

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

JOHN P. JOHNS)	
)	
v.)	
)	
DEPARTMENT OF REVENUE)	OAH No. 09-0572-PRO
<hr/>)	RFP No. 09-0020

DECISION

I. Introduction

The Alaska Retirement Management Board (Board) issued Request for Proposals No. 09-0020 (RFP), soliciting proposals to provide an audit of its performance consultants and to evaluate its investment policies.¹ The proposal submitted by Independent Fiduciary Services (IFS) was selected for award.

On October 6, 2009, John P. Johns, who had also submitted a proposal, filed a protest, which was denied.² Mr. Johns raised several issues on appeal,³ one of which was decided in the board's favor on a motion for partial summary adjudication.⁴ His post-hearing memorandum identifies three remaining issues: (1) the evaluation committee did not conduct a due diligence inquiry; (2) the scores for his proposal were unfair; and (3) the IFS proposal was substandard because it did not offer services in accordance with generally-accepted auditing standards.⁵

The assigned administrative law judge conducted a hearing on January 26, 2010. The members of the proposal evaluation committee testified, as did Mr. Johns. Mr. Johns did not prove that the evaluation of the proposals was unreasonable or that any member of the evaluation committee was biased. Therefore, his appeal is denied.

¹ ARMB is required by law to obtain these services periodically. AS 37.10.220(a)(11), (12).

² Protest, October 6, 2009; Decision, October 14, 2009.

³ Letter of Appeal, October 15, 2009.

⁴ Mr. Johns's appeal asserted that Mr. Bader should not have decided the protest because (1) the board did not delegate to him the authority to decide it, and (2) because he reports to the board (and to the commissioner of revenue), he has a disqualifying conflict of interest or bias. The administrative law judge ruled that these issues are immaterial on appeal.

⁵ Post Hearing Memorandum at 9 (February 9, 2010) (hereinafter, "2/9/2010").

Adoption

Mr. Johns by emails dated March 15, 16 and 18, requested that the proposed decision dated March 5 be modified as follows:

1. Amend the reference to the procurement officer as the person responsible for making a determination as to responsibility or responsiveness.
2. Address whether the services to be provided are governed by the Alaska Accountancy Act.
3. Take into account that opposing counsel had directly contacted Mr. Johns regarding the case.

None of these matters necessitates a change to the proposed decision.

1. As the proposed decision observes, in its capacity as the procurement evaluation committee, the committee had no obligation to conduct further inquiries. Also, as the proposed decision recognizes, the issue of who had authority to determine responsiveness is immaterial to this appeal, because Mr. Johns did not show that the IFS proposal was non-responsive. For these reasons, reference to the procurement officer (rather than to the Board or its delegate) as the person responsible for making a determination of responsiveness or responsibility is at worst a harmless error.
2. The applicability of the Alaska Accountancy Act is implicit in the discussion of generally accepted accounting standards, at page 18, section III(D) of the proposed decision. As the proposed decision states, "the RFP does not by its terms require compliance with generally accepted accounting standards." Assuming that the Alaska Accountancy Act applies, even though the RFP did not expressly require compliance with it, the proposed decision observes that "Mr. Johns did not establish that [IFS] would not [comply with the generally accepted accounting standards]", nor did he establish that IFS's performance of the contract would violate the Alaska Accountancy Act.
3. Under Alaska law, neither party (or counsel) could contact the administrative law judge concerning this case without notice to the other party. However, nothing in Alaska law prohibited opposing counsel from contacting Mr. Johns directly concerning this case, without notice to the administrative law judge. The matters discussed in the direct contacts were subsequently brought to the administrative law judge's attention in the Board's motion to dismiss, which was denied by order dated January 11, 2010, on the ground that those matters were outside the scope of this appeal.

Accordingly, by written delegation from and on behalf of the Commissioner of Administration, I adopt the attached proposed decision dated March 5 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 April 19, 2010.

