**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF TRANSPORTATION AND PUBLIC FACILITIES**

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| NANA MANAGEMENT SERVICES, LLC, | ) | |
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| v. | ) | |
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| DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES | ) | OAH No. 09-0068-PRO |
| | ) | RFP No. 02582043 |

**FINAL DECISION**

## I. Introduction

This is a protest appeal. The Department of Transportation and Public Facilities issued Request for Proposals (RFP) No. 0282043 to obtain maintenance and operation services for the Anton Anderson Memorial Tunnel. After evaluating the two proposals submitted, the department engaged in contract negotiations with VMS, Inc. (VMS), the higher ranked offeror. The negotiations resulted in an agreement between the department and VMS to enter into a contract eliminating two of the operational services described in the RFP -- provision of bicycle and pedestrian transportation, and wintertime security and law enforcement -- with a concomitant 3.3% reduction in price.

NANA Management Services, Inc. (NMS), the other offeror, filed a protest raising five issues: (A) the department had wrongfully conducted contract negotiations with only one offeror;[1] (B) the department had agreed to terms inconsistent with the solicitation;[2] (C) the technical proposals were not properly scored;[3] (D) clarifying discussions regarding price should have been conducted;[4] and (E) the department wrongfully failed to score several criteria.[5] The department denied the protest on all grounds asserted and NMS appealed. On appeal, NMS maintained its protest on all but the last of the issues it had raised.[6] The parties filed additional evidence and submitted

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1 Protest at 6 (4a), 7-8; Appeal at 1 (Errors 1-4), 7 (Error 8).
2 Protest at 6 (4a, b), 8-9 (5a[2], 5b); Appeal at 2-5 (2a-c), 5-6 (Error 5).
3 Protest at 6 (4c), 9-13; Appeal at 6-7 (Errors 6 & 7).
4 Protest at 6 (4d), 13; Appeal at 7-8 (Error 9).
5 Protest at 6 (4e).
6 NMS's appeal does not mention issue (E), which asserted that because the contract involves no federal funding, certain additional evaluation factors must be assessed.

the matter for decision on the record. The administrative law judge issued a proposed decision, and the commissioner remanded the matter for preparation of a revised decision. The administrative law judge prepared a revised decision, and the commissioner now issues this final decision.

AS 36.30.240 did not preclude the department from entering into contract negotiations with the highest ranked offeror after the evaluation had been completed. However, under the circumstances of this case, the negotiations that occurred exceeded appropriate limits. The protest is therefore sustained. The department is directed to solicit proposals for a new contract. The existing contract may be extended month-to-month as necessary to compete a new procurement.

## II. Facts

The 13,300 foot (2.5 mile) Anton Anderson Memorial Tunnel is the longest highway and combined rail-highway tunnel in North America.[7] With associated facilities, the tunnel provides controlled highway and rail access between Portage Glacier Highway and the town of Whittier on Prince William Sound.[8]

Since 2002, VMS has provided maintenance and operation services for the tunnel; as the initial and only contractor for those services, VMS "developed the entire program of maintenance and operations – including current manuals, policies and procedures…".[9] Anticipating the termination its existing contract with VMS, the Department of Transportation and Public Facilities issued Request for Proposals (RFP) No. 02582043 to obtain maintenance and operation services for the tunnel beginning in 2009.[10]

The RFP anticipated a five year period of performance beginning on March 1, 2009, under a one year contract with four one year renewal options.[11] The RFP described a selection procedure that anticipated negotiations with a single offeror at the conclusion

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On issue (B), NMS dropped one argument made in the protest. NMS initially argued that the department intended to enter into a five year contract. Protest at 9 (5b). However, the proposed contract is for a one year period with five one-year options. On appeal NMS does not contest the department's authority to enter into such a contract (except for the annual price adjustment). Reply at 5.

7 Request for Proposals, Proposed Statement of Services, Anton Anderson Memorial Tunnel Maintenance and Operations Services (hereinafter, SOS) at 5 (Ex. 1, p. 40).

8 *Id.* at 4-6.

9 SOS at 4 (Ex. 1, p. 39); VMS Proposal at 1 (Ex. 4, p. 8).

10 RFP Part A at 1 (Table of Contents; Ex. 1, p. 1).

11 RFP Part A at 1, 5 (Table of Contents; Ex. 1, pp. 1, 5).

of an evaluation process that could include discussions with multiple offerors.[12] The evaluation criteria included price (35%) and technical factors (65%).[13] The technical criteria included (1) the proposal's description of the project objectives and services and the methodology proposed for meeting them (10%), (2) the project staff and management (25%), (3) the offeror's workload and resources (5%), and (4) the offeror's business history, financial condition and capacity (25%). For each technical criterion, evaluators were instructed to award the better of the two proposals a rating of 5 and the other proposal a rating of 4 or less if there was a "significant difference" between the two for that criterion.[14] If unanimously deemed unacceptable on a criterion, the proposal could be awarded zero on that criterion.[15]

The RFP package includes a 30-page Proposed Statement of Services (PSOS).[16] In addition to a description of the tunnel facilities and the contemplated maintenance services, the PSOS contains a 13-page description of the contemplated operational services,[17] which included provision of transportation for bicyclists and pedestrians,[18] and security and law enforcement (the latter focused on traffic violations).[19]

