

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

JJG CLEANING SERVICES	)	
	)	
v.	)	
	)	
DEPARTMENT OF HEALTH AND	)	
SOCIAL SERVICES	)	OAH No. 09-0049-PRO
_____	)	ITB No. 2009-9900-8238

**REVISED DECISION**

**I. Introduction**

This is a protest appeal. The Department of Health and Social Services issued Invitation to Bid (ITB) No. 2009-9900-8238 to obtain janitorial services. Six bidders responded. One bidder, 2Kings Cleaning Service (2Kings), submitted three bids. The department accepted the highest of 2Kings' bids, which was lower than any of the other bids, and issued a notice of intent to award the contract to 2Kings. The next lowest bidder, JJG Cleaning Services (JJG), objected, and the department rescinded the notice of intent to award to 2Kings and issued a second notice of intent to award the contract, this time to JJG. 2Kings then filed a protest, and the department rescinded the second notice of intent and issued a third notice of intent to award the contract, this time to 2Kings. JJG filed a protest, and the department cancelled the solicitation. JJG has appealed.

Because JJG has shown that the procurement was not conducted in conformity with applicable procurement regulations and the terms of the ITB, the protest is sustained. The notice of cancellation is rescinded. The appropriate remedy is to accept 2Kings' first two bids and reject its third bid; to provide 2Kings an opportunity to withdraw one or both of its first two bids; and if both are withdrawn, to award the contract to JJG. The case is remanded to the procurement officer to implement that remedy, and this matter is referred to the Chief Procurement Officer for administrative review and corrective action as may be appropriate.

## II. Facts

The Department of Health and Social Services issued ITB No. 2009-0600-8282 on November 13, 2008.<sup>1</sup> The ITB requested bids to provide janitorial services at the Juneau Public Health Center.<sup>2</sup> The cover page stated: “Sealed bids must be submitted to [the department’s Anchorage office] **prior to 2:30 p.m. on December 5, 2008**, at which time they will be publicly opened.”<sup>3</sup> The ITB included the Division of General Services’ standard form instructions to bidders, which state: “Envelopes containing bids must be sealed, marked, and addressed as shown...”<sup>4</sup> The ITB stated: “**The State of Alaska can only accept one bid from each bidder.** Submitting two bids is considered an alternative bid and is not allowed. *2 AAC 12.830 states: ‘Alternate bids or proposals are non-responsive unless the solicitation states that such bids or proposals may be accepted.’*”<sup>5</sup>

The ITB listed services to be provided, including nightly, weekly, monthly, quarterly and bi-annual tasks. The bid schedule called for entry of a unit price for each category of service (nightly, weekly, monthly, quarterly and bi-annual), with the combined total of the extended prices for each category constituting the total price; the ITB called for award of the contract as a single lot to the lowest bidder.<sup>6</sup>

2Kings, a Juneau firm, mailed and faxed a bid on November 28, 2008.<sup>7</sup> The total price stated was \$12,040. The bid (attached as Appendix A-1) on its face showed unit prices that were inconsistent with the extended price in two categories of service (nightly & weekly), although the total price correctly reflected the extended prices.

The procurement officer, James Grotha, and Charlotte Malacas of 2Kings had a telephone conversation concerning this problem, and Mr. Grotha informed Ms. Malacas

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<sup>1</sup> Invitation to Bid No. 2009-0600-8282 (ITB), p. 1.

<sup>2</sup> ITB p. 10.

<sup>3</sup> ITB, p. 1 (bold and underlining in original).

<sup>4</sup> ITB p. 2. The instructions to bidders are included in the division’s “ITB – Standard Terms and Conditions”, available online, at <http://www.state.ak.us/local/akpages/ADMIN/dgs/policy.htm>. That web page specifically notes that modifications to this document are approved by the attorney general pursuant to 2 AAC 12.470.

<sup>5</sup> ITB, p. 9 (bold and italic in original).

<sup>6</sup> ITB at 2, ¶6.

<sup>7</sup> 2Kings Protest, p. 1.

that she could submit a corrected bid by fax.<sup>8</sup> Around noon on Monday, December 1, Ms. Malacas faxed a revised bid schedule for 2Kings, showing a total price of \$12,320.<sup>9</sup> Once again, the bid (Appendix A-2) on its face showed unit prices for nightly and weekly services that were inconsistent with the extended prices in those categories, and the total price reflected the extended prices.