Signed

Andrew M. Hemenway, Administrative Law Judge

II. Facts

A. Procedural History

The Alaska Retirement Management Board (Board) issued a Request for Proposals No. 09-0020 (RFP), soliciting proposals to provide an audit of its performance consultants and to evaluate its investment policies,⁶ in accordance with AS 37.10.220(a)(11) and (12).

Three proposals were submitted. One was deemed not responsive.⁷ The other two proposals, from Independent Fiduciary Services (IFS) and John P. Johns, were submitted to a proposal evaluation committee consisting of three members of the Board.⁸ The proposal submitted by Independent Fiduciary Services (IFS) was ranked higher by the committee, and on October 2, on the recommendation of the committee, the Board selected IFS for contract award.⁹

B. Material Facts

1. *Request for Proposals*

The Board is the trustee of the assets of the State of Alaska's retirement systems, which includes defined benefit and defined contribution components.¹⁰ The Board has the fiduciary responsibility to manage and invest those assets,¹¹ which altogether total more than \$15 billion.¹² The Board has nine members appointed by the governor.¹³ In addition to funds managed and invested by the Division of Treasury,¹⁴ the Board retains a number of investment managers who exercise delegated authority to invest funds on behalf of the Board, consistently with the Board's investment policies.¹⁵

⁶ The Board is required by law to obtain these services periodically. AS 37.10.220(a)(11), (12).

⁷ Protest Report, p. 2.

⁸ *Id.*

⁹ Exhibit B, pp. 1-2.

¹⁰ Ex. 1, pp. 1, 14.

¹¹ Ex. 1, p. 14.

¹² Ex. 1, Attachment 9.2.

¹³ The Board is assisted by an investment advisory council. AS 37.10.270.

¹⁴ These include short term fixed income, domestic fixed income, United States Treasury securities, and real estate investment trust. Exhibit 1, Attachment 9.2

¹⁵ See AS 37.10.071. The Board's investment policies include private equity, farmland, timberland, domestic fixed income, inflation-indexed fixed income, high yield fixed income, international fixed income, absolute return, and real estate. Ex. 1, Attachment 9.2.

The Board retains two performance consultants: a general investment consultant (Callan Associations) and a real estate consultant (Townsend Group).¹⁶ The consultants provide quarterly reports that calculate investment returns for various funds and compares those returns against benchmarks; they also conduct external investment manager evaluation and selection, and provide assistance in the development of the Board's investment policies.¹⁷

The Board solicited proposals to provide an audit of its performance consultants and to evaluate its investment policies.¹⁸ The review of the performance consultants was required to include:

- 1) Investment Performance Reporting
 - a) reasonableness, consistency and accuracy of the methods, factors and data used in the calculations
 - b) format and presentation to Board
- 2) Performance Benchmarks
 - a) manager level
 - b) fund level^[19]

The review of the investment policies was required to cover the suitability of the policies in terms of the Board's objectives and risk tolerance, and the clarity and completeness of the policies.

The solicitation states:

Respondents are expected to provide an opinion regarding:

- The reasonableness, consistency and accuracy of the methods, factors and data used in the calculations of the investment returns,
- The adequacy of report frequency, content and format of the investment returns, and
- The suitability, in terms of Board objectives, risk tolerance, financial and actuarial conditions of Board investment policies.^[20]

The evaluation factors were:

- (1) Understanding Scope of Services and Methodology (20%)
- (2) Overall Organization, Experience and Qualifications (20%)
- (3) Professional Qualifications and Personnel Experience (20%)
- (4) Cost (40%)^[21]

¹⁶ Ex. 1, p. 14.

¹⁷ Ex. 1, pp. 14, 15.

¹⁸ Ex. 1, p. 1.

¹⁹ Ex. 1, p. 15.

²⁰ Ex. 1, p. 1.

²¹ Ex. 1, p. 24 (Sec. 8.2). The first three factors are referred to hereinafter as "Understanding and Methodology," "Overall Organization," and "Professional Qualifications and Experience," respectively.