Two proposals were submitted, one from NMS and the other from VMS. NMS's 19-page technical proposal includes four pages addressing the project objectives and services and its proposed methodology.[20] The proposal does not include any reference to the provision of bicycle and pedestrian transportation.[21] The proposal twice references the provision of security and law enforcement services: it observes that security and law enforcement services will be subcontracted to the City of Whittier,[22] and it notes that the firm's security division, led by a former commissioner of the Department of Public Safety, "has a strong presence in the State of Alaska, including officers onsite in Whittier

12 RFP Part A at 2, paragraphs 2.4, 3.1, 3.2, 4, 5 (Selection Procedure; Ex. 1, p. 2).
13 RFP Part C (Ex. 1, pp. 8-13).
14 RFP Part A at 2 (Selection Procedure; Ex. 1, p. 2); Ex. 5, p. 1.
15 Ex. 5, p. 3 (Evaluation Instructions for Chairperson, ¶13).
16 Ex. 1, pp. 36-65.
17 Ex. 1, pp. 49-62.
18 Ex. 1, p. 59 (PSOS ¶3.26.6).
19 Ex. 1, pp. 61-62 (PSOS ¶3.27.5).
20 Ex. 3, pp. 6-9.
21 Ex. 3.
22 Ex. 3, p. 8.

on contract to the Alaska Railroad…[who] could be made available to provide immediate law enforcement support."[23]

VMS's 23-page technical proposal includes just over 13 pages addressing the project objectives and services and proposed methodology.[24] Like NMS's, it makes no reference to the provision of bicycle and pedestrian transportation, except to note the existence of that requirement as a change from the existing contract.[25] Also like NMS's proposal, it proposes to subcontract out security, to the Department of Public Safety/Whittier Police Department.[26]

A proposal evaluation committee met to review the proposals on June 26, 2008. The committee included five members, three of whom were to score the proposals. Those three individuals were the tunnel manager and two employees of the department's maintenance and operations division.[27] All three evaluators deemed the VMS proposal the better of the two with respect to two criteria: (1) description of the project objectives and services and the methodology proposed for meeting them and (2) project staff and management. All three evaluators preferred the NMS proposal with respect to (3) workload and resources; two of three preferred the VMS proposal with respect to (4) the firm's business history, financial condition and capacity.[28] Except for one evaluator on one criterion, the lower-ranked proposal received the maximum four point award: one evaluator awarded the NMS proposal three points on one criterion, (1) objectives, services and methodology, indicating that evaluator found that the NMS proposal was significantly different from VMS's on that criterion.[29]

For their technical proposals, VMS received 935 points and NMS received 825 points. The VMS proposal, priced at $3,086,830, received 468 points for price, and the NMS proposal, priced at $2,753,829, received 525 points for price. Total points were 1403 for VMS (935 + 468) , and 1335 for NMS (810 + 525).

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[23] Ex. 3, p. 12.
[24] Ex. 4, pp. 8-21.
[25] Ex. 4, p. 13. The proposal indicates that at present, VMS provides tunnel access to pedestrians and bicycles. Ex. 4, p. 8.
[26] Ex. 4, pp. 20, 27.
[27] Ex. 6, p. 1.
[28] Ex. 6, pp. 7-8.
[29] *Id. See* note 14, *supra*.

On June 27, the department notified the offerors that it intended to enter into negotiations for a contract with the top-ranked offeror, VMS.[30] On July 8, NMS wrote to the department asking that it enter into discussions with both offerors and solicit best and final offers, under the process described in the RFP.[31] On July 22, the department responded that it had determined that "additional discussions with proposers are not warranted at this time" and that "it received sufficient information from the proposers' initial submissions, making clarifying discussions and best and final offer negotiations unnecessary."[32]

Nearly four months later, on November 12, 2008, the department and VMS negotiated final contract terms. The department had estimated the cost of the new contract as $3,000,000.[33] The department agreed to reduce the operational services to be provided by eliminating the provision of bicycle and pedestrian transportation and winter security and law enforcement services, and VMS agreed to reduce its price to $2,985,000; in addition, the parties agreed to a 2.8% annual CPI adjustment for the life of the contract.[34] About two months later, on January 5, 2009, the department issued a notice of intent to award the contract to VMS.[35]

## III. Discussion

### A. The Parties' Arguments

The primary argument made by NMS in its appeal is that the department negotiated with a single contractor in violation of AS 36.30.240 and applicable regulations. The department argues that when the department issued a notice of intent to negotiate with a single offeror, it implicitly determined that NMS was no longer reasonably susceptible of being selected for award, and thus there was no violation of either AS 36.30.240 or 2 AAC 12.315.[36] The department observes that it used its standard form for a notice of intent to negotiate; the department states that it uses a

30 Ex. 7.
31 Ex. 1. *See* RFP Part A, page 2, ¶4 (Selection Procedure; Ex. 1, p. 2).
32 Ex. 9.
33 Record of Negotiation and Selection (RONS) at 3.
34 RONS at 3.
35 Ex. 14.
36 Motion at 5-6.

different form to alert offerors that it will conduct discussions under AS 36.30.240.[37] In this case, the department argues, it was negotiating with a single offeror "in compliance with 2 AAC 12.315."[38]