Mr. Grotha again spoke with Ms. Malacas about the 2Kings bid.<sup>10</sup> Unsure of how to correct the 2Kings bid, Ms. Malacas contacted a Juneau acquaintance, Gina Del Rosario, who is a principal of JJG Cleaning Services, another Juneau firm that offers janitorial services.<sup>11</sup> Ms. Del Rosario reviewed 2Kings' computations and provided guidance.<sup>12</sup> That afternoon, Ms. Malacas faxed a second revised bid (Appendix A-3) for 2Kings, showing a total price of \$18,200. There is no explanation in the record for the 50% increase in 2Kings' third bid price. This time, the unit prices were consistent with the extended prices; once again, the total price reflected the extended prices.

Ms. Del Rosario had learned about the solicitation on November 27,<sup>13</sup> and on November 28 she had contacted the department with questions about it.<sup>14</sup> At 9:31 a.m.

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<sup>8</sup> 2Kings states that it noticed its own error and initiated the telephone call to Mr. Grotha. 2Kings Protest, p. 1. However, there is some evidence that Mr. Grotha noticed the discrepancy and that he called 2Kings and informed it of the problem. See Email, JJG to J. Grotha (12/8/2009 @ 4:23 p.m.) ("I have personal information that 2Kings Cleaning Service already faxed her bid to you before Thanksgiving and that you reviewed it and provided feedback to her that she needs to correct that bid...").

<sup>9</sup> The fax header indicates that bid was sent at 12:02 p.m. However, the bid was stamped as received at 11:13 a.m. Presumably, one of the timeclocks in use was incorrect. It seems likely that the sending fax clock had not been set back one hour to adjust from daylight time to standard time.

<sup>10</sup> Mr. Grotha sent an email to his supervisor, Jeanne Mungle, stating that he had "could not make out what the costs are and called [2Kings]." Email, J. Grotha to J. Mungle (12/9/2008 @ 11:11 a.m.). However, while the record PDF copy of 2Kings' second bid is notably less boldly marked than its other two bids, it is not illegible and both the unit prices and extended prices are easily ascertained. The record suggests that the primary purpose of Mr. Grotha's call was not to obtain a clear and legible bid, but to point out that the second faxed bid contained the same types of bid extension errors as the first bid, and that 2Kings thereafter contacted Ms. Del Rosario for assistance in correcting those errors. See Email JJG to J. Grotha (12/8/2008 @ 4:23 p.m.); Protest Report at 2 ("2Kings was unsure of the specific problem the procurement officer was referring to and as a result 2Kings contacted JJG for bid submission assistance.").

<sup>11</sup> Oral Statement of G. Del Rosario, 2/19/2009. Notably, 2Kings' protest did not mention any conversation with Ms. Del Rosario, nor did it acknowledge the submission of three bids.

<sup>12</sup> Oral Statement of G. Del Rosario, 2/19/2009. The timing of the conversation (or conversations) between Ms. Malacas and Ms. Del Rosario has not been established. Ms. Del Rosario stated that when she talked to Ms. Malacas she was unaware that 2Kings had submitted a bid on this contract, because Ms. Malacas did not identify the solicitation at issue. Ms. Del Rosario indicated, however, that she reviewed 2Kings' bid computations. In light of JJG's December 8 email to Mr. Grotha, it seems likely that when JJG submitted its bid, it knew that 2Kings had bid on the same contract.

<sup>13</sup> Email, JJG to J. Grotha (12/28/2008 @ 2:16 p.m.).

<sup>14</sup> Email, JJG to J. Grotha (11/30/2008 @ 12:40 a.m.).

on December 1, a couple of hours before 2Kings faxed in its second bid, Ms. Del Rosario emailed Mr. Grotha, asking: “If the bidder already faxed their bid to you, are you still going to accept another bid from the same bidder and will that 2nd bid still be considered responsive under 2 AAC 12.830?”<sup>15</sup> Mr. Grotha responded, “Only the latest bid will count, alternative bid is two prices on the same bid i.e. a counteroffer.”<sup>16</sup> Ms. Del Rosario express mailed JJG’s bid to the department that same day.<sup>17</sup>

By the scheduled closing time on December 5, the department had received a total of eight bids from six offerors. 2Kings’ three bid total prices (\$12,040, \$12,320, and \$18,200) were lower than any of the other bid prices. The next lowest was from JJG (\$19,882.56). The four other bids were substantially higher (from \$24,034 to \$53,970).<sup>18</sup>

At 10:40 a.m. on December 8, in response to a request from Ms. Del Rosario for information on the status of the contract award, Mr. Grotha emailed to JJG notice of its intent to award the contract to 2Kings.<sup>19</sup> Later that morning, and again that afternoon, Mr. Grotha called Ms. Malacas and indicated that the award to 2Kings was uncertain.<sup>20</sup> Later that afternoon, JJG sent an email to Mr. Grotha objecting to the proposed award, asserting that Mr. Grotha had improperly provided assistance to 2Kings.<sup>21</sup> The department responded by issuing a second notice of intent, dated December 9, identifying JJG as the intended contractor and stating that 2Kings had submitted non-responsive alternate bids.

