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

REDOUBT DEVELOPMENT, LLC,	)	
	)	
v.	)	OAH No. 08-0637-PRO
	)	RFP No. 2009-0700-8059
DIVISION OF GENERAL SERVICES	)	
	)	

FINAL DECISION GRANTING SUMMARY ADJUDICATION

I. Introduction

This is a protest appeal growing out of a request for proposals to lease approximately 7,700 square feet of Anchorage office space for the Department of Labor and Workforce Development, Division of Vocational Rehabilitation. The Department of Administration's Division of General Services ("DGS") conducted the procurement. It received two offers, one from 4600 Debarr Road, LLC ("Debarr") and one from Redoubt Development, LLC ("Redoubt").

After evaluating the proposals, DGS scored them in a tie. The Request for Proposals provided that in the event of a scoring tie, the tie would be broken by reference to price alone. Since Debarr's price of $3.9 million was lower than Redoubt's $5.6 million, DGS issued a Notice of Intent to Award to Debarr.

Redoubt protested the proposed award. The procurement officer denied the protest. Pursuant to AS 36.30.590, Redoubt initiated a protest appeal challenging the decision to reject the protest. In response to the appeal and in accordance with AS 36.30.605, the procurement officer then prepared a protest report for the Commissioner of Administration. In his report, the procurement officer expressed the view that his original decision had been in error and that the protest ought to have been sustained. He proposed a remedy.

As required by AS 44.64.030(a)(22), the Commissioner of Administration promptly referred the matter to the Office of Administrative Hearings.[1] She elected to delegate final decisionmaking authority to the assigned administrative law judge.

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[1] DGS had suggested that she hear the matter directly, but the statute does not appear to provide for such a procedure.

By consent of all parties, Debarr intervened in the appeal in defense of the original DGS decision to deny the protest. Because there were no factual questions to resolve, the parties agreed to an expedited schedule for briefing cross-motions for summary adjudication to be filed by all three of them. The motions took the following positions:

Party	**Requested Action on Protest**	**Requested Remedy**
DGS	Sustain because Redoubt should have been scored above Debarr.	Do not award to Redoubt because Redoubt's price exceeded the budget. Proceed to a best and final offer round with both offerors.
Redoubt	Sustain because Redoubt should have been scored above Debarr.	Present Redoubt offer to Department of Labor and Workforce Development to see if it can increase budget. If not, cancel RFP and award bid preparation costs to Redoubt. Do not proceed to best and final offer round because first-round prices have been disclosed.
Debarr	Deny because Debarr was properly scored equal to Redoubt and won by the tiebreaker mechanism.	N/A [proceed according to Notice of Intent to Award]

In a proposed decision circulated on January 7, 2009, the administrative law judge indicated that he would grant Debarr's motion and deny those of DGS and Redoubt. All parties had an opportunity to respond to the proposed decision under AS 44.64.060(e). DGS and Debarr proposed that the January 7 document be adopted as the final decision. Redoubt submitted a proposal for action advocating that the protest be sustained.

This is the final decision issued after consideration of Redoubt's critique of the proposed decision. The outcome has not been altered, but some additional explanation has been inserted.

II. Material Facts

This appeal arises from a single issue: whether Redoubt and Debarr were or were not tied in the scoring of proposals, so that the tiebreaker mechanism would come into play. That issue turns on the use of rounding in scoring the proposals. If it was appropriate to round price points to the nearest whole number, the overall scores were tied. If price points should not have been rounded or should have been rounded in a different manner, there was no tie to trigger the tiebreaker.

When DGS issued RFP 2009-0700-8059, it specified a 100-point scoring structure distributed with the following maxima: 50 points for price, 15 for function, planning and design, 10 for appearance and indoor environment, 15 for public convenience and location, and 10 if the offeror qualified as an "Alaska Bidder."[2] Price points were to be awarded by converting the lease payments to present value and applying a five percent reduction for Alaska bidders, if applicable, and then awarding the lowest-price competitor fifty points. Any other competitor would receive a proportion of the available 50 points according to the ratio between its offer and the lowest-price offer, as expressed in the following formula:

$$\frac{\text{(Lowest total price offer)} \times 50}{\text{(Price of higher offer)}} = \text{Points awarded}$$[3]

The RFP made only one mention of rounding in connection with price points. That mention appeared in the minutiae of how quoted prices were to be reduced to present value, and it essentially provided that the present value "prices" to be developed for use in the above formula would be rounded to the nearest dollar.[4]