The cost proposal was an annual fixed fee, scored objectively based on the total proposed annual fee. The remaining factors were to be scored subjectively by the proposal evaluation committee, applying each factor in light of specific questions listed for each.²² Respondents were required to submit their proposal in a specified format reflecting the three subjective evaluation factors and were directed to include all of the information requested with respect to each of those factors.²³ In addition, respondents were required to identify methods of quality assurance and any assumptions or exceptions.²⁴ The information requested with respect to the three subjective evaluation factors consisted of open-ended inquires with respect to the Understanding and Methodology factor²⁵ and specific questions with respect to the Overall Organization and Professional Qualifications and Experience factors.²⁶ Respondents were advised to anticipate one trip to Juneau to meet with staff, and one trip to Anchorage to present the report, with the estimated cost of the trips to be included in the cost proposal.²⁷ The Board’s planned schedule called for submission of a draft report on by March 2, 2010, and presentation of the final report to the Board on April 22-23, 2010.²⁸

2. *IFS Proposal*

(1) Understanding and Methodology

IFS describes the requested review “as a limited scope ‘operational review’ or ‘fiduciary audit’.” IFS stated that the performance of investment consultants and review of a public fund’s investment policies “is often included in the scope of work for operational reviews or audits that we have performed for public pension funds,” including a 2002 review for the Board’s predecessor.²⁹

IFS’s proposal includes a five-page description of the methodology to be used. That description tracks the specified components of the review as stated in the RFP, and provides specific information on the manner in which those tasks will be carried out.

²² Ex. 1, Attachment 9.5.

²³ Ex. 1, pp. 16 (Sec. 6.1), 17-18 (Sec. 6.3).

²⁴ Ex. 1, pp. 17-18 (Sec. 6.3). The specific information requested is detailed at pages 18-21.

²⁵ Ex. 1, p. 18 (Sec. 6.4) (“Describe in detail your understanding of the work that is to be performed...”; “Describe the specific methodology to be used...”).

²⁶ Ex. 1, pp. 18-21 (Sec. 6.5, 6.6).

²⁷ Ex. 1, p. 23 (Sec. 7.2). The cost proposal included a line item for travel. Ex. 1, p. 22 (Sec. 7.1).

²⁸ Ex. 1, p. 2.

²⁹ Ex. 2, p. 2.

With respect to the reasonableness, consistency and accuracy of data, the proposal references comparison of the calculation and reporting processes for investment fund performance to CFA Institute standards, as well as comparison to other IFS clients' practices,³⁰ as well as a number of specific issues that can be considered.³¹ With respect to report format and presentation, the proposal notes that IFS "will...confer with representatives of the [Board] to determine whether the reports are meeting the users' needs and are practically useful."³² With respect to performance benchmarks, the proposal identifies specific factors to be considered,³³ distinguishes between different levels of analysis,³⁴ and mentions consideration of a variety of benchmark options.³⁵ With respect to evaluation of the Board's investment policies, the proposal describes reviewing each of 14 policies from three different perspectives.³⁶ In each of these areas, IFS stresses its institutional experience in performing similar analyses for similar clients.

In addition to the specific information mentioned above, the proposal includes a general description of the approach that IFS will take, consisting of information gathering, interviews, review and analysis, and drafting the report,³⁷ and includes a time line for each of those activities, with a draft report to be provided on March 2, 2010, and a final report to be submitted on April 10, 2010.³⁸ IFS plans to assign different aspects of the review and analysis to different team members based on "distinct, though interrelated, subjects."³⁹ IFS also stresses a collaborative and deliberative process for drafting the report, including "[e]xtensive discussions with the 'parties-in-the-know' regarding the draft report."⁴⁰

(2) Overall Organization

³⁰ Ex. 2, p. 3. This, IFS asserts, means that IFS is "able to evaluate the issue both in theory as compared to best practices [the CFA Institute standards] and in its practical application [experience with other clients]."

³¹ Ex. 2, pp. 3-4 (*e.g.*, independent vs. staff calculation; frequency of computation; pricing sources and conventions).

³² Ex. 2, p. 4.

