularly if long-standing, may nonetheless provide useful guidance as to the

---

[25] Tesoro Petroleum Corporation v. State, 42 P.3d 531, 537 (Alaska 2002) (internal citations omitted).

[26] Newmont Alaska Ltd. v. McDowell, 22 P.3d 881, 884 at n. 14 (Alaska 2001).

[27] *See, e.g.*, State v. Alex, 646 P.2d 203, 208 (Alaska 1982); Millman v. State, 841 P.2d 190, 194 (Alaska App. 1992).

[28] *See, e.g.*, North Slope Borough v. Sohio Petroluem Corporation, 585 P.2d 534, 541-543 (Alaska 1978); Lagos v. City & Borough of Sitka, 823 P.2d 641, 643 at n. 3 (Alaska 1991).

[29] *See generally*, Interior Cabaret, Hotel, Restaurant & Retailers Association v. Fairbanks North Slope Borough, 135 P. 3d 1000, 1010-1011 (Alaska 2006) (Matthews, J., concurring); Cook Schuhmann & Groseclose, Inc. v. Brown & Root, Inc., 116 P.3d 592, 600-601 (Alaska 2005) (Bryner, C.J., dissenting in part).

meaning.[30] When construction of the statute involves agency expertise, the courts will adopt the agency's interpretation unless it is unreasonable or there are sound reasons to disregard it.[31]

A. THE STATUTE IS AMBIGUOUS

The division asserts that the plain language of subsection (b)(4) supports its interpretation.[32] The division argues that CTG's reading would have been signaled by commas isolating the clause "or qualified to do business," and claims that a professor of English agrees with the division. CTG responds that using commas to isolate the clause "or qualified to do business" "is regarded as optional by most credible authorities on writing style," citing to one such purported authority.[33]

Perhaps because grammarians do not always agree on matters of style, the Alaska legislative drafting manual states: "Punctuate carefully, but do not depend upon punctuation to convey your meaning. The best way to convey meaning is with concise language arranged logically. Prose written carefully will not depend on punctuation for its meaning."[34] The division's and CTG's competing views reinforce this point: subsection (b)(4) could have been drafted to more precisely articulate the legislative intent, either as CTG reads it:

> (4) is incorporated under the laws of the state, is qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident of the state, is a limited liability company organized under AS 10.50 and all members are residents of the state, or is a partnership under AS 32.05 or AS 32.11 and all partners are residents of the state;

or as the division reads it:

> (4) is incorporated, is qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident of the state, is a limited liability company organized under AS 10.50 and all members are

---

30 Grimm v. Wagoner, 77 P.3d 423, 433 (Alaska 2003).

31 Lopez v. Administrator, Public Employees Retirement System, 20 P.3d 568, 570 (Alaska 2001); Bartley v. State, Department of Administration, Teachers' Retirement Board, 110 P.3d 1254, 1261 (Alaska 2005) [hereinafter, Bartley], *citing* Kelly v. Zamarello, 486 P.2d 906, 910-911 (Alaska 1971); *see* Whaley v. State, 438 P.2d 718 P.2d 722 (Alaska 1968).

32 Memorandum at 9.

33 Response at 9, note 15, *citing* THE ECONOMIST'S GUIDE TO STYLE. The cited reference states: "Use two commas, or none at all, when inserting a clause into the middle of a sentence."

34 Legislative Affairs Agency, MANUAL OF LEGISLATIVE DRAFTING (2007) at 63 (available online at http://w3/legis.state.ak.us/home.htm)

residents of the state, or is a partnership under AS 32.05 or AS 32.11 and all partners are residents of the state.

But the legislature did not choose either alternative, and thus subsection (b)(4) is susceptible of either reading. Although there are no commas setting off the phrase "or qualified to do business," the limiting clause "under the laws of the state" can reasonably be read as applicable to both its antecedents, "incorporated" and "qualified to do business." Indeed, reading the limiting clause as applicable to both antecedents is arguably more natural and fluid.

Most importantly, to read subsection (b)(4) as the division does would render the clause "or qualified to do business" superfluous, and a statute should be not be construed in a manner that renders portions of it unnecessary.[35] Under the division's proposed reading, the clause "or qualified to do business" would not add any entities that are not otherwise eligible for the preference: all corporations, foreign or domestic, would be within the scope of the term "incorporated"; all other business entities (sole proprietorships, limited liability companies, and partnerships) must be domestic. These textual clues make CTG's reading the more logical or "plain" reading.

