



Pinnacle appealed and the parties submitted the matter for decision on the written record. Because the ITB did not require bidders to employ or subcontract a mechanical administrator prior to submitting a bid, and because Statewide was authorized by law to add a subcontractor, the procurement officer's decision is sustained.

## **II. Facts**

The Department of Transportation and Public Facilities advertised the Spring Creek Correctional Center Fuel Piping Replacement Project on March 27, 2009. The project involved construction of a new fuel piping system, including removal and replacement of day tanks, installation of interior and exterior piping, connections to existing mechanical equipment and underground petroleum storage tanks, and installation of associated controls and wiring.<sup>1</sup> Under Alaska law, some of the work could only be done by a licensed mechanical contractor or otherwise under the supervision of a licensed mechanical administrator.<sup>2</sup> The ITB did not expressly require firms submitting bids to be a licensed mechanical contractor or to employ or subcontract a licensed mechanical administrator prior to the time of performance.

Four firms submitted timely bids, among them Statewide. Statewide is not a licensed mechanical contractor and it does not employ a licensed mechanical administrator. At the time it submitted its bid, Statewide believed, in good faith, that it would be able to perform all of the work required by the contract with its own employees, without the supervision of a mechanical administrator.<sup>3</sup> Statewide's belief was based on its understanding that use of employees certified to perform work on underground storage tanks and associated piping was sufficient to cover all of the work involved in the contract, consistent with its prior practice and experience in similar projects.<sup>4</sup>

DOTPF identified Statewide as the lowest bidder. AS 36.30.115(a) requires the apparent low bidder on a construction contract to submit a list of all subcontractors within five days. The ITB stated that timely submission of the subcontractor list "with all

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<sup>1</sup> Appeal at 3; DOTPF Memorandum at 2.

<sup>2</sup> Memorandum, B. Howes to K. Mahoney, July 15, 2009.

<sup>3</sup> DOTPF Memorandum, Exhibit B at 1-3.

<sup>4</sup> *Id.*; see also Letter, M. Garner to S. Smith, June 16, 2009.

required information” was required for a bidder to be considered responsive.<sup>5</sup> On May 27, 2009, Statewide provided DOTPF with its list of subcontractors and DOTPF issued notice of intent to award the contract to Statewide.<sup>6</sup>

Statewide’s subcontractor list did not identify any subcontractors and represented that Statewide would not use subcontractors for any portion of the work exceeding one-half of one percent of the total contract amount.<sup>7</sup> On June 4, 2009, Pinnacle Construction, Inc., filed a protest, asserting that “Statewide cannot fulfill the technical qualifications of the contract work and therefore is ineligible for this procurement.”<sup>8</sup> Specifically, Pinnacle argued that: (1) Statewide could not itself perform the work, and that it had not identified any qualified subcontractor to perform it; (2) to permit Statewide to hire a qualified subcontractor would constitute a change in its bid; and (3) by asserting (in its subcontractor list) that it would perform the work itself, Statewide had misrepresented its qualifications.<sup>9</sup>

On June 12, 2009, DOTPF asked Statewide to explain how it intended to meet the alleged requirement that some of the work be done under the supervision of a mechanical administrator.<sup>10</sup> Statewide responded on June 16, asserting that all of the work in question could be done by persons certified by the Department of Environmental Conservation (DEC) to work on underground storage tanks, and that supervision by a mechanical administrator was not required.<sup>11</sup> However, Statewide added that it had “entered into a contractual arrangement with Steve Lemme [a licensed mechanical administrator], d/b/a Seward Plumbing and Heating [a licensed mechanical contractor], to obtain all mechanical administrator services that may be required” and that it anticipated spending less than one-half of one percent of the contract amount for that work.<sup>12</sup>

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<sup>5</sup> DOTPF Memorandum at 2; Subcontractor List (“The apparent low bidder shall complete this form and submit it so as to be received by the Contracting Officer prior to the close of business on the fifth working day after receipt of written notice from the department. Failure to submit this form with all required information by the due date will result in the bidder being declared nonresponsive and may result in the forfeiture of Bid Security.”).