³³ Ex. 2, p. 4.

³⁴ Ex. 2, pp. 4-5 (policy vs. strategic level).

³⁵ Ex. 2, p. 5 ("policy index"; peer group, risk-adjusted measures, Board policy criteria).

³⁶ Ex. 2, p. 5 (describing a, b, and c perspectives).

³⁷ Ex. 2, pp. 6-7.

³⁸ Ex. 2 (Ex. A).

³⁹ Ex. 2, p. 6.

⁴⁰ Ex. 2, p. 7.

IFS has been in existence for 25 years; it “specialize[s] in evaluating investment processes, practices and procedures for defined benefit plans.”⁴¹ Since 1996, it has been an independent, privately-owned firm; it has 37 employees organized into several groups, one of which performs operational review (such as this engagement) and has extensive experience in that area.⁴² It also provides investment advice on an ongoing basis, primarily to ERISA-covered plans.⁴³

IFS offers four reasons why the Board should choose it: first, it “pioneered the ‘Operational Review’ and is the pre-eminent firm in the country specializing in this type of work;”⁴⁴ second, it regularly acts as an investment fiduciary with responsibilities equivalent to the Board’s;⁴⁵ third, it maintains its independence by, among other things, not having affiliations, selling products to asset managers, and not entering into continuing engagements;⁴⁶ and fourth, it has extensive comparable experience.⁴⁷

IFS provided the names of more than two dozen public entities for which it has provided services equivalent to those requested within the past five years,⁴⁸ and identified three recent clients for whom it had provided similar or related services.⁴⁹

(3) Professional Qualifications and Experience

IFS personnel include members with backgrounds in a wide variety of relevant areas, and include eight CFA’s, seven MBA’s, five JD’s, two CPA’s and one CAIA, many with “hands-on pension and benefit plan experience.”⁵⁰

(4) Cost

The IFS cost proposal of \$121,000 includes \$12,000 for two trips to Alaska, \$500 for supplies and other expenses, and \$108,500 for labor at rates ranging from \$250 to \$525 per hour, with a total estimated time of 310 hours for the entire project.⁵¹

3. *Johns Proposal*

⁴¹ Ex. 2, p. 8.

⁴² Ex. 2, pp. 8-9.

⁴³ Ex. 2, p. 9.

⁴⁴ Ex. 2, p. 12.

⁴⁵ Ex. 2, p. 13 (“IFS regularly acts as an independent fiduciary, responsible for prudent and proper investment decision-making relating to public pension fund investment portfolios.”).

⁴⁶ Ex. 2, p. 13.

⁴⁷ Ex. 2, pp. 13-14.

⁴⁸ Ex. 2, pp. 14-15, 18.

⁴⁹ Ex. 2, pp. 18-20.

⁵⁰ Ex. 2, p. 21.

⁵¹ Ex. 2, p. 24.

(1) Understanding and Methodology

Mr. Johns summarizes the RFP's statement of services and description of the activities to be performed.⁵² Mr. Johns offers to "adhere to generally accepting auditing standards, as promulgated by the US GAO." He states:

Although not required by the subject RFP, such an approach is warranted because adhering to such standards provides an assurance to the [Board] that...[t]he audit and review is planned and performed with due professional care [, that t]he auditor's opinion and any findings...are accompanied by sufficient competent evidence[, and that s]taff assigned to the audit are from from any influences that would impair independence or objectivity...^[53]

Mr. Johns describes a four-phase plan, with specific activities in each phase: project initiation (initial project briefing with client; obtain and review investment policies and performance reports; initial interviews and inquiries; document understanding of Board policies and reporting protocols), planning (compile list of best practices as evaluative criteria; consult with client re suitability of criteria; initial risk assessment), conduct (investment policies best practices analysis; evaluation of performance consultants), and close (draft report, review with client, and finalize).⁵⁴ Mr. Johns proposed submitting a draft report on February 28, 2010, with a final report by June 30, 2010.⁵⁵