In addition to these textual clues, the overall statutory scheme supports CTG's interpretation. First, reading subsection (b)(4) as providing a preference to all foreign corporations, regardless of whether they are qualified to do business in the state, would be inconsistent with the much more restrictive treatment of limited liability companies and partnerships, which must be organized under Alaska law to qualify for the preference. Second, to be required to obtain a certificate of authority, a foreign corporation must "transact business" in Alaska.[36] Activities that are required for application of the Alaska bidder preference include maintaining a place of business in the state for at least six

---

[35] *Cf.* In re Hutchinson, 577 P.2d 1074, 1075 (Alaska 1978). It is a general principle of statutory construction that qualifying words apply only to the immediately preceding antecedent. 2A SUTHERAND STATUTORY CONSTRUCTION §47.33 (5th ed. 1992). However, because in this particular case that rule would render the qualifying words superfluous, it does not apply. *Id.* ("The rule is another aid to discovery of intent or meaning and is not inflexible and uniformly binding. Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent." [citations omitted]); *see, e.g.*, Twenty-Eight Members of Oil, Chemical & Atomic Workers Union, Local No. 1-1978 v. Department of Labor, 659 P.2d 583, 588 Note 4 (Alaska 1985) (finding the grammatical rule unpersuasive in light of overall statutory scheme).

[36] *See generally*, Kachemak Seafoods, Inc. v. Century Airlines, Inc., 641 P.2d 213, 216-17 (Alaska 1982) (interpreting former AS 10.05.597).

months, staffed by an employee: a business that meets this criterion is likely to be transacting business within the state within the meaning of AS 10.06.705, and therefore would likely be required to obtain a certificate of authority.[37] Limiting the Alaska bidder preference to foreign corporations that transact business within the state is a logical way of limiting the preference to foreign corporations that have a legally significant nexus with the state.

Because the plain language of the statute does not mandate either reading, it is ambiguous, and the sliding scale of statutory construction must be utilized. Because the wording of the statute and the overall statutory scheme tend to support CTG's reading, under the sliding scale of statutory interpretation that reading should be adopted unless the legislative history indicates a contrary legislative intent.

B. LEGISLATIVE INTENT

The general purposes of the Procurement Code were set out in legislation adopted when the code was enacted in 1986.[38] They include, among other things, fair and equitable treatment of offerors, maximization of the purchasing value of state funds, and facilitating broad-based competition.[39] The purpose of the Alaska bidder preference is "to encourage local industry, strengthen and stabilize the economy, decrease unemployment, and strengthen the tax and revenue base of the state."[40] The Alaska bidder preference decreases the purchasing value of state funds,[41] and is to that extent inconsistent with the general purposes of the Procurement Code. Because "[t]he preference operates to make the cost of doing the public's business more expensive," the

---

37 *See* AS 10.06.718 (non-inclusive list of activities that do not constitute "transacting business").

38 Section 1, Chapter 106, SLA 1986.

39 *Id.*, subsections 4, 5, 6.

40 AS 36.30.180. The division cites to findings articulated in House Bill 45, introduced in the 15th legislature, indicating that the purposes of the Alaska bidder preference also include reducing the state's administrative expenses associated with dealing with out-of-state businesses. House Bill 45, however, was never enacted, and the findings it contains were never adopted by the legislature. *See also*, Irby-Northface v. Commonwealth Electric Corp., 664 P.2d 557, 561 (Alaska 1983) ("the statute's purpose [interpreting former preference language] is to give Alaskan businesses a competitive chance with nonresident businesses in the award of state contracts.").

41 That the Alaska bidder preference reduces the purchasing value of state funds is undeniable. This is not inconsistent with the possibility, reflected in the findings proposed in House Bill 45, that the preference also has the effect of reducing administrative costs, apart from the actual contract price.

