

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

MIKUNDA, COTTRELL & CO., INC.)	
)	
v.)	
)	
DEPARTMENT OF HEALTH)	
AND SOCIAL SERVICES)	OAH No. 07-0618 PRO
_____)	RFP No. 2007-0600-6772

DECISION

I. Introduction

This is a protest appeal. It concerns Request for Proposals 2007-0600-6772, issued by the Department of Health and Social Services for auditing services.

The department issued the request for proposals on February 22, 2007. Four responsive proposals were received. On September 12, 2007, the department issued a notice of intent to award the contract to Myers and Stauffer, LC. Mikunda, Cottrell & Company, Inc., (Mikunda, Cottrell) filed a timely protest asserting that: (1) the proposal evaluation committee was not independent; and (2) Mikunda, Cottrell's proposal had not been fairly scored. The protest was denied and Mikunda, Cottrell filed an appeal with the Commissioner of Administration. The commissioner referred the matter to the Office of Administrative Hearings. At a prehearing conference, the parties agreed to submit the matter for decision on the written record.

Because Mikunda, Cottrell has not shown that the department abused its discretion in the composition of the proposal evaluation committee, or that the scoring was unreasonable, the appeal is denied.

II. Facts

RFP No. 2007-0600-6772 sought proposals to provide statewide on-site and desk audits of Medicaid service providers. The request for proposals included minimum

requirements for prior experience of the audit manager and staff,¹ but proposers were advised that “[t]he experience and qualifications of the personnel proposed...will be evaluated based on how well the personnel go beyond the minimum prior experience requirements.”² Respondents were to include “comprehensive narrative statements” that “illustrate their understanding of the requirements of the project and the project schedule”,³ and that “set out the methodology they intend to employ and illustrate how the methodology will serve to accomplish the work and meet the state’s project schedule.”⁴

Under Section 7 of the request for proposals, each proposal was to be scored on four factors: Understanding of the Project, Methodology and Management Plan for the Project, Experience and Qualifications, and Contract Cost. Under the first three factors, the request for proposals listed specific questions for each factor, stating that the proposals would be evaluated against those questions. Qualified respondents could receive an additional Alaska Offeror’s Preference.

The department selected a proposal evaluation committee consisting of three department employees: Jerry Fuller, Jack Nielson, and Randall Schlapia.⁵ The committee’s task was to review and score the proposals on the three subjective factors, which had a combined total maximum score of 50 points: Understanding of the Project (15 points), Methodology and Management Plan for the Project (20 points), and Experience and Qualifications (15 points). The members of the committee were provided a memorandum outlining their obligations, including a description of the methodology to be employed in scoring proposals.⁶ Committee members were directed to begin with a neutral score for each factor, and to add or subtract points for each factor based on the member’s individual perception of the merits of the proposal with respect to that factor, in light of the questions identified in the request for proposals.⁷ In addition, committee members were directed to provide a “brief and concise reason” for any added or

¹ RFP §§ 2.08, 5.04.

² RFP §6.05.

³ RFP §6.03.

⁴ RFP §6.04.

⁵ Memorandum, P. von Gemmingen to B. Reid, September 10, 2007.

⁶ Memorandum, B. Reid to Procurement Evaluation Committee Members, August 17, 2007.

subtracted points, referencing specific provisions in the proposal.⁸ Up to 40 points for Contract Cost, and the additional 10 points for proposals qualified for the Alaska Offeror's Preference, were awarded separately by the department's procurement staff, based on objective information included in the proposals. The maximum possible score was 100 points (50 subjective, 40 cost, 10 Alaska Offeror's preference).

The department received four responsive proposals, including one from the incumbent contractor, Myers and Stauffer, and three others: CGI Technologies and Solutions, Inc. (CGI), Alutiiq Diversified Services, Inc. (Alutiiq), and Mikunda, Cottrell. The proposal evaluation committee members independently reviewed and scored all the responsive proposals, and subsequently met to discuss the evaluation criteria and each member's scores. All three committee members ranked Myers and Stauffer #1 of the four respondents; of the available 50 points, the members' average total score for Myers and Stauffer was 37.67 points.⁹ The committee members scored CGI second overall, with an average total score of 24.08 and average rank of 2.33;¹⁰ members scored Mikunda, Cottrell third overall, with an average total score of 16.33 and average rank of 3.0;¹¹ and members scored Alutiiq fourth overall, with an average total score of 13.75 and average rank of 3.67.¹² After adding in the points for cost and the Alaska Offeror's preference, Myers and Stauffer rated the highest (77.67), Mikunda, Cottrell second (63.03), CGI third (62.78), and Alutiiq fourth (61.25).¹³

⁷ *Id.*, Attachment 2 ("How to Score Proposals").