NMS disputes the department's assertion that NMS was not reasonably susceptible of being selected for award. It argues that as a factual matter "[t]he record supports the finding that NMS's proposal was reasonably susceptible for award," pointing out that: (1) the notice of intent to negotiate itself observes that if negotiations with VMS were unsuccessful, the department had discretion to negotiate with NMS; (2) the department's July 22 letter declining to enter into discussions did not claim that NMS was not reasonably susceptible of award, but rather simply stated that "additional discussions are not warranted at this time" because the proposals were "sufficient"; and (3) nothing in the evaluation committee's report suggests that NMS was not reasonably susceptible of award.[39] Furthermore, NMS argues, 2 AAC 12.315 allows contract negotiations only after discussions under 2 AAC 12.290 or revision of the RFP and receipt of revised proposals under 2 AAC 12.295.[40]

The department replies that the evaluation committee's report shows nothing more than that NMS's proposal was responsive, not that it was reasonably susceptible of award. It argues that 2 AAC 12.315 cannot reasonably be construed as limiting contract negotiations to instances in which discussions or revisions to proposals have occurred,[41] and that pre-award contract negotiations regarding price are permissible in the context of a request for proposals.[42]

These arguments raise three issues. The first issue is whether after final evaluation, a procurement officer has discretion to enter into negotiations with the highest ranked offeror absent prior discussions with all offerors reasonably susceptible of award. If the procurement officer has discretion to negotiate in that situation, the second issue is the permissible scope of the negotiations. The third issue is whether in this particular

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37 Motion at 7.
38 Motion at 7.
39 Response at 4.
40 Response at 8-9.
41 Reply at 3-4.
42 Reply at 4, *citing* In Re Spectrum Printing, at 4 (Department of Administration No. 98-14, April 28, 1999).

case the exclusive negotiations and resulting contract were appropriate rather than equal discussions and solicitation of best and final offers.

B. AS 36.30.240 Does Not Prohibit Negotiations After Final Evaluation

AS 36.30.240 states:

> As provided in the request for proposals, and under regulations adopted by the commissioner, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of contract for the purpose of obtaining best and final offers. In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors. AS 44.62.310 does not apply to meetings with offerors under this section.

NMS concedes that "[n]either the MPC [Model Procurement Code], the Alaska statutes, or the…regulations prevent exclusive communications ("negotiations") with a proposer to finalize an agreement."[43] "The issue," NMS states, "is what can be negotiated and when." The "when" in this case is after a final evaluation. The proposed decision did not, as NMS asserted in its initial proposal for action, conclude that AS 36.30.240 "did not apply after the initial ranking of proposers."[44] It concluded, rather, that AS 36.30.240 does not apply to contract negotiations after a final evaluation.[45]

In its second proposal for action, NMS does not suggest that AS 36.30.240 prohibits exclusive contract negotiations after final evaluation and prior to contract award. Rather, NMS argues that AS 36.30.240 limits the scope of such negotiations, because it implicitly precludes pre-award contract negotiations that "involve a revised scope of services and a revised price proposal."[46]

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[43] NANA Management Services, LLC's Response to DOT/PF's Supplemental Points and Authorities at 1 (hereinafter, NMS Supplemental Reply).

[44] NANA Management Services, LLC's Brief Upon Remand at 1 (hereinafter, NMS Supplemental Brief).

[45] "AS 36.30.240 and 2 AAC 12.290 apply to the second period, during which proposals are under evaluation." Proposed Decision at 10. The "second period" includes the time when "an evaluation is conducted, and the intended awardee is identified." *Id*. The third period, to which AS 36.30.240 does not apply, is "the third period, after the evaluation has been completed." *Id*. (emphasis in original) The "final evaluation" is the demarcation point between the second and third periods.

[46] NMS Proposal for Action – Revised Recommendation, at 3.

NMS's argument highlights two key distinctions: (1) between (a) pre-final evaluation discussions and revisions to a proposal and (b) post-final evaluation, pre-contract award negotiations regarding contract terms; and (2) between (a) the contents of a proposal and (b) the terms of a contract. By its express terms, AS 36.30.240 requires equal discussions as a condition of revisions to a proposal prior to contract award; as NMS recognizes, however, AS 36.30.240 does not prohibit exclusive contract negotiations with the intended contractor after final evaluation and prior to contract award. Furthermore, AS 36.30.240 is silent regarding the degree to which contract terms agreed to following contract negotiations may vary from the proposal.

VMS and the department did not engage in "discussions" within the meaning of AS 36.30.240, that is, communications aimed at clarification of or revisions to a proposal prior to final evaluation. Rather, they engaged in post-final evaluation contract negotiations aimed at establishing contract terms with the offeror whose proposal had been identified as the most beneficial to the state and selected for award of the contract. VMS did not revise its proposal. Rather, it agreed to a contract on terms that varied from the proposal. As NMS has acknowledged, AS 36.30.240 does not prohibit exclusive contract negotiations after final evaluation and prior to contract award. AS 36.30.240 addresses revisions to proposals, but it does not address the degree to which contract terms may vary from a proposal. NMS has not shown a violation of AS 36.30.240.