<sup>6</sup> Subcontractor List, May 27, 2009; Notice of Intent, May 27, 2009.

<sup>7</sup> Subcontractor List, May 27, 2009.

<sup>8</sup> Protest at 1.

<sup>9</sup> Protest at 2-5.

<sup>10</sup> Letter, S. Smith to Statewide, June 12, 2009.

<sup>11</sup> Letter, M. Garner to S. Smith, June 16, 2009, at 1-2.

<sup>12</sup> *Id.*, at 2.

Statewide also observed that “through the submittal of its bid, [Statewide] had contractually bound itself to perform the work in accordance with all applicable state laws and regulations for the specified price.”<sup>13</sup>

On June 29, 2009, the procurement officer issued his decision on the protest. The procurement officer determined that at least some of the work would require the services of a mechanical administrator. The decision observed that the terms of the ITB require the contractor to comply with all applicable state laws, including any applicable licensing provisions.<sup>14</sup> The decision noted that Statewide had represented that it would subcontract a mechanical administrator to perform any necessary supervision, anticipating that the subcontract would amount to less than one-half of one percent of the total contract price. The procurement officer expressed skepticism that the supervisory work could be achieved at such a low cost, but accepted Statewide’s representation, stating that “the Department must rely on Statewide’s assertion that they do not anticipate the [subcontract] will exceed ½ of 1% [of the total contract price]” and that therefore “enforcement of this limit becomes a matter of Contract Administration and not one of Contract Award.”<sup>15</sup> Noting that DOTPF would closely monitor performance of the work to ensure that the relevant licensing statutes were followed, the procurement officer denied the protest, finding that it was in the best interests of the state “to proceed with the award of the contract.”<sup>16</sup>

On July 9, 2009, after the contract had been awarded, Statewide filed this appeal. On July 15, an investigator for the Department of Commerce, Community and Economic Development’s Division of Corporations, Business and Professional Licensing notified DOTPF’s project manager that, in consultation with personnel from the Department of Labor and Workforce Development,<sup>17</sup> the division had determined that both DEC certification and a mechanical administrator’s license were required for some of the work

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<sup>13</sup> *Id.* See, ITB Section 0070, Article 7.1. As observed in the procurement officer’s decision, this language obligates the contractor to comply with all applicable provisions of law in performing the work. Protest Decision, June 29, 2009, at 3.

<sup>14</sup> Protest Decision at 3, 5-6.

<sup>15</sup> Protest Decision at 5.

<sup>16</sup> Protest Decision at 8.

<sup>17</sup> The Department of Labor and Workforce Development’s Division of Labor Standards and Safety, Mechanical Inspection Section enforces the contractor licensing and mechanical administrator program. <http://labor.alaska.gov/lss/mihome.htm> (accessed November 9, 2009).

at issue. Subsequently, on August 6, 2009, Statewide made a written request to add Pioneer Plumbing and Heating as a “Mechanical subcontractor” at a cost to Statewide of approximately \$24,400, with no increase in the contract price to DOTPF.<sup>18</sup> The proposed subcontract was with Michael Uher (a licensed mechanical administrator) d/b/a Pioneer Plumbing and Heating (a licensed general contractor).

As required by AS 36.30.115(e)(2), the procurement officer conducted a hearing to determine whether to cancel the contract or to impose a penalty for Statewide’s apparent violation of AS 36.30.115. He found that Statewide’s failure to list a mechanical administrator as a subcontractor was due to a belief that no administrator was required for this job, and that Statewide had not engaged in bid shopping. The procurement officer determined that cancellation of the contract was not in the state’s best interest and imposed a penalty of four percent of the subcontract amount for the failure to list a subcontractor. Subsequently, pursuant to AS 36.30.115(f), the procurement officer approved Statewide’s request to add Michael Uher d/b/a Pioneer Plumbing and Heating as a subcontractor.