For the "performance consultant audit," Mr. Johns's proposal describes a "six-step audit plan that evaluates...the reports produced by the performance consultants...as well as the reporting process itself:" first, review of a representative sample of performance reports to become familiar their organization and content, and to "identify possible gaps anomalies or other conditions indicative opportunities to improve upon the consistency and reliability of the investment management report;" second, "through inquiries, interviews and an examination of pertinent documentation" obtain an understanding of "the methods and techniques employed by the performance consultants to ensure that such reports are reliable;" third, "[p]erform substantive testing and analytic procedures (*e.g.*, tracing reported information to summary and subsidiary schedules;

⁵² Ex. 3, pp. 2-3.

⁵³ Ex. 3, p. 3.

⁵⁴ Ex. 3, p. 3.

⁵⁵ Ex. 3, p. 22.

trend-line and variance analysis; reconciling reports to the Board’s financial statements) necessary to verify the accuracy of reported investment returns;” fourth, independently calculate returns from a representative sample of reports; fifth, review results with the consultants and Board staff; and sixth, prepare a draft report.⁵⁶

With respect to the investment policies, Mr. Johns proposed to identify and categorize the elements of a well designed investment policy, and to compare the Board’s policies with those criteria.⁵⁷ To identify the criteria, Mr. Johns would rely on his “experience in formulating and in evaluating the investment policies for other public entities,” “best practices as prescribed by authoritative entities,” reviews of investment policies of other entities similar to the Board, to the extent “such reviews are available in the public domain,” and a survey of multi-employer public pension plans.⁵⁸ In addition, he proposed “to evaluate the suitability of the Board’s investment policies according to a comprehensive risk management framework,” in the belief that “this approach is preferable to an approach that is limited to an assessment of the inherent or intrinsic risk associated with a particular asset or asset class.”⁵⁹ The methodology was described as consisting of review of “relevant background information, including [Board] minutes, investment policy documents,”⁶⁰ interviews with Board and staff members in order to “understand the objectives of the [Board] and how these objectives are addressed within the investment policies in place,” in consultation with the Board and staff, defining “specific criteria to be employed in assessing the suitability of [the Board’s] investment policies,” comparison of the current policies with the criteria, and documentation of any inconsistencies between the current policies and the Board’s objectives, current actuarial or financial conditions, or generally accepted best practices.⁶¹

(2) Overall Organization

⁵⁶ Ex. 3, pp. 5-6.

⁵⁷ Ex. 3, p. 6.

⁵⁸ Ex. 3, p. 6.

⁵⁹ Ex. 3, p. 7. Mr. Johns provided a graphic representation of the risk framework he would employ. Ex. 3, p. 8.

⁶⁰ Ex. 3, p. 5.

⁶¹ Ex. 3, pp. 8-9.

Mr. Johns is a sole proprietor based in Juneau, Alaska.⁶² Mr. Johns provides auditing and financial and management advisory services to state and local governments.⁶³ He proposed offering his services as an individual.⁶⁴

Mr. Johns identifies the following as his competitive advantages: first, as a Juneau-based individual, he can “remain in close contact with the [Board] staff...without incurring the expense and lost productivity of travel...”; second, he is a “known quantity” because he has provided auditing services to the Legislative Audit Division; third, his “cost structure” allows him to “offer a substantial commitment of personal involvement...at a competitive price;” fourth, he has “hands-on experience with pension plan administration...as well as the formulation and evaluation of investment policies”; fifth, he has “a wealth of knowledge in both the theory and practice of public finance and public accounting”; sixth, he has “project management experience with top-tier auditing and advisory services firms”; and seventh, he has “trusted relationships with some of the most complex and diverse public sector entities in...North America.”⁶⁵

Prior to March, 2009, Mr. Johns was a “Director with KPMG’s CFO Advisory Services Practice” providing “actuarial, risk management, transactional and technology related consulting services to major institutional investors, including...multi-employer [public] retirement plan administrators.”⁶⁶ Mr. Johns provided the names of three public entities with which he had “business relationships” prior to establishing his own firm.⁶⁷

(3) Professional Qualifications and Experience

Mr. Johns has a B.S. degree from the University of California at Berkeley and an MBA from Santa Clara University.⁶⁸ Mr. Johns has been a CPA since 1994 and has lectured at the university level on the topics of finance, accounting and information systems.⁶⁹

Prior to establishing his own firm, he “held executive-level positions with KPMG LLP (Director) and IBM Global Services (Principal) along with senior management

⁶² Ex. 3, p. 10.