The department argues that AS 36.30.240 did not apply to the discussions that occurred in this case because after the department elected to forego discussions, NMS's proposal was no longer "reasonably susceptible of being selected for award." NMS responds that its offer was, in fact, "reasonably susceptible of being selected for award." These arguments conflate two completely different concepts. AS 36.30.240 gives the procurement officer discretion (subject to the terms of a proposal and applicable regulations) to engage in discussions with offerors that are reasonably susceptible of contract award, but it does not require the officer to do so. Thus, that discussions did not occur does not mean that NMS was not reasonably susceptible of award within the meaning of AS 36.30.240. The record provides ample support for a finding that NMS was reasonably susceptible of award, but that the procurement officer elected to forego discussions and instead proceed directly to engage in contract negotiations with the

highest ranked offeror. The NMS proposal was "reasonably susceptible of being selected for award," within the meaning of AS 36.30.240, because if the department had elected to engage in discussions, it would have been required to include NMS in those discussions.

Nonetheless, there was no violation of AS 36.30.240. As the department points out, once the final evaluation had been completed and the department had elected to forego discussions, NMS was no longer "reasonably susceptible of being selected for award" for purposes of discussions under AS 36.30.240 no matter how competitive its proposal was, because the department had already selected another proposal for contract award and had decided not to engage in discussions. All that remained was to finalize the details of the contract, and, given the obligation of the parties to negotiate those terms in good faith, it must be assumed that they would successfully do so. The relevant period of time to determine whether a particular proposal is reasonably susceptible to award within the meaning of AS 36.30.240 is before the evaluation process has been completed, and before the decision is made to forego discussions with those offerors deemed reasonably susceptible of award.

The relevant issue in this case with respect to AS 36.30.240 is not whether the NMS proposal was reasonably susceptible of award within the meaning of AS 36.30.240, but rather is whether discussions under AS 36.30.240 are a mandatory prerequisite to contract negotiations. As NMS recognizes, they are not.[47] AS 36.30.240 does not prohibit exclusive contract negotiations with the offeror whose offer has been selected for award after final evaluation. In this case, the final evaluation was complete and the decision to forego discussions was made before contract negotiations began.[48] AS 36.30.240 says nothing about the scope of permissible contract negotiations after final evaluation and selection of the intended contractor, nor does it address the extent to which contract terms may vary from the proposal as finally evaluated. There was no violation of AS 36.30.240.

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[47] "NMS does not suggest that negotiations cannot occur unless there has been BAFO's. The issue is what is the scope of allowable negotiations." NMS Supplemental Brief at 4. *See also* note 43, *supra*.

[48] Ordinarily, the fact that the evaluation is final is signaled by a Notice of Intent to Award, which formally identifies the selected offeror's proposal for purposes of AS 36.30.250(a). In this particular case, the department issued a Notice of Intent to Negotiate, rather than a Notice of Intent to Award. However, because NMS objected to the lack of discussions and the department confirmed that it had elected to forego discussions, it is clear that the evaluation was final.

C. 2 AAC 12.315 Does Not Expressly Prohibit Negotiations After Final Evaluation

Even though AS 36.30.240 does not prohibit or limit the scope of exclusive contract negotiations after final evaluation, the Department of Administration could reasonably have chosen to do so by regulation. The parties' arguments on the motion for summary adjudication focus on whether 2 AAC 12.315, which directly and expressly addresses contract negotiations (as compared with "discussions") has that effect.

2 AAC 12.315 expressly authorizes a limited scope of contract negotiations "[a]fter evaluation of proposals under 2 AAC 12.290, including an adjustment of an evaluation under 2 AAC 12.295." The regulation does not expressly prohibit contract negotiations in the absence of discussions, as it might easily have been worded to do.[49] However, it is a general principle of statutory construction that language authorizing one course of conduct is generally construed as prohibiting an alternative course.[50] That principle, applied to 2 AAC 12.315, would lead to the conclusion that the regulation, by expressly authorizing negotiations after discussions with all offerors reasonably susceptible of award, implicitly prohibits negotiations absent such discussions. The principle, however, is not controlling and may be disregarded if it leads to an interpretation not intended by the Department of Administration.[51] The Department of Administration's intent may be derived from the broad structure of the applicable regulations,[52] changes to the relevant regulations over time,[53] any contemporaneous[54]

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[49] For example, the regulation might have been phrased: "After evaluation of proposals under 2 AAC 12.290, including an adjustment of an evaluation of a proposal as authorized under 2 AAC 12.295, but not including an evaluation of proposals under 2 AAC 12.260…"; or "Only after evaluation of proposals under 2 AAC 12.290…".

[50] This principle is known as "*expressio unius est exclusio alterius*." *See generally*, 2A SUTHERLAND'S STATUTORY CONSTRUCTION §47.23 (5th Ed. 1992).

[51] *Id.*, §§47.24-25.

[52] *See* Alaska Center for the Environment v. State, Office of the Governor, Office of Management and Budget, Division of Governmental Coordination, 80 P.3d 231, 243 (Alaska 2003), *quoting* Federal Deposit Insurance Corporation v. Laidlaw Transit, Inc., 21 P.3d 344, 351 (Alaska 2001), *quoting* Millman v. State, 841 P.2d 190, 194 (Alaska App. 1992).