2Kings filed a formal protest on December 10, 2008, asserting that because Mr. Grotha had agreed to destroy its original faxed bid, submitted on November 28, 2 Kings should be considered to have submitted only one bid, the faxed bid submitted on December 1 at approximately 12:02 p.m.<sup>22</sup> The department at this point consulted with the Division of General Services. Having received clarification from the Division of

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<sup>15</sup> Email, JJG to J. Grotha (12/28/2008 @9:31 a.m.).

<sup>16</sup> Email, J. Grotha to JJG (12/1/2008 @ 9:55 a.m.).

<sup>17</sup> Email, JJG to J. Grotha (12/2/2008 @4:46 p.m.).

<sup>18</sup> One of the other bids, from A Helping Hand Cleaning Service, a Fairbanks firm, was apparently submitted by fax. It bears a fax header with the date December 5 and time 1:37 p.m.; it was stamped as received on December 5 at 1:44 p.m.

<sup>19</sup> Email, J. Grotha to JJG (12/8/2008 @ 10:40 a.m.).

<sup>20</sup> 2 Kings Protest at 1.

<sup>21</sup> Email, JJG to J. Grotha (12/8/2008 @ 4:23 p.m.).

<sup>22</sup> 2Kings Protest. Notably, the bid that 2Kings submitted by fax at that time was priced at \$12,320. The 2Kings protest does not reference the bid faxed at 2:15 p.m., which was priced at \$18,200.

General Services, on December 23 the department issued a third notice of intent, this one identifying 2Kings as the prospective contractor, without issuing a decision on 2Kings' December 10 protest.

### **III. Discussion**

#### **A. The Protest Is Sustained.**

JJG filed a protest of the December 23 notice of intent, making these points: (1) the department should have rejected any faxed bids, pursuant to 2 AAC 12.150(a); (2) the most recent bid should not have been deemed a correction of the prior bids, because 2Kings did not submit a written request for correction, as required by 2 AAC 12.140(a); (3) 2Kings' bids should have been deemed non-responsive pursuant to the ITB provision governing multiple bids; and (4) the procurement officer had not followed appropriate procurement procedures.

In a decision issued on January 14, 2009, the department responded to JJG's points as follows: (1) without responding to JJG's assertion that 2 AAC 12.150(a) prohibits faxed bids, the department stated that "[a]lthough the ITB did not prohibit faxed bids, the department should have placed the faxed bids into a sealed envelope until bid opening;" (2) without specifically addressing the requirements of 2 AAC 12.140(a), the department noted that "the argument can be made that by submitting a bid, then submitting another bid, the bidder is modifying the entire original bid;"<sup>23</sup> (3) the ITB provision governing multiple bids "was unclear and contributed to an ambiguous or otherwise inadequate specification;"<sup>24</sup> and (4) the procurement officer "inadvertently failed to conduct the bid process equitably, largely due to feedback that was provided to 2Kings during the solicitation period" and that he "inadvertently provided bid assistance to 2Kings."<sup>25</sup>

#### *1. Sealed Bids Were Required*

JJG's first ground of protest is that faxed bids should not have been accepted. JJG relies on the plain language of the first sentence of 2 AAC 12.150(a), which states:

A bid must be submitted in a sealed envelope with the invitation to bid number identified on the outside of the envelope.

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<sup>23</sup> Protest Decision, p. 2.

<sup>24</sup> Protest Decision, p. 2.

<sup>25</sup> Protest Decision, p. 3.