### **III. Discussion**

#### **A. Statewide’s Bid Was Responsive**

Pinnacle’s first argument on appeal is that Statewide’s bid was non-responsive. Pinnacle points out that Statewide is not itself qualified to perform the work required by the terms of the ITB and it did not in its bid or in its list of subcontractors identify a subcontractor who was qualified.<sup>19</sup> DOTPF responds that “Pinnacle apparently concedes that Statewide’s bid, as submitted prior to the bid opening, was fully responsive.”<sup>20</sup>

##### *1. Statewide’s Bid Was Responsive As Submitted*

Possession of a license as a condition of bid submission may be required by law. For example, under Alaska law a bidder must be licensed to do business in the state at the time a bid is submitted.<sup>21</sup> Even if not required by law, possession of a license may be required by the terms of a solicitation as a condition of responsiveness. However, where neither Alaska law nor the terms of a solicitation requires a respondent to possess a

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<sup>18</sup> DOTPF Memorandum, Exhibit A at 2.

<sup>19</sup> Appeal at 3-5.

<sup>20</sup> DOTPF Memorandum at 6.

particular license at the time of bid submission, possession of that license is not a condition of bid responsiveness even if it is a requirement for performance of the contract.<sup>22</sup>

In this particular case, Pinnacle has not pointed to any provision of law or in the ITB that required bidders to have a mechanical administrator's license assigned to it, or to employ a mechanical administrator, at the time of bid submission. The procurement officer correctly determined that the bid as submitted was responsive.

2. *The Subcontractor List Did Not Make The Bid Nonresponsive*

The ITB expressly states that the apparent low bidder will be declared non-responsive if the subcontractor list submitted after bid opening fails to include "all required information." Pinnacle's second argument on appeal is that because Statewide did not identify a mechanical contractor or mechanical administrator in its subcontractor list (and it could not legally perform the work without one or the other), this language in the ITB mandates a determination that Statewide's bid was non-responsive.

DOTPF responds that the ITB should be read consistently with AS 36.30.115,<sup>23</sup> and that so read the ITB does not limit a bidder's ability, subject to approval by the

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<sup>21</sup> AS 36.30.110(b).

<sup>22</sup> In Re Waste Management of Alaska, Inc., DOA No. 01.08, at 16 (Department of Administration 2001); *see also*, Trastar, Inc. v. Department of Transportation and Public Facilities, OAH No. 09-0211-PRO, at 9, note 30 (Department of Administration 2009).

<sup>23</sup> Alaska Statute 36.30.115 states:

(a) Within five working days after the identification of the apparent low bidder for a construction contract, the apparent low bidder shall submit a list of the subcontractors the bidder proposes to use in the performance of the construction contract. The list must include the name and location of the place of business for each subcontractor, evidence of the subcontractor's valid Alaska business license, and evidence of each subcontractor's registration as a contractor under AS 08.18. ....

...  
(c) If a bidder for a construction contract fails to list a subcontractor or lists more than one subcontractor for the same portion of work and the value of that work is in excess of one half of one percent of the total bid, the bidder shall be considered to have agreed to perform that portion of work without the use of a subcontractor and to have represented the bidder to be qualified to perform that work.

...  
(e) If a construction contract is awarded to a bidder who violates this section, the procurement officer may

(1) cancel the contract; or

(2) after notice and a hearing, assess a penalty on the bidder in an amount that does not exceed 10% of the value of the subcontract at issue.

(f) ...[A] construction contractor may request permission from the procurement officer to add or replace a listed contractor. The request must be in writing, specifically

procurement officer, to add a subcontractor after the list of subcontractors required by AS 36.30.115(a) has been submitted.<sup>24</sup>

As DOTPF points out, the purpose of AS 36.30.115 is to prevent (or at least minimize) bid-shopping.<sup>25</sup> Nothing in the statute suggests that a bidder who fails to list a subcontractor must automatically be deemed non-responsive. To the contrary, AS 36.30.115 (e) and (f) provide specific remedies for a bidder's failure to list a subcontractor. The language of the ITB implements AS 36.30.115(a); it is intended to prevent bid-shopping, not to enforce licensing requirements. To read the ITB as Pinnacle does would effectively abrogate the procurement officer's discretion under AS 36.30.115(e) and (f). Accordingly, the ITB is construed to mandate a finding that a bidder is non-responsive only if no subcontractor list is filed, or if, for any subcontractor listed, the information required by AS 36.30.115(a) has not been provided. So construed, the ITB does not mandate a determination that Statewide was a non-responsive bidder.