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

[54] This principle is well established in the context of statutory interpretation. *See, e.g.,* State v. Alaska State Employees Ass'n/AFSCME Local 52, 923 P.2d 18, 24 (Alaska 1996) (subsequent testimony about legislature's intentions irrelevant); Department of Community & Reg. Affairs v. Sisters of Providence in Washington, 752 P.2d 1012, 1015 (Alaska 1988) (after-the-fact letter from legislator irrelevant to determining legislative intent); Alaska Public Empl. Ass'n v. State, 525 P.2d 12, 16 (Alaska 1974) ("subsequent testimony of even the prime sponsor of a bill as to . . . the meaning of that bill should

express indications of the department's intent,[55] and any applicable administrative interpretations.[56]

The administrative law judge's revised decision reviewed these materials in depth and concluded that the Department of Administration did not intend, in promulgating 2 AAC 12.315, to altogether prohibit exclusive negotiations after final evaluation. However, definitive interpretation of that regulation falls within the purview of the Department of Administration. For this reason, the commissioner will presume, without deciding, that 2 AAC 12.315 does not prohibit exclusive negotiations with the highest ranked offeror after a final evaluation, and before contract award.

D. The Negotiations That Occurred Were Inappropriate

*1. Discussions Regarding Work Orders Were Unnecessary*

NMS specifically requested that the department engage in clarifying discussions regarding one specific topic. NMS pointed out that under the existing contract with VMS, a substantial cost had been incurred as "work orders," that is, extra work outside the scope of the former contract's scope of work, and that NMS had specifically proposed to exclude the cost of extra work from work orders issued under the new contract if the extra work was performed by its employees during their normal contract work hours.[57] NMS argued that its proposal would thus avoid double billing. NMS asked that the

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not be considered"; "we do not wish to transform statutory construction into a parade of legislators' affidavits"). In other jurisdictions, the same concept has been applied in the context of regulations. *E.g.*, Armco, Inc. v. Commissioner, 87 T.C. 865 (U.S. Tax Ct. 1986) (affidavit of IRS employee who drafted regulations irrelevant to interpreting regulation); Apel v. Murphy, 70 F.R.D. 651, 654, 656 (D.R.I. 1976) (testimony of administrative officials on purpose of regulations barred as irrelevant).

[55] Again, this principle is well established in the context of statutory construction. *See generally*, Interior Cabaret, Hotel, Restaurant & Retailers Association v. Fairbanks North Slope Borough, 135 P. 3d 1000, 1010-1011 (Alaska 2006) (Matthews, J., concurring); Cook Schuhmann & Groseclose, Inc. v. Brown & Root, Inc., 116 P.3d 592, 600-601 (Alaska 2005) (Bryner, C.J., dissenting in part).

[56] Administrative interpretations that courts have considered in interpreting statutes include administrative adjudications, consent decrees, policy manuals, and information letters. *See, e.g.*, United States v. Boyle, 469 U.S. 241, 243 n. 1, 105 S.Ct. 687, 689, 83 L.Ed. 2d 622 (1985) (Internal Revenue Service Policy Manual); Wescott v. State, Department of Labor, 996 P.2d 723 (Alaska 2000) (policy manual); Wien Air Alaska v. Department of Revenue, 647 P.2d 1087, 1091 (information letter); State v. O'Neill Investigations, 609 P.2d 520, 529 (Alaska 1980) (consent decrees). *See generally*, In re Western Queen Fisheries LLC, OAH No. 05-0775-TAX, at 10-12 (August 9, 2006). An administrative agency is not bound to its own prior interpretation, although it may not abandon an authoritative interpretation without explanation. *See generally*, May v. State, Commercial Fisheries Entry Commission, 168 P.3d 873, 884 (Alaska 2007); Alaska Public Interest Group v. State, 167 P.3d 27, 42 (Alaska 2007).

[57] Ex. 8, p. 2. *See* Ex. 3, p. 35 (NMS Price Proposal, additional sheet #1).

department open discussions and invite best and final offers based on the anticipated amount of work orders for extra work under the new contract.

The department responded:

> The Department has carefully considered the points raised in your letter. We have decided, however, that additional discussions with proposers are not warranted at this time. The Department believes it has received sufficient information from the proposers' initial submissions, making clarifying discussions and best and final offer negotiations unnecessary.[58]

NMS protested the department's decision to forego discussions on this topic.[59] The department's protest decision states that it saw no need to engage in price discussions since it assumed both offerors would submit billings in good faith, and that it had no reason to anticipate that either would engage in double billing. It stated:

> Both proposals were evaluated with an assumption of each proposer's good faith and fair dealing. Thus, a written offer by [NMS] to accurately report labor costs and submit true and accurate bills does not necessarily improve the ranking of [NMS], since that standard is expected in all dealings with the Department. Therefore, there was no reason for the Department to conduct clarifying discussions on this point.[60]

On appeal, the parties have not addressed these competing visions of the need for discussions. NMS's primary argument is that discussions were required, because the department could not have negotiated a contract absent discussions. The department's primary argument is that discussions were not required, because after the notice of intent to negotiate was issued, NMS was no longer reasonably susceptible for award. These arguments do not address whether it was an abuse of discretion not to engage in discussions regarding price for extra work.

Review of the record, however, establishes that the department's decision to forego discussions of the price of extra work was not an abuse of discretion. In the first place, NMS has not shown that this issue was a significant one. The department had changed the scope of work from the prior contract, and the degree to which extra work would be required under the new contract has not been established; accordingly, it is not clear whether extra work would continue to generate substantial costs.

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58 Ex. 9.