The department observes that this sentence does not expressly prohibit the submission of faxed bids. The department states, “It has become an accepted practice for the Division of General Services to allow for faxed bids. In those instances, faxed bids are placed into sealed envelopes and opened on the date specified in the ITB. The person receiving the faxed bid and placing it in the envelope is not typically the procurement officer.”<sup>26</sup>

It is true that 2 AAC 12.150(a) does not expressly prohibit the submission of faxed bids. However, regulations should be interpreted “with due regard for the meaning the[ir] language conveys to others,”<sup>27</sup> and 2 AAC 12.150(a) does not convey an intent to permit the submission of bids by fax. A bid must be submitted in a sealed envelope, the regulation says: bidders submit bids; purchasing agencies accept or reject them. Furthermore, a potential bidder who is aware that bids may be submitted by fax, notwithstanding the plain language of 2 AAC 12.150(a), has a substantial competitive advantage over other bidders who rely on the regulation as written: a bidder who submits a fax bid can take advantage of late price changes, has extra time to seek better terms from suppliers and can avoid delayed mail or express delivery. Finally, to permit faxed bids without any established formal procedure for bid security upon receipt would defeat the purpose of requiring sealed bids, which is, patently, to ensure that the bid contents are not disclosed to unauthorized persons prior to bid opening.<sup>28</sup>

If, as the department represents, “[i]t has become an accepted practice for the Division of General Services to allow for faxed bids,” it is reasonable to assume, in light of the plain language of 2 AAC 12.150(a), that the practice is accepted only when the ITB permits it (so that all prospective bidders are aware of that option notwithstanding the plain language of 2 AAC 12.150) and appropriate procedures for bid security have been established.<sup>29</sup> Clearly, it may be desirable to allow for faxed (or electronic) bids in many cases. However, in light of the plain language of 2 AAC 12.150(a), fax bid

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<sup>26</sup> Department’s Supplemental Memorandum at 3.

<sup>27</sup> Wilson v. State, Department of Corrections, 127 P.3d 826, 829 (Alaska 2006).

<sup>28</sup> And, incidentally, to avoid precisely the type of problem that arose in this case, where the procurement officer contacts the bidder about a problem on the face of the bid.

<sup>29</sup> This is the rule under the Federal Acquisition Regulation. *See* FAR §14.303(c). That regulation also provides describes the factors relevant to the determination to accept faxed bids, which include the adequacy of the agency’s provisions for bid receipt and security. *See* FAR §14.202-7(a)(1)-(5).

submission, if it is not prohibited by law, is acceptable only when it is expressly authorized in the solicitation. In this case, the ITB contained the Division of General Services' standard terms and conditions concerning bid submission, which do not expressly authorize submission of faxed bids.

The protest is sustained on JJG's first stated ground.

2. *Multiple Bids Were Prohibited*

The ITB states: "**The State of Alaska can only accept one bid from each bidder.** Submitting two bids is considered an alternative bid and is not allowed. 2 AAC 12.830 states: '*Alternate bids or proposals are non-responsive unless the solicitation states that such bids or proposals may be accepted.*'"<sup>30</sup>

This language clearly and expressly prohibits acceptance of more than one bid, and states that submission of two bids "is not allowed." The department argues that only one bid was accepted (the last - and highest - of 2Kings' three bids) and that it was appropriate to cancel the solicitation under 2 AAC 12.860(2) because the ITB wrongly prohibited the submission of multiple bids even though the agency intended only to prohibit the submission of alternate bids, which as the division explained to the department (and as the department had told Ms. Del Rosario prior to the bid closing time), are not the same as multiple bids.<sup>31</sup>

JJG finds the ITB provision referenced above to be perfectly clear and unambiguous.<sup>32</sup> And, insofar as the quoted language prohibits the submission of two (or multiple) bids, JJG is correct: the ITB clearly and unambiguously prohibits the submission of two bids.<sup>33</sup> But that the ITB clearly and unambiguously prohibited multiple bids does not mean that the department lacked authority to cancel the solicitation under 2 AAC 12.860(2), which provides that:

After...notice of intent to award but before award, all bids...may be rejected in whole or in part by the chief procurement officer or the head of

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<sup>30</sup> ITB, p. 9 (bold and italic in original).

<sup>31</sup> Protest Report at 2, 3.

<sup>32</sup> Protest Appeal at 1.

<sup>33</sup> A bidder who submits three bids has, by definition, also submitted two bids, which is not allowed. The ITB, read reasonably, cannot be construed to permit the submission of more than one bid by a single bidder.

a purchasing agency issuing the solicitation. Reasons for rejection include the following:

...

- (2) ambiguous or otherwise inadequate specifications were part of the solicitation.

The terms of an ITB may be inadequate, even if they are clear and unambiguous: the ITB may be incomplete, inaccurate, or mistaken, and thus fail to communicate to potential bidders the information that is necessary in order to intelligently compete.<sup>34</sup> And that the department has used the same language on prior occasions does not mean that the language is adequate. It simply means that the department had not yet identified a problem.