⁸ *Id.*

⁹ Fuller, Nielson and Schlapia awarded Myers and Stauffer 34.25, 33.75, and 45 points, respectively.

¹⁰ Fuller, Nielson, and Schlapia awarded CGI 21.5, 16.75, and 34.0 points, and ranked it #2, #3, and #2, respectively.

¹¹ Fuller, Nielson, and Schlapia awarded Mikunda, Cottrell 18.25, 22.75, and 8.0 points, and ranked it #3, #2, and #4, respectively.

¹² Fuller, Nielson, and Schlapia awarded Alutiiq 15.25, 16.0 and 10.0 points, and ranked it #3, #4, and #4, respectively.

¹³ Despite Mikunda, Cottrell's substantially lower score than CGI's on the subjective evaluation, it emerged as the second highest-ranked proposal overall because Mikunda, Cottrell received 10 points for the Alaska bidder preference (CGI did not qualify for that preference) and Mikunda, Cottrell received a slightly higher score for cost, due to application of the Alaska bidder's preference to the Cost factor, even though Mikunda, Cottrell's indicated cost was slightly higher than CGI's.

III. Discussion

A. The Proposal Evaluation Committee Was Independent

The central thesis of Mikunda, Cottrell's protest and appeal is that a proposal evaluation committee acts in a capacity equivalent to an audit committee, and that as such it should be "independent of management."¹⁴ Mikunda, Cottrell asserts:

We feel that the PEC serves as an audit committee for the State of Alaska for the audits of the providers of Medicaid services in the State of Alaska. As such, the PEC members should be held to the same standards as an audit committee.^[15]

Mikunda, Cottrell relies on general accounting principles. Under those principles an auditing firm should refrain from providing a non-auditing service where that service "creates an independence impairment either in fact or appearance with respect to entities they audit."¹⁶

Mikunda, Cottrell has not clearly articulated the nature of the independence impairment it contends exists in this case. The referenced accounting principle limits the non-audit functions of an auditing entity. Based on that principle, Mikunda, Cottrell's argument suggests that it would be inappropriate for the department's internal auditors to have a role in the selection of independent auditors who would, in effect, be second-guessing the internal auditors' own work. But Mikunda, Cottrell has not shown that any member of the proposal evaluation committee functions as an internal auditor for the department with respect to Medicaid providers.¹⁷ Even if it had made such a showing, the accounting principles that Mikunda, Cottrell relies on specifically provide that an auditor may, with appropriate supplemental safeguards, serve on an evaluation committee

¹⁴ Protest at (4); Appeal at (4).

¹⁵ *Id.*

¹⁶ Government Auditing Standards, §3.20. An "independence impairment" is a situation that could lead an objective third party with knowledge of the relevant information to conclude that the auditors "are not able to maintain independence and thus are not capable of exercising objective and impartial judgment on all issues associated with conducting the audit and reporting on the work." *Id.*, §3.03.

¹⁷ Based on the description of the department's oversight processes provided in the Myers and Stauffer proposal, it appears that internal auditing represents only a small part of the department's review program, in that "[e]ach division performs claims reviews and audit activities specific to the provider types under its jurisdiction." *Id.* at 9. The proposal asserts that "[t]he audit services requested by the Department's current RFP present an opportunity to enhance and complement the current ongoing [review] activities." *Id.* at 10.

substantially equivalent to the proposal evaluation committee.¹⁸ Acceptable supplemental safeguards include a written statement of the objectives and scope of work involved in the non-audit services, together with management's acceptance of responsibility for the outcome,¹⁹ and excluding any individual who provides the non-audit service from providing any auditing services "in the subject work of the non-audit service."²⁰ In this case, the department provided clear written instructions to the evaluators and accepted full responsibility, through procurement staff independent of management, for the award of the contract, and there is no evidence that any of the evaluators functions as an auditor for Medicaid providers. Under these circumstances, Mikunda, Cottrell has not shown any violation of generally accepted accounting principles.