59 Protest at 13 (5d).

60 Exhibit 1, p. 6.

More fundamentally, whether to engage in negotiations concerning payment for extra work before or after a contractor has been selected, or by contract amendment after the contract has been awarded, is generally a choice within the discretion of the purchasing agency. In this particular case, the terms of the PSOS make it clear that the department had elected to deal with extra work after contract award, rather than by discussions prior to the conclusion of the evaluation process. Regarding maintenance and repairs, the PSOS provides:

> The Contractor shall be responsible for providing all labor, equipment, tools, supervision, materials, supplies, and any other incidental items necessary for the maintenance repair, operation and documentation thereof of the [Whittier Tunnel]…[61]
> …
> During the course of the contract, work items that are outside normal preventative and corrective maintenance may need to be performed. The Contractor shall…negotiate a flat rate hourly for labor for which those items shall be covered…. The Contracting Agency reserves the right to reject any or all proposals and conduct the work with another contractor, or using Contract Agency personnel or by any other means….[62]
> …
> If emergency repairs fall outside the hours of operation or any maintenance period, or the contractor is required to bring in additional personnel to deal with the emergency, then work will be considered out-of-scope for the out of operations time, and/or the addition[al] work force only….[63]

With respect to operations, the PSOS states:

> …All operations shall be based on the Operating Plan, and the traffic modes outlined in this section. The Contracting Agency's Tunnel Manager can modify the Operational parameters contained in the Operating Plan and this Contract in consultation with the Contractor as need[ed] to provide for the best interest of the public and/or the State. Changes that do no impact the Contractor's cost shall not be considered out-of-scope.[64]
> …

NMS did not object to any of these provisions, which directly govern payment for out-of-scope services. Indeed, with respect to operations, the PSOS in substance calls for

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61 Exhibit 1, p. 42 (PSOS at 7, §3.0).
62 Exhibit 1, p. 47 (PSOS at 12, §3.13).
63 Exhibit 1, p. 47 (PSOS at 12, §3/15).
64 Exhibit 1, p. 47 (PSOS at 14, §3.2). *See also, id.,* pp. 51-52 (PSOS at 16-17, §§3.23, 3.24, 3.25). Unforeseen extra operating hours are also provided for. *Id.*, pp. 56-57 (PSOS at 21-22, §3.26.2).

precisely what NMS offered: work that can be performed at no additional cost by existing personnel will not be paid for as extra work (*i.e.*, no double billing). With respect to maintenance, by reserving the right to negotiate with third parties the department retained the ability to solicit services at a later date and thus maintained competitive control over cost. And with respect to emergency repairs, the PSOS reflects a judgment that the scope of work is sufficient, and that payment for unanticipated extras would be dealt with on a case by case basis. In light of these provisions, NMS has not shown that it was an abuse of discretion to forego discussion of extra work before selecting a contractor.

*2. The Negotiations Were Otherwise Inappropriate*

Although the specific issue identified by NMS did not warrant clarifying discussions, the commissioner concludes that under the facts of this particular case, the negotiations that occurred were inappropriate, and that the procurement officer's decision should therefore be reversed. Several considerations are relevant in this regard.

First, even assuming exclusive contract negotiations after a final evaluation and prior to contract award are permissible, the applicable statutes and regulations provide no clear guidance on their permissible scope. The parties have identified four different tests for the scope of exclusive contract negotiations, to the extent they are permissible: (1) negotiations are permissible so long as the contract as executed does not alter the essential purpose of the solicitation; (2) negotiations are permissible so long as they are consistent with AS 36.30.240 and the related regulations; (3) only non-material terms may be negotiated; and (4) negotiations are restricted to minor informalities as defined by 2 AAC 12.990(8).

The revised decision properly rejected the department's suggestion that negotiations are permissible so long as the contract is consistent with the essential purpose of the solicitation.[65] However, although the particular terms of the contract that were affected by the negotiations in this case may not have been material, as the revised decision concluded, they were certainly substantive and were more than minor informalities. Restricting post-final evaluation exclusive negotiations to minor informalities would create a strong incentive for procurement officers to engage in

[65] Revised Decision at 16.

discussions or to amend a request for proposals, rather than to rely on post-evaluation contract negotiations to achieve more favorable terms. Such an approach would avoid the potential pitfalls associated with a broader scope of negotiations, as occurred in this case, and would enhance the prospects for obtaining a contract on the terms that are most favorable to the purchasing agency, while ensuring fair and equal treatment of all offerors. In light of these considerations, a contracting officer's decision to negotiate substantive terms absent prior discussions with all offerors should be carefully scrutinized.

Second, in this solicitation, as in any solicitation with an incumbent contractor as an offeror, evaluation criteria dealing with key personnel and prior experience are problematic: an incumbent contractor's personnel typically have more, and more directly relevant, experience than a competitor's personnel.[66] The administrative law judge correctly concluded that NMS's protest regarding the evaluation on this criterion was properly dismissed.[67] Nonetheless, it would have been better to deal with NMS's concern, raised prior to the due date for proposals, through discussions or by amendment of the request for proposals.[68] NMS had made a specific suggestion that the RFP be revised to limit specifically-identified personnel to two key positions, the contract manager and the project manager, and that it expressly leave open the option to negotiate with employees of the incumbent contractor (VMS) for other positions.[69] The

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[66] *See, e.g.,* AdapTech General Scientific, LLC, No. B-293867 (Comp. Gen., June 4, 2004); Construction Technology Laboratories, Inc., No. B-281836 (Comp. Gen., April 12, 1999); ManTech Advanced Systems International, Inc., Nos. B-255719.2 (Comp. Gen., May 11, 1994).