However, whether the department had discretion under 2 AAC 12.860(2) to cancel the solicitation,<sup>35</sup> and if so whether it abused that discretion,<sup>36</sup> are questions that need not be answered, because even if cancellation pursuant to 2 AAC 12.860(2) was within the purchasing agency's discretion, JJG's protest was filed before cancellation,

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<sup>34</sup> See, e.g., In Re Kyllonen Enterprises, OAH No. 08-0399-PRO at 7-9 (Department of Administration, March 10, 2009).

<sup>35</sup> 2 AAC 12.860(2) provides discretion to cancel a solicitation based upon ambiguous or inadequate specifications. Under Alaska law, bid specifications are described as provisions of the ITB that address functional or performance requirements for the items being purchased, or the stated minimum requirements for eligibility to bid. See 2 AAC 12.0070-.100; 2 AAC 12.120(a)(2). Information concerning bid submission requirements have a different function. See 2 AAC 12.120(a)(1).

The treatise that the Division of General Services relied on in advising the department addresses procurement practice under federal law. It states:

The term 'specifications' is used in several different contexts in Government contracting. In its broadest sense, it identifies all of the requirements of the IFB, including (1) the item or service to be furnished, (2) delivery requirements, (3) provision for samples or descriptive literature, and (4) pre-production model requirements. In its narrowest sense, it refers to a standard description of the item or service embodied in a well-established and coordinated form.... Finally, the term 'specification' is also used to refer to the item description regardless of the formality with which it has been established.

Schnitzer, GOVERNMENT CONTRACT BIDDING, ch. 9 at 187 (2d Ed. 1982) (hereinafter, "Schnitzer"). Under none of these formulations would a provision of an ITB prohibiting multiple bids be considered a specification.

<sup>36</sup> Schnitzer notes that when an ITB defect is discovered after bid submission, "an award may be made, even if the IFB is defective, if (1) competition was not adversely affected, (2) the Government will receive the items it requires, and (3) no bidder obtained an undue advantage." *Id.*, ch. 5, §C(2) at 67. In this particular case, the purchasing agency will receive the services requested and there is no evidence that competition was adversely affected by the prohibition of multiple bids, or that any bidder received an undue competitive advantage as a result of that provision. Nor, in light of 2 AAC 12.140(a), is there an reason to believe that the prohibition of multiple bids would have adversely affected any bidder: the regulation expressly provides for the correction or withdrawal of a bid, and a reasonable reading of that regulation and the terms of the ITB is that any bidder could have withdrawn its bid, in writing, and submitted a new one, without violating Alaska law or the terms of the ITB.



and cancellation under 2 AAC 12.860 does not abrogate a protestor's right to an appropriate remedy under AS 36.30.565(a) if its protest is sustained.<sup>37</sup>

Because the ITB expressly and unambiguously prohibited the submission of multiple bids, the protest is sustained on JJG's second stated ground.

3. *No Written Request to Correct Bids Was Submitted*

JJG's third ground for protest is that the procurement officer wrongly treated 2Kings' subsequent bids as corrections or withdrawals of prior bids, contrary to the plain language of 2 AAC 12.140(a), which states:

(a) A bid may be corrected or withdrawn by written request received in the office designated in the invitation for bids before the time and date set for opening.

The department contends it correctly treated each new bid as an implicit request to correct the prior bid. The department notes that "[a]ccording to [the Division of General Services], it can be logically determined that additional bids following an initial bid are written requests for pre-opening correction and the last correction is the one that prevails."<sup>38</sup> The department also refers to the division's observation that "the argument can be made that by submitting a bid, then submitting another bid, the bidder is modifying the entire original bid."<sup>39</sup>

The division had commented to the department that the submission of multiple bids is problematic, because "a bidder can...state that the most advantageous [to the bidder] bid is the one that should be accepted."<sup>40</sup> But that problem can generally be solved by applying 2 AAC 12.140(a) as it is written and accepting both bids: although this particular ITB precluded accepting multiple bids, no provision of Alaska law has

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<sup>37</sup> See, e.g., *In Re Kyllonen Enterprises*, OAH No. 08-0399-PRO at 7-9 (Department of Administration, March 10, 2009).

<sup>38</sup> Protest Report at 2. See Email, J. Grotha to J. Mungle & W. Harvey (12/23/2008 @ 10:43 a.m.). Mr. Soza had earlier noted that the Schnitzer treatise on federal procurement practices, discussing untimely modifications to a timely submitted bid, "contemplates the possibility of a bidder submitting a bid and then subsequently modifying it." Email, J. Soza to J. Mungle (12/22/2008 @ 4:06 p.m.).