Alaska Attorney General has consistently opined that "the Alaska bidder's preference must be strictly construed."[42]

These observations pertain to the Alaska bidder preference in general. At issue in this case is one particular aspect of that preference, namely, its application to a foreign corporation that is transacting business in the state but that is not qualified to do business in Alaska under AS 10.06.705. The legislative history of AS 35.30.170(b)(4) is illuminating with respect to that particular point. Prior to 1986, the Alaska bidder preference was set out in former AS 37.05.230(5). It included the same requirements as AS 36.30.170(b)(1)-(3), and neither of the requirements of AS 36.30.170(b)(4)-(5). In 1986, the Senate Select Committee on Procurement introduced Senate Bill 341, which was ultimately enacted as the Alaska Procurement Code. Senate Bill 341 as introduced included a new requirement for the Alaska bidder preference, applicable to joint ventures, in language identical to current AS 36.30.170(b)(5). That language requires that for a joint venture to qualify for the Alaska bidder preference, all of the ventures must qualify; this requirement in effect rejects a court decision interpreting AS 37.05.230(5) liberally to provide the Alaska bidder preference for joint ventures when any one of the ventures qualified for the preference.[43]

AS 36.30.170(b)(4) found its way into the legislation in the Senate Judiciary Committee. CSSB 341 (Jud), the Senate Judiciary version of the bill, added this language:

> (4) is incorporated under the laws of the state, is a sole proprietorship, and the proprietor is a resident of the state or is a partnership, and all partners are residents of the state; and

The Senate version was changed in the House State Affairs Committee, which adopted this language in HCS CSSB 341(SA):

> (4) is incorporated or qualified to do business under the laws of the state, is a sole proprietorship, and the proprietor is a resident of the state or is a partnership, and all partners are residents of the state; and

---

[42] 1999 Op. Att'y. Gen. (File No. 663-00-0083, March 4, 1999); 1989 Op. Att'y. Gen. (File No. 663-89-0635, July 1, 1989).

[43] Irby-Northface v. Commonwealth Electric Corp., 664 P.2d 557 (Alaska 1983).

The latter language remained unchanged through the remainder of the legislative process and was enacted as law.[44] This legislative history clearly and unambiguously supports CTG's interpretation: the Senate Judiciary version of the bill specifically and expressly limited the Alaska bidder preference to domestic corporations. Subsequently, in the House State Affairs Committee, the door for eligibility was widened slightly to include foreign corporations, but only if they are qualified to do business under the laws of the state.[45]

C. PRIOR ADMINISTRATIVE PRACTICE

It has consistently been the interpretation of the division of general services, and of the chief procurement officer, that a foreign corporation need not be qualified to do business in Alaska in order to qualify for the Alaska bidder preference. As previously observed, the division's prior practice in this regard may provide useful guidance. However, the commissioner, not the chief procurement officer[46] or the division of general services, has the statutory authority to promulgate regulations implementing the Procurement Code[47] and to issue the final administrative decision in this particular case.[48] The commissioner may exercise independent judgment, within the limits of reasonable statutory construction, in interpreting the Procurement Code, with due regard for sound public policy and the advisability of avoiding unreasonable or unnecessary disruption in long-standing administrative practice.[49]

---

44 Ch. 106, SLA 1986 (HCS CSSB 341 (Fin)).

45 Minutes of the House State Affairs Committee state indicate that the new language was added at the suggestion of Assistant Attorney General Jim Baldwin, in lieu of an alternative proposal by Associated General Contractors to delete the reference to corporations altogether. House State Affairs Committee minutes, April 29, 1986, at numbers 262-345. Prior related discussions in the Senate Judiciary Committee had considered establishing a requirement for a specified percentage of an entity's profits to be generated in Alaska. *See*, Senate Judiciary Committee Minutes, March 6, 1986, at Nos. 474-502. The latter approach was embodied by House Bill 45 in 1987, which was not adopted by the legislature. Taken together, this additional legislative history also suggests that the legislature did not intend to allow all foreign corporations qualified under subsections (b)(1)-(3) to qualify for the Alaska bidder preference.

46 The chief procurement officer's duties, set out at AS 36.30.010, do not include the promulgation of regulations or interpretation of applicable law.

47 AS 36.30.680.

48 AS 36.30.040(a).

49 *See* In re Waste Management of Alaska, Inc., (Department of Administration, April 24, 2002), at 9-13; In re Service Oil, (Department of Administration, May 26, 1998), at 4 ("the Commissioner is not obligated to defer to the interpretation advanced by [the Division of General Services].").