⁶³ Ex. 3, p. 10.

⁶⁴ Ex. 3, p. 60 (Exhibits C & D).

⁶⁵ Ex. 3, p. 11.

⁶⁶ Ex. 3, p. 13.

⁶⁷ Ex. 3, p. 13.

⁶⁸ Ex. 3, p. 61.

⁶⁹ Ex. 3, p. 16.

positions in three small firms providing auditing and advisory services to state and local government and institutional investors.”⁷⁰ Studies he has “conducted” include a statewide audit of federal funds received by the State of Alaska for the Legislative Audit Division,⁷¹ serving as a “subject matter expert” in the areas of investments, cash management accounting, and information systems⁷² for a firm conducting a performance audit of the Los Angeles City Treasury (his responsibilities included “[e]valuating the Treasurer’s investment policies...for consistency with applicable statutes and best management practices [and r]eviewing the timing, format and content and accuracy of the reports submitted),”⁷³ assessing the cost-effectiveness of various pension financing options for the Santa Clara Board of Supervisors,⁷⁴ acting as project manager for a performance audit of \$7 billion freeway construction project in the Phoenix metropolitan area,⁷⁵ and providing consulting advice in the form of pro forma financial statements in support of a proposed \$200 million geothermal project in California.⁷⁶ Mr. Johns has six years of service as a municipal finance director, with responsibilities for pension plan financing and accounting.⁷⁷

(4) Cost

Mr. Johns’s proposed cost was \$92,000, all for his personal labor, at the rate of \$115 per hour, with a total estimated time of 800 hours for the entire project.⁷⁸

4. *Evaluation of Mr. Johns’ Proposal*

The proposal evaluation committee was comprised of three Board members, Mike Williams, Sam Trivette, and Gail Harbo. The committee scored the proposals separately and subsequently conferenced to discuss their scores. None of the committee members changed their scores as a result of the conference. The scores were:

	Understanding 20 points		Organization 20 points		Prof. Qual. & Exp. 20 points		Total 60 points	
	IFS	JJ	IFS	JJ	IFS	JJ	IFS	JJ

⁷⁰ Ex. 3, p. 14.
⁷¹ Ex. 3, p. 15.
⁷² Ex. 3, p. 23 (Exhibit B).
⁷³ Ex. 3, p. 14.
⁷⁴ Ex. 3, p. 15.
⁷⁵ Ex. 3, p. 15.
⁷⁶ Ex. 3, p. 15.
⁷⁷ Ex. 3, p. 16.
⁷⁸ Ex. 3, p. 18.

Williams	20	15	20	10	19	15	59	40
Trivette	20	6	19	1	18	3	57	10
Harbo	19	10	20	8	20	6	59	24
Total	59	31	59	19	57	24		

(1) Mike Williams

Mike Williams has been a member of the Board for four years. Since 1998, he has been the supervisor of the Division of Taxation in the Department of Revenue. He testified that he had concerns regarding Mr. Johns’s status as a sole proprietor, which he felt created a “key man risk” and a risk that work might not be timely completed. Furthermore, he felt that the work product would benefit from multiple inputs. He did not consider Mr. Johns’s experience as an auditor to be directly comparable to the services required by the RFP. He did not consider the number of hours estimated to perform the work in his evaluation.