<sup>39</sup> Protest Decision at 2. See Email, J. Soza to J. Mungle (12/23/2008 @ 10:09 a.m.). Mr. Grotha's observation was based on language quoted from Schnitzer's treatise on federal procurement practices, dealing with untimely modification of a timely submitted bid. *Id.*, quoting Schnitzer, ch. 18, §C(1) at 433. Timely modification (*i.e.*, modification prior to the time bids are due) of bids in the federal procurement system is governed by FAR §14.303. FAR §14.303(a) states: "Bids may be modified or withdrawn by any method authorized by the solicitation..."

<sup>40</sup> Email, J. Soza to J. Mungle & W. Harvey (12/23/2008 @ 10:43 a.m.)

been identified that prohibits a purchasing agency from accepting multiple bids from a single bidder.<sup>41</sup> It is a fundamental tenet of procurement law that a bidder is bound to its bid, and the submission of multiple bids does not relieve a bidder from that commitment.

An unwritten practice of treating a subsequent bid as an implicit request to correct, modify, or withdraw a prior bid disregards the plain language of 2 AAC 12.140(a) and prevents the purchasing agency from accepting the offer that is most favorable to it. At the same time, it does not prevent bidders from arguing that the bid most favorable to them should be accepted, notwithstanding the agency's unwritten practice. But the relevant question raised by the protest is not whether an unwritten practice of treating subsequent bids as implicit requests to correct, modify, or withdraw a prior bid would avoid bidding disputes, but rather whether it is consistent with the plain language of 2 AAC 12.140(a).

Just as 2 AAC 12.150(a) does not expressly prohibit the submission of faxed bids, 2 AAC 12.140(a) does not expressly prohibit the implicit correction, modification or withdrawal of a bid by the submission of a subsequent bid. However, it does not convey an intent to permit the unstated withdrawal of a bid: by definition, a "written request" is expressed in writing, not implied from conduct (*i.e.*, submission of a subsequent bid). Furthermore, allowing the implicit withdrawal of a prior bid would defeat the purpose of the express requirement in 2 AAC 12.140(a) that requests to withdraw a bid must be written, which is, self-evidently, to avoid disputes over a bidder's unstated intent.

The protest is sustained on JJG's third stated ground.

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<sup>41</sup> Multiple bids by a single bidder are acceptable under federal law. See Dakota Woodworks, No. B-220806 ( Comptroller General, October 29, 1985) ("[T]he general rule is that multiple bids by a single interest need not be rejected so long as such bidding is not prejudicial to the United States or to other bidders." [citation omitted]).

A bidder might have a legitimate reason to submit multiple bids. For example, a bidder might choose to submit a second bid at a higher price, with terms that it was more confident would be deemed responsive than the terms of its other bid. See, e.g., Hewitt, Olson Capital Recovery Group, Inc., No. B-261856 (Comp. Gen., November 7, 1995) (9 of bidder's 17 bids non-responsive, but two of its responsive bids were the lowest; rejecting protest based on submission of multiple bids, stating "[W]e do not see how other bidders were prejudiced"). Or a bidder might submit an early bid to protect against the possibility that a last minute bid at a lower price might not be timely. Or a bidder might choose to submit a bid with a higher quality product at a higher price; if both bids are lower than any others, the agency could pick either. See 2 AAC 12.180(d).

4. *The Procurement Officer's Contacts Were Improper*

The department agrees that its procurement officer “inadvertently failed to conduct the bid process equitably” and “inadvertently provided bid assistance to 2Kings.”<sup>42</sup> This means that the department sustained JJG’s protest on its fourth stated ground.

B. Appropriate Remedy

When a protest is sustained, the procurement officer must implement an appropriate remedy after considering all of the circumstances, including the following specific statutory factors:<sup>43</sup>

1. *Seriousness of Procurement Deficiency*

In this case, the Department of Health and Social Services failed to adhere to the literal terms of 2 AAC 12.140(a) and 2 AAC 12.150(a) without providing notice to bidders in the terms of the ITB of the manner in which those regulations would be applied. In addition, it failed to adhere to the terms of the ITB governing submission of multiple bids, and its procurement officer provided inappropriate assistance to a bidder after bid submission. These are serious deficiencies in the procurement process. Because the contract has not been awarded, this factor supports cancelling the solicitation unless it can be determined which bidder would have been awarded the contract under the correct application of the procurement regulations and the terms of the ITB.