Five evaluators sat on the Proposal Evaluation Committee (PEC) for this RFP. They scored the proposals in the various scoring categories using whole numbers; for example, committee member Lana Jones-Edwards awarded the Redoubt proposal 14 out of 15 for public convenience and the Debarr proposal 11 out of 15 in the same category.[5] The procurement officer added these scores to scores he assigned for the Alaska Bidder Preference—10 points for each offeror—and for price—35 points for Redoubt and 50 points for Debarr. He obtained totals for each PEC member as follows:

Evaluator	**Redoubt**	**Debarr**
Jones-Edwards	82	87
Fazio	85	74
Cusack	79	82
Jolly	81	83
Stewart	85	86

2 RFP § 5.3.
3 *See id.*
4 *See id.* at 56.
5 Proposal Evaluation Committee Summary Sheet (Bid Protest Exhibit C).

Adding these scores, he calculated a total of 412 points for each competitor, or an average of 82.4 points each.[6] Because this was a tie, he applied the tiebreaker provision in Section 5.2 of the RFP, which provided: "If any scores are tied, the Offeror submitting the lowest TOTAL PRICE OFFER after application of Present Value Analysis and applicable preferences will prevail." He determined that Debarr, with the lowest total price offer, should prevail.

This outcome occurred because the procurement officer had rounded to the nearest whole number when he assigned price points. The formula in the RFP for price points would yield the following fraction:

$$\frac{3{,}930{,}631 \times 50}{5{,}584{,}020} \quad \text{or} \quad \frac{196{,}531{,}550}{5{,}584{,}020}$$

In decimal notation, this translates to about 35.195352094011124601989247889513. (While not an irrational number,[7] the decimal does not end or repeat for at least 30 places). Had there been no rounding, or rounding to no fewer than one decimal place, Redoubt would have received about 35.2 price points, with Debarr remaining at the maximum of 50. All of the Redoubt scores on the above chart would have increased by about 0.2. While this would still have left Debarr as the marginally preferred vendor in the total scores of four of the five evaluators, the aggregated scores would have been Redoubt 413, Debarr 412, and the averages would have been Redoubt 82.6, Debarr 82.4.

The practice of rounding price points to the nearest whole number before adding scores and comparing totals has been the usual, but not universal, approach of DGS procurement officers in leasing procurements over the last few years.[8] It has occurred in 12 of 13 leasing procurements for which evidence is available,[9] including one recent procurement in which Redoubt participated.[10] The single exception is a 2003 procurement, conducted by a different procurement officer among different vendors, in which price points were rounded to two decimal

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[6] *Id.* at 2. Rounding aside, this particular method of integrating points assigned by the procurement officer with the subjective grades of the PEC members is DGS's standard methodology and is not challenged in this case. *See* Group Exhibit A.

[7] Debarr's assertion that it is an irrational number is mistaken. No number that can be expressed as a fraction is irrational. *See, e.g.*, http://www.eduplace.com/math/mathsteps/7/a/index.html.

[8] Affidavit of Ken Stewart, ¶ 5; Group Exhibit A.

[9] These consist of the 12 procurements whose scoring is documented in Group Exhibit A, as well as the cancelled procurement on RFP 2008-0700-7876 that is documented at Redoubt Appendix A.

[10] Redoubt Appendix A. Outside the leasing context, it seems to be common to apply less rounding to price points than has been typical in leasing procurements. *See, e.g., In re Aetna*, OAH No. 06-0230-PRO, Final Decision and Order at 12 (Dep't of Administration 2006) (price points calculated to five significant digits); *Mikunda, Cotrell & Co. v. Department of Health and Social Services*, OAH No. 07-0618-PRO, Decision at 3 (Dep't of Administration 2008) (price points apparently calculated to three significant digits). (These and other Alaska procurement decisions may be viewed at http://www.state.ak.us/local/akpages/ADMIN/oah/pro.shtml).

places.[11] In none of these 13 procurements, however, were the final scores so close that the presence or absence of rounding within the price points component could have altered the outcome.

In this procurement, as has been mentioned previously, the procurement officer did round the price points to the nearest whole number and therefore reached a scoring tie. After he applied the tiebreaker provision and identified Debarr as the vendor to be selected, he issued a Notice of Intent to Award on October 24, 2008. In accordance with AS 36.30.230(a), the notice recited that all proposal information would become public upon its issuance, and the parties seem very shortly thereafter to have become privy to the price and other details of one another's proposals.