In this case, statutory context and the legislative history provide a clear indication that a foreign corporation that is transacting business in Alaska is not qualified for the Alaska bidder preference under AS 36.30.170(b)(4) unless it is qualified to do business under Alaska law. Assuming that CTG's interpretation is not compelled as a matter of law in order to implement the legislative intent, the commissioner should nonetheless adopt that interpretation in accordance with the apparent legislative intent and the textual clues previously noted, unless there are persuasive reasons of administrative convenience to the contrary.

The division does not argue that requiring qualification to do business in Alaska would create an administrative burden. Just as the division presently ensures compliance with AS 36.30.170(b)(1) by requiring bidders to submit a current Alaska business license issued under AS 43.70.020, the division could easily require foreign corporations asserting eligibility for the Alaska bidder preference to submit a current certificate of authority issued under AS 10.06.705: no administrative burden would be placed on the procuring agency, other than to confirm that the appropriate certificate was submitted.

The division does argue, however, that requiring registration in Alaska would not provide any administrative benefit to purchasing agencies, because if the foreign corporation has a presence in Alaska (as it must in order to qualify), "the division is spared the administrative costs of doing business with corporations located outside of the [state]."[50] This argument considers only the administrative costs of doing business. But registration requires identification of major shareholders, directors and officers and appointment of a registered agent; these and other requirements of registration may afford the purchasing agency administrative benefits in the event of disputes with a foreign corporation.[51] In addition, requiring compliance with AS 10.05.705 enhances state revenues and assists the state in the enforcement of other applicable laws;[52] these ancillary benefits, while not within the jurisdiction of the department of administration, warrant consideration.

---

50 Memorandum at 10.

51 *See generally* AS 10.06.705-.788.

52 *See* AS 10.06.710, -.743.

Because the text and legislative history of the statute support CTG's reading, and the division of general services had not provided persuasive reasons to continue its prior practice, subsection (b)(4) should be interpreted to mean that a foreign corporation transacting business in Alaska is not entitled to the Alaska bidder preference unless it holds a certificate of authority at the time it submits a bid or proposal. The protest should therefore be sustained.

D. Remedy

In implementing a remedy for a statutory protest, all of the circumstances must be considered, including: [53]

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

In this case: (1) the incorrect application of the Alaska bidder preference was a serious error that affected the outcome of the solicitation and the ranking of the proposals; (2) the contract is for services on an "as needed" basis in multiple categories of services, with no guaranteed minimum, and rescoring of the proposals for the categories CTG identified in its protest should not cause substantial prejudice to Dibon (other than the loss of a contract that it was improperly awarded) and it will vindicate the integrity of the procurement system; (3) all parties acted in good faith; (4) the procurement has been completed (*i.e.*, the contract has been awarded), but performance is continuing; (5) rescoring would reduce the cost of the contract to the agency and should not have any significant adverse administrative impacts; and (6) there is no particular urgency, since a contract is in place.

Under these circumstances, the appropriate remedy is to cancel the award to Dibon for those categories that are the subject of CTG's protest, rescore the proposals

---

[53] AS 36.30.685(b); *see e.g.* Appeal of Waste Management of Alaska, Inc., No. 01.08 at 17-20 (Department of Administration, April 25, 2002).

with respect to those categories, and award contracts for those categories in accordance with the rescoring.

IV. Conclusion

There are no material facts at issue. The protest is sustained on appeal, and this case is remanded to the procurement officer to implement an appropriate remedy in accordance with this decision.

DATED July 2, 2007.

Andrew M. Hemenway
Administrative Law Judge

3. The undersigned, by or on behalf of the Commissioner of the Department of Administration and in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this _____ day of _____, 2007.

By: _____
Signature

_____
Name

_____
Title

---

4. The undersigned, by or on behalf of the Commissioner of the Department of Administration and in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons: as the Dept of Law 7-24-07 memo from AG Colberg, signed by AAG Cachel in the outline, the footnote related to AS 36.30.595(b) is stricken from the decision. Otherwise, I adopt the decision. (Copy Attached)

Additionally, AS 36.30.625(a) should not be used as a benchmark to broaden the interpretation of appeal language in other sections of the Procurement Code. KB 8.2.07

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 2 day of August, 2007.

By: _____
Signature
Annette Kreitzer
Name
Commissioner
Title

I hereby certify that on this date an exact copy of the foregoing was provided to the following individuals:
Mark Stuhlmiller
Rachel Witty, AAG
Annette Kreitzer, Commissioner
via Neil Robert Date 8/6/07