2. *Degree of Prejudice to Parties and Procurement System*

Whether JJG was prejudiced depends on how the evidence is viewed. Under one view, 2Kings did not independently discover the error in its first bid. If that is so, then if the procurement officer had followed proper procedure, 2Kings would not have learned of the pricing discrepancy on its first bid, and would never have submitted another one.<sup>44</sup> On that view of the evidence, at bid closing the department would have had only one bid

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<sup>42</sup> Protest Decision at 3.

<sup>43</sup> AS 36.30.585; *see, e.g., State, Department of Administration v. Bachner Company, Inc.*, 167 P.3d 58 (Alaska 2007).

<sup>44</sup> 2 AAC 12.170(b) states: “If, before award, a procurement officer knows of an error in a bid, the officer shall notify the bidder of the error.” This provision presumes the submission of sealed bids; with that presumption, there is no requirement for the procurement officer to notify the bidder of an error discovered prior to bid opening as a result of the submission of an unsealed bid. As the department correctly ruled in its protest decision, to allow such assistance would give an unfair competitive advantage to bidders who submit faxed or otherwise unsealed bids, even if an unsealed bid may be accepted.

from 2Kings, a bid that had been mailed and faxed to the department, with a total price of \$12,040, and with errors in two of the unit prices. The standard terms and conditions of the bid state: “In case of error in the extension of prices in the bid, the unit prices will govern; in a lot bid, the lot prices will govern.” The ITB states: “Award will be made as one lot to the lowest responsive and responsible bidder. In order to be considered responsive, bidders must bid on all items.”<sup>45</sup> Under these terms, the total price was a lot price. Thus, the total price governed, and the unit prices did not. Accordingly, had the procurement officer followed correct procedures, 2Kings would have been offered the opportunity to withdraw its bid (because it contained a facial mathematical error), but could not have corrected it.<sup>46</sup> If 2Kings had not withdrawn the bid, it would have been evaluated at a price of \$12,040, and JYG would not have received the award.

On another view of the evidence, 2Kings discovered the bid error on the first bid on its own and called Mr. Grotha to see what could be done about it (this what 2Kings’ protest says is what actually happened). If the procurement officer had followed proper procedure, the procurement officer would not have commented on the substance of the bid, but he would have told 2Kings that it could file a sealed corrected bid along with a written request to withdraw the first bid. This would have been permissible because it would have been information dealing with the bid submission process, rather than the contents of a bid. 2Kings would then have submitted the second bid along with a request to withdraw the first. The second bid, at \$12,320, would have prevailed, and JYG would not have received the award.

What remains unexplained, in 2Kings’ telling, is why 2Kings submitted a third bid and why that bid’s price increased by 50% from the bid 2Kings had submitted just two hours previously. 2Kings has not asserted, and it is not plausible to believe, that this third bid was the result of 2Kings’ independent discovery of its prior errors with respect to the unit prices, since the dramatic change in the total price appears to be unrelated to the prior unit price errors. In the absence of evidence showing that the third 2Kings bid was not tainted, directly or indirectly, by improper prior contacts with the procurement

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<sup>45</sup> ITB at 2, ¶6. The unit prices would govern in a solicitation with itemized bidding, where each item bears a unit price and an extended price. Where multiple items are gathered in a single lot, the lot price governs.

officer,<sup>47</sup> there is not a reasonable degree of assurance that if proper procedures had been followed the third bid would have been submitted. The third bid should therefore not be accepted.

From a remedial point of view, what is important is that under all of these scenarios, it appears that if there had been no impropriety, JJG would not have received the award. Thus it appears that the department's failure to follow proper procedures did not in fact prejudice JJG. Nonetheless, there was serious damage to the integrity of the procurement system, because there is a distinct possibility that the department's improprieties were the direct or indirect cause of 2Kings' submission of a third bid of \$18,200. With that possibility not ruled out, it appears that if proper procedures had been followed, 2Kings would have been bound to a bid of either \$12,040 or \$12,320.

Because the record indicates that if proper procedures had been followed, 2Kings would have submitted only its first two bids, and would have had the opportunity to withdraw both because of pricing errors, this factor supports rejecting 2Kings' third bid, accepting 2Kings first two bids, providing it with an opportunity to withdraw either or both, and awarding the contract to JJG if 2Kings withdraws both.

### 3. *Good Faith*

The department characterizes its procurement officer as having "inadvertently" provided assistance to 2 Kings, but in fact there was nothing at all inadvertent about the procurement officer's conduct. However, that the procurement officer knowingly and intentionally provided assistance to a bidder does not necessarily mean that the officer acted in bad faith (*i.e.*, with knowledge that it was wrongful to provide the assistance, or with the intent to prejudice another bidder). In this case, although the record demonstrates a serious breakdown in the procurement process, there is no evidence of

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<sup>46</sup> 2 AAC 12.170.