**B. Statewide Did Not Change Its Bid**

Pinnacle's second argument on appeal is that Statewide's subsequent identification of a proposed subcontractor constituted a change in its bid, because Statewide's bid impliedly or, in conjunction with the subcontractor list, expressly represented that Statewide would not use any subcontractors.<sup>26</sup>

Again, Pinnacle's argument is inconsistent with AS 36.30.115. If accepted, it would preclude any bidder from adding subcontractors after the initial list has been submitted, because all bidders represent that the subcontractor list as submitted is complete and accurate. Furthermore, the ITB neither states nor implies that the subcontractor list submitted after bid opening is a part of the bid. Under the express terms of the ITB, the subcontractor list was supplemental information that was to be

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detailing the basis for the request, and include appropriate supporting documentation. The procurement officer shall approve the request if the procurement officer determines in writing that the requested addition or replacement is in the best interests of the state.

<sup>24</sup> DOTPF Memorandum at 10-11.

<sup>25</sup> See generally, Senate Finance Committee Minutes, SB 341 (April 4, 1986). Bid shopping occurs when the low bidder seeks to obtain lower prices from subcontractors after contract award. Similar statutes are common. See, e.g., Titan Electric Corp. v. Los Angeles Unified School District, 160 Cal App. 188, 202 (Cal. App. 2008); McCandish Electric, Inc. v. Will Construction Co., 25 P.3d 1025, 1061 (Wash. App. 2001).

<sup>26</sup> Appeal at 6.

reviewed prior to a determination as to whether the bidder (not the bid) was responsive. By submitting a bid, Statewide committed itself to perform the contract in accordance with state law. Neither the subcontractor list nor any subsequent additions to it changed that undertaking or altered the bid as submitted, even if the means by which Statewide intended to meet its obligations did change.

C. Pinnacle Did Not Show that Statewide Was Not a Responsible Bidder

Pinnacle's third argument is that Statewide should have been found not to be a responsible bidder, because it did not show that it had the capacity to perform the contract in accordance with law. A purchasing agency's pre-award determination that a bidder is responsible is arguably within the scope of a protest appeal.<sup>27</sup>

Prior to contract award, in response to an inquiry from the procurement officer, Statewide notified DOTPF that it planned, if necessary, to enter into a subcontract with a corporation, Seward Plumbing and Heating, Inc., that is a licensed mechanical contractor and that lists Steve Lemme as its licensed mechanical administrator. That arrangement would not have worked, Pinnacle asserted in its appeal, "since Mr. Lemme is not an employee of Statewide but is simply an independent contractor."<sup>28</sup> Citing 12 AAC 21.600, Pinnacle asserts that the work must be done either under Statewide's own registration as a mechanical contractor, or under the supervision of a mechanical administrator who is a Statewide employee.<sup>29</sup>

Leaving aside, for the moment, analysis of the language of the regulation, Pinnacle's appeal is unpersuasive. Although Pinnacle argues that the arrangement initially proposed by Statewide was not permitted, Pinnacle's appeal concludes that "it is obvious that Statewide needed to employ a mechanical subcontractor who, in turn, employed a mechanical administrator."<sup>30</sup> That is precisely what Statewide proposed; a

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<sup>27</sup> See Flagship Development, LLC v. Division of General Services, OAH No. 06-0249-PRO, at 11 (Department of Administration 2006). By contrast, the contracting officer's post-award determination that a contractor is or is not performing in compliance with applicable law is a matter of contract administration and is not the proper subject of a protest. Safety Waste Incineration v. Department of Corrections, OAH No. 05-0643-PRO, at 5 (Department of Administration 2005).

<sup>28</sup> Appeal at 6.

<sup>29</sup> Appeal at 6. Pinnacle also cites to AS 08.18.028, but has not articulated any reason why that statute limits Statewide's ability to employ or subcontract a mechanical administrator.

<sup>30</sup> Appeal at 7.

subcontract with a mechanical contractor (Seward) who, in turn, employed a mechanical administrator (Steve Lemme).