Redoubt's protest and its formal denial by the procurement officer followed. After Redoubt had filed its appeal and jurisdiction over the procurement had passed to the commissioner, the procurement officer, as required by statute, issued his Protest Report. He concluded:

> With the RFP remaining silent on the issue of rounding Price Points, there is no basis for rounding the Price Points. . . . [Redoubt]'s argument on the rounding issue has merit. If the rounding had not occurred, [Redoubt] would have had the highest score after the first phase of the evaluation process. The Contracting Officer would not have had the authority to issue the [Notice of Intent to Award] to [Redoubt] because the total cost of [Redoubt's] offer exceeded the funding commitment provided by the agency for this solicitation; however, the cost variance was close enough for the offer to be susceptible to award. The Contracting Officer would have pursued Best & Final offers if there had been no rounding.[12]

The procurement officer has explained his view that the protest has merit on the basis that the RFP's silence "may be a source of ambiguity for an offeror unfamiliar with the leasing section's standard practice," while offerors familiar with the practice "may have an expectation of rounding."[13] As to available funding, he has revealed that the Redoubt offer exceeded the funding the Department of Labor and Workforce Development committed to this procurement,[14] but he has withheld the actual figure on the basis that releasing it would interfere with efforts to negotiate the best possible deal for the state.[15]

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11 Group Exhibit A at 4-6.
12 Protest Report at 2-3.
13 Affidavit of Ken Stewart, ¶ 7.
14 *Id.*, ¶ 8.
15 DGS Response to Motions for Summary Adjudication at 3 n.7.

In the Protest Report, DGS suggested that the protest be sustained and that the two offerors be invited to submit best and final proposals under 2 AAC 12.290(c) on the price component only. DGS has since amended this view to advocate a best-and-final round that permits revision of all components of the proposals.[16]

III. Discussion

The decision under review in this protest appeal is the decision to issue the Notice of Intent to Award. The first question, therefore, is whether that decision ought to be overturned and the notice vacated.

When the procurement officer elected to round scores to the nearest whole number, he did nothing extraordinary. He followed a procedure that DGS has followed in most of its leasing procurements, and indeed a procedure that had been followed in a prior procurement involving Redoubt.[17] Some degree of rounding is almost universal in procurement scoring, and it is generally regarded as a reasonable practice even when it causes a tie that forces the use of a tiebreaker procedure. Thus, in *General Electric Co. v. Kreps,*[18] a federal court found it "rational" that a committee procuring a $37 million system to improve weather forecasting had rounded component scores to tenths of a point, resulting in a tie that would not have occurred had it "carr[ied] out all calculations to hundredths of a point."[19] The court found the procedure rational even though it does not appear to have been mentioned in the RFP. Likewise, in *United States v. Thompson,*[20] the U.S. Court of Appeals for the Seventh Circuit observed that a procurement officer acted "sensibly" in rounding scores to the nearest whole number, so as to avoid making a selection on a "trivial" scoring difference, and instead opted to treat the scores as tied.[21] Again, it seems clear from the context that the rounding was not addressed in the RFP.

Both Redoubt and DGS focus much of their concern on the fact that rounding price points was not mentioned in the RFP, with DGS concerned that offerors could therefore have a differing "expectation" about rounding.[22] The purpose of an RFP is to place parties on an equal

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16 *Id*. at 4.

17 Redoubt Appendix A, pp. 2-3 (scoring summary on RFP 2008-0700-7876).

18 456 F. Supp. 468 (D.D.C. 1978).

19 *Id.* at 472. The committee may, in addition, have made a closely related decision to determine that a scoring difference of 0.044 points should be disregarded due to "mathematical insignificance." *Id.* at 471.

20 484 F.3d 877 (7th Cir. 2007).

21 *Id*. at 879.

22 DGS Response to Motions for Summary Adjudication at 4.

and materially informed footing in preparing their proposals.[23] Ambiguities in an RFP that could cause offerors to frame their proposals based on divergent expectations are problematic. It is also problematic if an RFP tells parties that their proposals will be evaluated on one basis and they are in fact to be evaluated on a materially different basis, because the result can be that their proposals may not be aimed at the actual evaluation criteria. The dispute over rounding in this case, however, does not present these problems. Without knowledge of a competitor's price, an offeror cannot know what price points will be assigned to its proposal and therefore cannot foresee how rounding might affect those points. Because of this opacity, rounding of price points cannot be "gamed," and differing expectations—if the participants focus on this detail enough to have any expectations at all—are unimportant. There is no chance that the knowledge that rounding might be to the nearest whole number, nearest tenth, or nearest hundredth would affect the dollar amount of a proposal.