More fundamentally, generally accepted accounting principles are aimed at securing the independence of auditors acting in that capacity. Members of a proposal evaluation committee are not acting as auditors; their actions as members of the committee are governed by principles of procurement law, not by the standards governing auditors. In the procurement arena, a purchasing agency has substantial discretion in the structure of a proposal evaluation committee, and:

[i]ndividual 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.'^[21]

Whatever the professional responsibilities of an auditor with respect to participation in a proposal evaluation committee, there is no requirement in procurement law that the members of a proposal evaluation committee must be, as Mikunda, Cottrell argues, "independent of management." To the contrary, individuals with management responsibilities for the project that is the subject of an evaluation are routinely included in

¹⁸ The principles state that an audit firm may, with appropriate safeguards: Provid[e] human resource services to assist management in its evaluation of potential candidates when the services are limited to activities such as serving on an evaluation panel of at least three individuals to review applications...to provide input to management in arriving at a listing of best qualified applicants to be provided to management.

Government Auditing Standards, §3.28(f).

¹⁹ *Id.*, §3.30(b).

²⁰ *Id.*, §3.30(c).

²¹ In Re Alaska Archives, No. 97-005 at 5, note 8 (Department of Administration, September 25, 1997) [citation omitted].

a procurement evaluation committee precisely for that reason. Admittedly, to compose a proposal evaluation committee limited to individuals who have direct personal involvement in the performance or management of the project that is the subject of the solicitation can be problematic. In such cases there is:

a risk of conflicts or gaps between [committee members'] 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 [or another individual not involved in management of the project] in a [proposal] 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 [proposal] 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.^[22]

In this case, Mikunda, Cottrell did not identify the specific positions occupied by the members of the committee, but none of them was the project manager or the department's primary contact on the solicitation, and none was shown to have any role in the auditing of Medicaid providers.²³ Whether viewed from the perspective of generally accepted accounting principles, or from the perspective of procurement law, Mikunda, Cottrell has not shown that the department abused its discretion in the composition of the proposal evaluation committee.

²² Empyra.com, Inc., v. Alaska Permanent Fund Corporation, OAH No. 06-0520-PRO, at 9 (November 3, 2006).

²³ Proposal at 88 (identifying primary agency contact as Leo Blas, Quality Assurance Manager); Email, K. Londeen to P. Von Gemmingen, September 13, 2007 @ 6:13 a.m. (identifying Allen Jansen as the project manager).

B. The Evaluation Was Not Unreasonable

Mikunda Cottrell argues that the scores it received do not fairly reflect the merits of its proposal. In particular, Mikunda, Cottrell's protest asserted that "our experience and qualifications were not scored in an unbiased manner,"²⁴ and on appeal it asserts that "a biased analysis was conducted also on the Understanding of the Project and Methodology and Management Plan sections of our proposal."²⁵

Review of the evaluators' scores does not reveal any internal inconsistencies or anomalies. The evaluators' rankings are generally consistent, indicating substantial agreement as to the relative merits of the proposals. The numerical scores are also generally consistent; the primary distinction being that one of the evaluators gave notably higher scores to his two higher-ranked proposals (45 and 34 points) and notably lower scores to his two lower-ranked proposals (10 and 8 Points) than the other two evaluators did.

It is true that all three evaluators gave the incumbent contractor substantially higher scores than any of the other respondents, and in a procurement involving an incumbent contractor there is a risk that the incumbent may have inside information. However:

[i]n 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.^[26]

That the normal advantages of incumbency would yield high scores for a successful incumbent is not at all unusual, and does not in itself suggest any impropriety. A successful incumbent will likely have a good understanding of the project, an operational plan that meets the agency's needs, and personnel with extensive directly relevant experience, and if an incumbent's proposal is well written it would not be

²⁴ Protest at 2.

²⁵ Appeal at 2.

²⁶ In Re Sanders, OAH No. 05-0240, at 21 (December 22, 2005), *citing*, Government Business Services Group, No. B-278052.3 (GAO, March 27, 2001).

unusual if a successful incumbent's scores were relatively high.²⁷ Of course, if the incumbent has not provided satisfactory performance, relatively low scores would not be surprising.²⁸ In this case, the Mikunda, Cottrell has neither alleged nor provided any evidence that the incumbent contractor had access to inside information, it did not suggest that the request for proposals was deficient in any way, and the contracting agency provided ample opportunity for respondents to ask questions. There is no appearance of any impropriety.

In addition to not identifying any scoring anomalies or appearance of impropriety, Mikunda, Cottrell has not presented any evidence of bias. In the absence of any evidence to support a claim of bias, Mikunda, Cottrell's argument appears to be that the scores it received were unreasonably low, and that its scores can only be explained as the product of bias, rather than of a fair and independent assessment of the proposal. The central issue, then, is whether the evaluation of Mikunda, Cottrell was unreasonable.