Furthermore, Pinnacle has not shown that the licensing authorities viewed the proposed arrangement as improper. DOTPF was advised that:

the project is required to have an MA, licensed in the appropriate category, and [*sic*] is assigned<sup>[31]</sup> to the contractor's license who is involved in the project.<sup>[32]</sup>

This language is not entirely clear, but it is not unreasonable to read it to mean that there must be a mechanical administrator, licensed in the appropriate category, assigned to the license of the contractor who is subcontracted to perform the work. Again, that is precisely what Statewide initially proposed: Mr. Lemme's license is assigned to Seward Plumbing & Heating, Inc.

Turning to the language of the regulation, however, Pinnacle's argument that the proposed subcontract would not have worked is plausible. 12 AAC 21.600 states that a "mechanical contractor may only submit bids for, or work on, projects for which the contractor has a licensed mechanical administrator." Because Statewide does not employ a mechanical administrator or have one assigned to its license, it appears that 12 AAC 21.600 would preclude it from contracting the work to a mechanical contractor, such as Seward Plumbing and Heating, Inc. Pinnacle suggests that the point of the regulation is to prevent a general contractor from subcontracting with a mechanical contractor that has "no lasting connection" with the general contractor.

Even if Statewide's proposed subcontract with Seward was impermissible under 12 AAC 21.600, however, this does not mean that DOTPF erred in finding Statewide to be responsible. The procurement officer, after consulting with counsel, determined that Safeway had the capacity to obtain whatever license was necessary by one means or another. While it may be that Statewide's proposed subcontract with Seward conflicted

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<sup>31</sup> AS 08.40.280 states: "A person may not qualify or operate as a mechanical administrator for more than one registered contractor, corporation, joint venture, or other business entity unless the municipality or community where the person qualifies or operates as a mechanical administrator is the principal place of business of fewer than three mechanical administrators." Licensees are obligated to notify the department of any changes in their employment or affiliation. 12 AAC 39.912.

<sup>32</sup> Memorandum, B. Howes to K. Mahoney, July 15, 2009.

with 12 AAC 21.600, Pinnacle has not shown that Statewide could not have found some other way of complying with applicable licensing requirements.

In particular, Pinnacle does not dispute that Statewide could itself have directly employed a mechanical administrator, and there is no evidence that one could not have been hired and assigned to Statewide by the Division of Corporations, Business and Professional Licensing prior to the time performance was due to begin. In addition, Pinnacle has not shown that 12 AAC 21.600 prevents Statewide from subcontracting the oversight of the work to a mechanical administrator who is not also a mechanical contractor, which is the approach that Statewide eventually settled on, by entering into a sub-contract with Michael Uher, a licensed mechanical administrator.<sup>33</sup>

Because Pinnacle has not shown that Statewide lacked the ability to perform the contract in accordance with law, the procurement officer's determination that Statewide was a responsible bidder is sustained.

#### **IV. Conclusion**

Statewide's bid committed it to comply with applicable licensing provisions in performing the work. Pinnacle has not shown by a preponderance of the evidence that Statewide is incapable of doing so. The ITB did not mandate a determination of non-responsiveness for failure to list a subcontractor, and the procurement officer had legal authority under AS 36.30.115(f) to permit Statewide to add a subcontractor. Pinnacle has not shown that the procurement officer erred in exercising his discretion to do so. The procurement officer's decision to deny the protest is therefore sustained.

DATED November 18, 2009.

Signed  
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Andrew M. Hemenway  
Administrative Law Judge

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<sup>33</sup> The July 15 memorandum indicates that the work cannot be supervised by a subcontracted mechanical administrator who is not assigned to the general contractor's license. Pinnacle did not argue, nor does it appear, that Mr. Uher could not have been assigned to Statewide for purposes of this project. See AS 08.40.280 ; 12 AAC 39.912.

## Adoption

On behalf of the Commissioner of the Department of Transportation and Public Facilities, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 4th day of January, 2010.

By: *Signed* \_\_\_\_\_  
Signature  
Leo Von Scheben \_\_\_\_\_  
Name  
Commissioner of Transportation \_\_\_\_\_  
and Public Facilities \_\_\_\_\_  
Title

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