[67] Revised Decision at 23-24.

[68] When an incumbent contractor seeks to retain a contract, discussions may be a useful tool to mitigate the incumbent's inherent advantages in the procurement process. *See generally*, Empyra.com, Inc. v. Alaska Permanent Fund Corporation, OAH No. 06-0520-PRO (December 19, 2006). The terms of a solicitation may have a direct impact on a potential offeror's ability to compete with the incumbent contractor. *See, e.g.*, Patriot Contract Services, No. B-294777.3 (May 11, 2005) (solicitation required letters of commitment reflecting agreement on terms of employment); MCR Engineering Company, Inc., Nos. B-287164, B-287164.2 (Comp. Gen., April 26, 2001) (incumbent's personnel hired by competitor); Construction Technology Laboratories, Inc., *supra* (solicitation permitted offerors to propose personnel from whom the offeror had no commitment, provided the offeror included a compensation package and acceptable transition plan).

[69] Ex. 2, pp. 2-3. *See* A& T Engineering Technologies, Vector Research Division, Nos. B-282670, 282670.2 (August 13, 1999); AdaptTech General Scientific, LLC, *supra* ("The substitution of incumbent employees for proposed employees with an agency's permission, and where there has been no misrepresentation, is not an improper bait and switch.").

department's response[70] ignored NMS's specific suggestion and did not address NMS's underlying concern.

Third, the purchasing agency's decision to engage in contract negotiations was driven by its pre-determined budget. In any procurement in which the purchasing agency has a pre-determined budget limit whose existence is not disclosed, proceeding to contract negotiations is problematic. If the purchasing agency is unwilling to enter into a contract in excess of a pre-determined amount, then to solicit offers without disclosing the existence (if not the amount) of the budgetary limit may be unfair to potential offerors.[71]

Fourth, although the preponderance of the evidence is that the contract negotiations did not have the effect of changing the ranking of the two proposals, it is possible that the purchasing agency would have preferred to have NMS doing the job at its lower price and including the two services deleted in the final contract, than to have VMS doing the job at its higher price excluding those two services. Thus, it is possible that the procurement officer's decision to forego discussions affected the outcome of the procurement.

E. Remedy

The available remedies in a protest appeal include an award of proposal preparation costs, termination of an existing contract, declining to exercise options under an existing contract (non-renewal), cancellation of the solicitation with or without resolicitation, re-evaluation, and corrective administrative action (*e.g.*, referral to the Attorney General for investigation under the Ethics Act, referral to departmental personnel for disciplinary proceedings, or referral to the Chief Procurement Officer for consideration of changes to applicable law or policies).[72] The commissioner has a "substantial amount of discretion" in determining the appropriate remedy.[73]

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[70] Protest Decision at 5.

[71] *Cf.* In Re Kyllonen Enterprises, OAH No. 08-0399-PRO (Department of Administration, March 10, 2009).

[72] *See*, e.g., Appeal of J & S Services, Inc., No. 02.01 at 7-8 (Department of Administration, September 17, 2002).

[73] State, Department of Administration v. Bachner Company, Inc., 167 P.3d 58, 61 (Alaska 2007).

As directed by the commissioner, the parties submitted memoranda addressing an appropriate remedy, and a hearing on remedies was conducted.[74] The parties have identified the following potential remedies: (1) award NMS the reasonable cost of preparing its proposal; (2) remand to the department for discussions with the offerors and submission of revised proposals for rescoring; or (3) non-renewal and issue a new request for proposals.

AS 36.30.585(b) provides that in determining an appropriate remedy, the following factors must be considered: (1) the seriousness of the procurement deficiencies; (2) the degree of prejudice to other interested parties or to the integrity of the procurement system; (3) the good faith of the parties; (4) the extent to which the procurement has been accomplished; (5) costs to the agency and other impacts on the agency of a proposed remedy; and (6) the urgency of the procurement to the welfare of the state.

(1) Seriousness of the Procurement Deficiency.

In this case, the department conducted contract negotiations with the highest ranked offeror after a final evaluation. The scope of those negotiations was not shown to be in violation of law, but in the absence of clear regulatory limits, negotiations that exceed minor informalities create a substantial risk of unfairness in the procurement process. In this particular case, the negotiations were inappropriate, which is a serious deficiency in the procurement process. Because the department acted in good faith, an award of costs is not required. To the extent possible, the appropriate remedy would be to provide an opportunity for equal discussions and submission of revised proposals. However, because both parties' prices have been disclosed, the effect of such a remedy would be to create an auction. In the absence of an agreement by both NMS and VMS as to the conduct of further discussions, the scope of permissible changes, and the manner of rescoring, a remand would create a substantial risk of further protests and is therefore inappropriate. The parties in this case were unable to reach such an agreement. This factor supports non-renewal and resolicitation.

(2) Degree of Prejudice to Parties; Integrity of the Procurement System.

[74] An initial hearing was conducted on January 29, 2010 and a supplemental hearing on costs was conducted on February 12, 2010.