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]."²⁹ An evaluation is reasonable if "the objective facts...reasonably support [the] evaluations."³⁰

Mikunda, Cottrell presents no specifics to support the claim that its proposal was undervalued, except to point out that its personnel have substantial relevant experience, some of it specifically in investigative audits of Medicaid provider fraud. The evaluators' notes reflect that one of the evaluators provided additional points for experience beyond the minimum requirement and for strong support from a reference.³¹ However, both

²⁷ See generally, Empyra.com, Inc., v. Alaska Permanent Fund Corporation, OAH No. 06-0520-PRO at 7-8 (November 3, 2006).

²⁸ Cf. TEAM Support Services, Inc., No. B-279379.2 (GAO, June 22, 1998) (evaluator could downgrade proposal based on personal knowledge and opinion of offeror's performance on another contract).

²⁹ In Re World Wide Movers, Inc., No. 97-004 at 10 (Department of Administration, September 19, 1997), 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).

³⁰ King v. Alaska State Housing Authority, 512 P.2d 887, 894 (Alaska 1973).

³¹ Nielson, page 52, items (2), (6).

other evaluators noted that the reference concerned work unrelated to a Medicaid audit,³² and in general the evaluators all observed that the firm's experience, and the experience of some of the individuals on the engagement team, was either not shown or was deficient in relationship to this specific assignment.³³ The evaluators' observations regarding the nature of the firm's experience and that of the engagement team reflect the contents of the proposal.³⁴

With respect to other aspects of the Mikunda, Cottrell proposal, all three of the evaluators subtracted points for lack of information showing completion of prior projects within budget.³⁵ In addition, the evaluators generally downgraded Mikunda Cottrell's proposal for lack of appropriate software and reliance on access to the department's database at its office.³⁶ Mikunda, Cottrell has not asserted that these observations are contrary to the contents of the proposal as submitted.

In sum, the record discloses the evaluators' basis for their ratings, and demonstrates that they considered all of questions raised in the request for proposal and that their observations are consistent with the contents of the proposal. No more is required.³⁷

³² Fuller, Schlapia, page 52, item (6).

³³ Fuller, page 52, item (2); Nielson, page 49, item (3); Schlapia, page 50, item (4); pages 51-52, items (1)-(6).

³⁴ Mikunda, Cottrell did not claim to have previously performed similar engagements. However, its team included two individuals with prior Medicaid audit experience: James Worthington and Erick Campbell. Mr. Worthington had conducted Medicaid investigative audits on behalf of the State of Alaska, Department of Law for some 14 years; Mr. Schlapia, who otherwise generally rated the firm quite poorly, rated team members' experience as "very good for financial review." Schlapia, page 52, item (3). Mr. Campbell is the supervising shareholder. He is described as having "vast experience auditing Medicaid claims," but the nature of that experience is not described and the supervising shareholder does not appear to have an auditing role in this particular engagement. See proposal at 23, C12.

Mr. Schlapia rated the team members' experience in the area of medical records review as "poor". Schlapia, page 52, item (3). The primary person identified for this task was Janet Mischler, whose experience, as described on pages 28 and 30 of the proposal and in her resume at pages C4-C5, consists primarily of case management with possibly some limited medical records review.

³⁵ Fuller, page 52, item (4); Nielson, page 52, item (4); Schlapia, page 52, item (5).

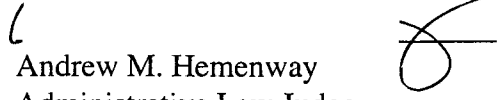
³⁶ Fuller, page 51, item (9); Nielson, page 50, item (4), page 51, item (9); Schlapia, page 50, item (1), page 51, item (9). See RFP am 6, Question 64. Two of the evaluators downgraded Mikunda, Cottrell, and one downgraded CGI, because they planned on billing for appeals. Fuller, page 49, item (3); Nielson, page 50, item (5), Nielson/CGI, page 50, item (5). This was unreasonable, because the request for proposals specifically provides for separate pricing for that element. See RFP am. 6, Questions 31, 63; Revised Cost Proposal. In light of the evaluation as a whole, however, this was harmless error.

³⁷ See, e.g., Environmental Affairs Management, Inc., No. B-277270, at 4 (GAO, September 23, 1997).

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 Mikunda, Cottrell failed to present evidence to establish that the scoring was unreasonable. For these reasons, the protest appeal should be denied.

DATED March 7, 2008.


Andrew M. Hemenway
Administrative Law Judge

Adoption

On behalf of the Commissioner of the Department of Administration, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). 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 8 day of April, 2008.

By: _____
Signature Annette Kreitzer
Name Commissioner
Title _____

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

Eric Campbell
Paula von Gemmingen

Signature _____ Date 4/9/08