It bears noting that if price points were not rounded at all there would, as a practical matter, never be any scoring ties in competitive sealed proposal procurements. The chance of identical scores after subjective points have been compiled and price points carried out to an unlimited number of decimal places would be almost infinitesimally small.[24] But it is typical for Alaska RFPs, such as this one, to contain a tiebreaker provision. Drafters of RFPs and those who read them therefore presumably have the expectation that ties may occur. Since ties are a virtual impossibility without rounding, one can infer that, if they think about it enough to have an expectation, both the drafters and their audience have an expectation of rounding.

Some rounding and approximation in the weighing of competitive proposals is, as the *Thompson* court observed, sensible. It is simply an illusion to pretend that the weighing of proposals is so precise and scientific an exercise that distinctions of a tenth of a point (one one-thousandth of a 100-point scale) or a hundredth of a point (one ten-thousandth) can have much meaning. Rounding has the effect of treating very small scoring differences as ties,[25] and this is appropriate in a ranking procedure that contains a large subjective element.

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[23] *See, e.g., Shields Enterprises, Inc. v. United States*, 28 Fed. Cl. 615, 627 (1993) ("The goal is to insure equal and intelligent competition, . . . and provide offerors sufficient information to submit an intelligent proposal . . . .") (quoting J. Cibinic & R. Nash, *Formation of Government Contracts* 562-3 (1986)).

[24] The *General Electric* and *Thompson* cases discussed above are good examples of how, if ever more minute calculation were required, ties would almost always be resolved.

[25] Though the nuance is not raised by the facts of this case, it would arguably be best to supplement or replace a rounding protocol with an evaluation of the mathematical significance of small differences. *See* note 19, supra, and *General Electric*, 456 F. Supp. at 471.

Redoubt contends that the effect of rounding in this case was to "increase[e] Redoubt's bid by $31,167."[26] Redoubt reaches this conclusion by back-calculating from the number of price points Redoubt was awarded to generate the average dollar figure that would correspond to that number of points.[27] In other words, in a regime where price points are rounded to whole numbers and the 50-point bid is $3,930,631, a score of 35 price points would encompass all prices between $5,536,099[28] and $5,696,564.[29] Redoubt contends that it has effectively been moved from $5,584,020—it's actual price—to $5,615,187, which is at the midpoint of the range of prices to which 35 points could correspond. Redoubt goes on to argue that the procurement officer therefore made an unauthorized "alteration" to Redoubt's proposal.[30] It further contends that a $31,167 price change cannot be found to be immaterial.

Redoubt's argument is inventive but ultimately unconvincing. First, nothing compels the conclusion that the procurement officer assigned Redoubt a dollar value other than exactly the one bid, which does fall well within the range of prices encompassed by a 35-point score. Second, price points are not dollars. They are a mechanism for integrating dollar bids into an overall point score, the other components of which are approximate and subjective. Unless one could say with some confidence that a proposal garnering (through any combination of scoring) 82.6 of these combined points is meaningfully superior to one garnering 82.4 of them, it is reasonable to treat such proposals as tied.

In the present case, the procurement officer applied the rounding protocol that had been standard operating procedure for the leasing staff for some time. There is nothing to indicate that he did so with a motive to steer the decision in a particular direction. His action was mathematically reasonable and was sensible from the point of view of maintaining a rational procurement process, proceeding to the tiebreaker mechanism when scores were too close to be meaningfully distinguished from one another. In deciding to award the contract to Debarr through the tiebreaker provision, he reached a result that affirmed the outcome dictated by the point scores of four of the five evaluators, rather than forcing the procurement in a direction suggested by the total score of only one evaluator on the strength of a difference in aggregate point totals amounting to less than two one-thousandths of the scoring total. While other ways of

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26 Redoubt Development, LLC's Proposal for Action at 2.
27 *See* Redoubt Motion for Summary Adjudication at 5.
28 (50 ÷ 35.5) x 3,930,631.
29 (50 ÷ 34.5) x 3,930,631.
30 Redoubt Development, LLC's Proposal for Action at 4.

handling the rounding and the protest might have been supportable, this is a classic example of a circumstance in which a commissioner (or a commissioner's delegee) would ordinarily want to give the procurement officer some "running room," and would defer to his judgment.[31]

This case presents an additional question, however: whether the due deference that would normally be accorded to the decision formally under appeal ought to be retracted and extended instead to the procurement officer's later recommendation—after the matter had already passed to the commissioner's jurisdiction—to sustain the protest on the basis that the rounding was ill-advised. There are three reasons not to do this.

First, the time at which the procurement officer has statutory discretion to exercise is when he administers the procurement and when he rules on the protest. His subsequent views, however well-intentioned and worthy of consideration, are a litigation position, not an exercise of discretion that has been vested in him by law.