Because NMS has not shown that the negotiations that occurred affected the ranking of the proposals, it has not shown that it was prejudiced. However, the conduct of inappropriate negotiations adversely affects the integrity of the procurement system. The absence of an effective remedy could create an incentive for the department to substitute post-evaluation negotiations for discussions, since the department would have nothing to lose by engaging in broad-ranging negotiations, and affected offerors would have nothing to gain from filing a protest if inappropriate negotiations occurred. Restricting the scope of post-evaluation contract negotiations to appropriate limits is a highly important aspect of ensuring fairness in the procurement process, and conducting discussions facilitates obtaining a proposal that is "most advantageous to the state."[75] Accordingly, this factor supports non-renewal and resolicitation.

(3) Good Faith.

Bad faith conduct by the purchasing agency typically warrants cancellation of the solicitation, in order to protect the integrity of the procurement process. In addition, when the purchasing agency has breached the implied covenant of good faith and fair dealing, compensatory damages in the form of the costs of preparing a proposal generally must be awarded.[76] However, in the absence of such a breach, costs may be awarded if there is statutory authority for the award and an award of costs is an appropriate remedy.[77] An award of costs is limited to those costs attributable to an irregularity in the procurement.[78]

In this case, there is no evidence that the department or any of the parties acted in bad faith, and thus cancellation is not necessary. Nor did the department breach the implied covenant of fair dealing. Post-evaluation negotiations are permissible, and the post-evaluation negotiations in this particular case were not found to be contrary to law. Rather, the commissioner has determined that in light of the record as a whole,

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[75] See AS 36.30.250(a).

[76] *See, e.g,* King v. Alaska State Housing Authority, 633 P.2d 256, 263 (Alaska 1981).

[77] In some cases, an award of costs may be the only practicable remedy. The failure to award costs in such cases, even if there is no bad faith, could adversely impact the integrity of the procurement process by insulating procurement decisions from administrative review and creating the perception that the procurement process is unfair. Because under the facts of this case, an award of costs is not an appropriate remedy, it is not necessary to decide whether AS 36.30.585(a) provides statutory authority for an award of costs in the absence of bad faith.

[78] Lakloey, Inc. v. University of Alaska, 141 P.3d 317, 321 (Alaska 2006) ("A successful bid protestor is…not automatically entitled to an award of its entire bid preparation costs upon a showing of bid irregularities, but must demonstrate a loss of time or resources, or identify additional costs incurred, because of the bid irregularities.").

discussions rather than post-final evaluation negotiations would have been appropriate, and better ensure fair and equal treatment of all offerors. This does not mean that by conducting post-final evaluation negotiations with VMS, the department put NMS at an unfair competitive disadvantage: indeed, by the time the negotiations occurred, the competition had been concluded. In addition, NMS has not shown conducting discussions, rather than post-final evaluation contract negotiations, would more likely than not have altered the outcome of the solicitation. For these reasons, and because another remedy is practicable, an award of the costs of preparing a proposal is not required.

This factor supports non-renewal and resolicitation.

(4) The Extent the Procurement has been Accomplished.

Because procurement was not stayed, the procurement was completed and the contract awarded before the protest appeal was decided. However, the contract is for one year with annual renewal options. For this reason, non-renewal and resolicitation is a reasonable remedy. This factor therefore supports cancellation and resolicitation.

(5) Costs to the Agency and Other Agency Impacts of the Proposed Remedy.

The potential cost to the department in the event of non-renewal is primarily the cost of conducting another solicitation. The department has indicated that resolicitation is practicable, and resolicitation may result in improved proposals from both offerors, with resulting benefits for the performance of the contract.

This factor supports non-renewal and resolicitation.

(6) Urgency of the Procurement.

Because the contract has been awarded, there is no urgency in implementing a remedy. However, the timing of a resolicitation is of concern to the department. The department has indicated it will be able to conduct a resolicitation in a reasonable time. This factor therefore non-renewal and resolicitation.

(7) Other Factors.

The factors listed in AS 36.30.585(b) are not exclusive. All of the circumstances should be considered in determining an appropriate remedy. VMS argues that the appropriate remedy is an award to NMS of the costs of preparing its proposal, because VMS is not responsible for the error that occurred, and because there is virtually no

chance that NMS would have been able to lower its price sufficiently to obtain the contract if it had been afforded the opportunity to do so. However, this argument overlooks the fact that if discussions had occurred prior to final evaluation, NMS would have had the opportunity to revise its proposal in light of any deficiencies identified during those discussions. It is possible that if discussions had been conducted rather than post-evaluation negotiations, NMS would have prevailed.

## IV. Conclusion

The procurement officer may have had legal authority to forego discussions and enter into contract negotiations with the prospective contractor once the evaluation was completed. However, the commissioner is not obliged to accept the procurement officer's discretionary decision to do so,[79] and the negotiations that occurred in this particular case were inappropriate in light of the circumstances. Therefore, the protest is SUSTAINED.

Based on the factors considered above, non-renewal and resolicitation is the appropriate remedy. The department is directed to solicit a new contract to begin following the expiration of the initial one-year contract term, which may be extended on a month-to-month basis for as long as necessary to establish a new contract.

DATED February 23, 2010

*Signed*
Leo von Scheben
Commissioner

[79] *See, e.g.,* Redoubt Development, LLC v. Division of General Services at 9, OAH No.08-0637-PRO (Department of Administration 2009); Quality Sales Foodservice v. Department of Corrections, OAH No. 06-0400 at 11-12 (Department of Administration 2006); In Re Waste Management of Alaska, Inc., DOA No. 01-08 (Department of Administration 2002).