<sup>47</sup> One can easily concoct plausible, but wholly speculative, scenarios, in which this change would not have occurred unless the procurement officer had improperly informed Ms. Malacas that its bid had been wrongly calculated. Here is one: after 2Kings had submitted its second bid, Mr. Grotha called and informed Ms. Malacas that the second bid had not cured the error in the first one; Ms. Malacas then contacted Ms. Del Rosario, who (anticipating the rejection of both of 2Kings' bids) explained how to properly calculate the extended price for nightly and weekly services, and in the process let slip her own bid price; Ms. Malacas, armed with that knowledge, submitted her own bid at a total price just low enough to edge out JJG, even if JJG were awarded the Alaska bidder preference. Imagination yields other possibilities, most of which point to a highly competitive, perhaps even cutthroat, level of competition in this field.

bad faith on the part of the purchasing agency. With respect to the bidders, it may be that JIG or 2Kings, or perhaps both, took advantage of their knowledge of the other's bid, but there is no evidence that either of them acted in bad faith towards the purchasing agency. Cancellation is therefore not necessary if another remedy is reasonable.

4. *Extent Accomplished*

The solicitation has been cancelled, and there is no risk of upsetting existing contracts.

5. *Costs and Other Impacts to the Agency*

JIG states that the existing contract has been extended at a cost in excess of JIG's bid. Resolicitation would impose an additional administrative cost on the department. Award of the contract to either 2Kings or JIG will minimize costs to the agency, without unfairly prejudicing the other bidders, whose bid prices have all been exposed. Cancellation and resolicitation, however, would be unfair to all of the bidders, including JIG and 2Kings, because it would likely cause them to reduce their bid prices as a consequence of the department's multiple errors in the conduct of the solicitation.

6. *Other Circumstances*

In this particular case, JIG was fully aware of the procurement deficiencies before the bid closing time (in addition to being told by 2Kings that it had discussed its bid with the procurement officer, JIG had been told by the department that it would accept faxed bids and that a second bid would be accepted notwithstanding the ITB language).<sup>48</sup> That JIG elected not to bring its concerns to the attention of the procurement officer before the closing date is a circumstance to consider in selecting an appropriate remedy. However, in the absence of any showing that JIG itself engaged in any improper conduct, its prior knowledge of questionable conduct by the purchasing agency is not a reason for denying JIG a contract that it would have received had proper procedures been followed.

The Department of Health and Social Services argues that referral to the Chief Procurement Officer is unnecessary, because the solicitation was cancelled and therefore "no procurement violation occurred," and because it is conducting its own internal review to guard against similar occurrences in the future.<sup>49</sup>

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<sup>48</sup> Email, J. Grotha to JIG (12/1/2008 @ 9:55 a.m.).

<sup>49</sup> Department's Supplemental Memorandum at 5.

These arguments are unpersuasive. The defects in this procurement were systemic in nature and they pertain to interpretation and application of multiple regulations governing the procurement process. That the solicitation was cancelled does not mean that no procurement violation could occur. That the Department of Health and Human Services is conducting its own internal review does not mean that the matter should not be referred to the Chief Procurement Officer, particularly in light of the Division of General Services' participation in the department's response to the concerns expressed by JJG.

#### **IV. Conclusion**

The notice of cancellation is rescinded. 2Kings' first two bids are accepted; it shall be provided an opportunity to withdraw either or both. 2Kings third bid is rejected. If 2Kings withdraws its first two bids, JJG shall be awarded the contract.

This matter is referred to the Chief Procurement Officer to determine whether specific changes should be made to existing regulations, the administrative manual, or the standard terms and conditions of the ITB, whether additional training or information should be provided to procurement officers on the relevant issues, and whether any other remedial or corrective actions should be taken.

DATED July 1, 2009.

Signed  
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Andrew M. Hemenway  
Administrative Law Judge

## Adoption

The Department of Health and Social Services' proposal is accepted, and the proposed decision has been revised to delete the assertion at pages 8-9 of the proposed decision that the department did not follow the procedure specified for cancellation under 2 AAC 12.860. That statement was in error.

On behalf of the Commissioner of the Department of Administration, the undersigned adopts this revised decision as final under the authority of AS 44.64.060(e)(1) and (4). 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 1st day of July, 2009.

By: Signed  
Signature  
Andrew M. Hemenway  
Name  
Administrative Law Judge  
Title

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