Second, the procurement officer's explanation for changing his mind is not very persuasive, and it rests on a misunderstanding of the range of his discretion. His concern is that offerors may have had divergent expectations about rounding.[32] As explained above, however, it is unlikely that different expectations existed on the question of rounding, and it is irrelevant if they did. Further, the procurement officer seems to have been talked into the belief that he did not have discretion to do any rounding of price points, whereas this decision holds that his legal range of discretion did encompass the rounding choice he originally made.

Third, to allow the procurement officer to change position at this stage could introduce an appearance of impropriety into this procurement. The risk of appearance of impropriety arises from the fact that the procurement officer coupled his change in position with a proposal to proceed to best and final offers.

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[31] Although a supervising commissioner is not required to defer to a procurement officer's decisions, a measure of practical "due deference" is often extended as a matter of good administrative practice. *See, e.g. Quality Sales Foodservice v. Dep't of Corrections*, OAH No. 06-0400-PRO, Decision and Order at 11-12 (Dep't of Administration 2006); *In re Waste Management of Alaska, Inc.*, Case No. 01-08, Decision at 9-13 (Dep't of Administration 2002).

The deference afforded here is to the procurement officer's election to round to whole numbers and his resulting ultimate decision to issue the notice of intent to award on the basis of a tie and application of the tiebreaker mechanism. The notice of intent to award is the action that Redoubt protested, and it is the matter fundamentally under review in this appeal. In its proposal for action, Redoubt correctly points out that the procurement officer's later decision to deny the protest was based on reasoning that all parties have agreed was faulty, and that decision has not received deference here.

[32] Affidavit of Ken Stewart, ¶ 7.

Presumably for reasons of fairness to bidders and to promote healthy interest in state solicitations, Alaska has a policy of avoiding "auction techniques that reveal one offeror's price to another."[33] In this case, the offerors' prices and other terms have been revealed in a wholly innocent manner, at a time when the procurement officer genuinely thought the procurement was over. Nonetheless, they have been revealed. To continue with the procurement in these circumstances alters the bargaining balance between the government and the offerors, to the offerors' disadvantage. It risks the perception that the procurement officer has simply identified an opportunity to make a silk purse from a sow's ear—to turn a bid protest into an opportunity to gain a better deal for the state through leverage that would not ordinarily be available.

A procuring agency may continue to best and final offers after prices have been innocently revealed, notwithstanding the risk of conducting a *de facto* auction, but a decision to do so must be motivated by a substantial reason independent of a desire to take advantage of the situation to gain further concessions from the offerors.[34] In this case, the reason offered for sustaining the protest—a desire to go back and undo a rounding process that was wholly defensible to begin with—is not persuasive enough. It does not completely dispel the concern that another reason may have motivated the change in position. This militates against giving deference to the revised position.

IV. Conclusion

Because the procurement officer's original decision to issue the Notice of Intent to Award was reasonable and is entitled to deference in the circumstances of this case, it is affirmed. Debarr's motion for summary adjudication is granted; the motions for summary adjudication of the other parties are denied. The protest appeal is denied.

V. Adoption

This order is issued under the authority of AS 36.30.675(b). The undersigned, by delegation of the Commissioner of Administration and in accordance with AS 44.64.060, adopts

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[33] 2 AAC 12.290(a).

[34] *See, e.g., Logicon, Inc. v. United States*, 22 Cl. Ct. 776, 788 (1991) (proceeding with a best and final offer round after disclosure of prices must be justified by "substantial concerns" to maintain the integrity of the procurement, such as a conclusion that the offers presently on the table do not meet the agency's needs); 50 Comp. Gen. 222 (1970) (permitting improvements in offerors' prices after prices innocently disclosed "would have compromised the integrity of the Federal Procurement system by allowing [an] auction"); 65 Comp. Gen. 62 (1985) (best and final offer round after prices revealed, merely because of desirability of clarifying one offer, "would compromise the integrity of the competitive system").

this Final Decision Granting Summary Adjudication as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this 14th day of January, 2009.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Certificate of Service: The Undersigned certifies that on the 14th day of January, 2009, a true and correct copy of this Final Decision Granting Summary Adjudication was faxed or sent by pdf attachment to the following: Ken Stewart (contracting officer); Tanci Mintz (Leasing and Facilities Mgr., DGS); Donald McClintock (counsel for Redoubt Development, LLC); Scott Taylor (counsel for 4600 Debarr Road, LLC); Rachel Witty, AAG (counsel for DGS); and Annette Kreitzer, Commissioner of Administration. Additional copies were sent by regular mail to counsel only (McClintock, Taylor, and Witty).

By: Signed
Kim DeMoss

[This document has been modified to conform to technical standards for publication.]