(2) Sam Trivette

Sam Trivette has been a Board member since 2005. He does not have direct professional financial experience. Mr. Trivette considers the services requested to be highly specialized, and believes that experience in the field is critical. Mr. Trivette does not consider experience in financial auditing to be the type of experience desired: rather, experience in modeling, risk assessment and portfolio analysis is desired; he did not feel that Mr. Johns’s experience was described with sufficient detail and his perspective was that Mr. Johns’s experience was not particularly useful or valuable for this particular engagement. Mr. Trivette was of the view that this would be the first time Mr. Johns had conducted a review of this nature. He felt the methodology Mr. Johns described was “pretty unclear” and that Mr. Johns had not identified potential problems; the proposal was “so general” that he wasn’t sure Mr. Johns understood the services required.

(3) Gail Harbo

Ms. Harbo has been a member of the Board since October, 2005. She is a retired high school mathematics teacher with about 40 credits in business, accounting and finance. She considers relevant experience extremely important, and that a team approach is valuable because it provides “lots of eyes.” She considered Mr. Johns’s proposal lacking sufficient detail, and could not find that he had done significant

comparable work for a public entity. She also was unable to find the dates and lengths of service of his prior employers. She was unable to specifically identify Mr. Johns's duties and experience at KPMG. Overall, it appeared to her that Mr. Johns's proposal involved "a lot of on the job training."

III. Discussion

Although Mr. Johns asserts that the members of the evaluation committee were biased, there is no evidence of bias.⁷⁹ The central thrust of his protest and appeal is that they did not fairly and reasonably evaluate his proposal:

In determining whether an evaluation is reasonable, the question to be determined is "whether the...record discloses the basis for the evaluators' ratings and adequately demonstrates that they considered all of the important factors [as identified in the request for proposals]." An evaluation is reasonable if "the objective facts...reasonably support [the] evaluations."^[80]

A. Lack of Due Diligence

Mr. Johns objects that the proposal evaluation committee failed to fairly evaluate the proposals because it did not conduct a "due diligence" review to determine if the claims made by the respective offerors were consistent with the actual facts. In particular, Mr. Johns objects that the committee did not interview respondents, conduct follow-up inquiries as permitted by section 2.4 of the request for proposals, or conduct reference checks or otherwise verify the respondents' credentials and claimed experience.⁸¹

Mr. Johns's objections misconceive the role and responsibilities of a proposal evaluation committee. This is a proceeding under the Procurement Code, and the issue to be determined is whether the members of the proposal evaluation committee fulfilled

⁷⁹ Mr. Johns's protest speculates that the deviation in his scores, as compared with the relatively consistent scores for IFS, may reflect bias. Protest, p. 3. Because all of the members ranked Mr. Johns's proposal lower than IFS, and each of the individual member's scores for Mr. Johns's proposal are consistent, the scores on their face do not suggest any impropriety. See note 87, *infra*. More fundamentally, bias cannot be established through speculation. See, e.g., Empyra.Com, Inc. v. Alaska Permanent Fund Corporation, OAH No. 06-0520-PRO at 9 (Alaska Permanent Fund Corporation 2006

⁸⁰ Mikunda, Cottrell & Co., Inc. v. Department of Health and Social Services, OAH No. 07-0618-PRO at 8 (Department of Administration 2008) and Empyra.Com, Inc. v. Alaska Permanent Fund Corporation, OAH No. 06-0520-PRO at 15 (Alaska Permanent Fund Corporation 2006), quoting In Re World Wide Movers, Inc., No. 97-004 at 10 (Department of Administration 1997), and King v. Alaska Housing Authority, 633 P.2d 256, 263 (Alaska 1981).

⁸¹ Johns Post-Hearing Memorandum at 1-4.

their obligations under the Procurement Code, not whether they fulfilled any independent obligations they may have as trustees.⁸² Under the Procurement Code a proposal evaluation committee is entitled to rely on an offeror's good faith and may, in its discretion, evaluate a proposal as submitted, leaving any further inquiry to the procurement officer for consideration in connection with the determination of responsiveness and responsibility. Mr. Johns has not shown any procedural error.

Moreover, he did not show any substantive impropriety. At the hearing, Mr. Johns did not demonstrate the existence of a material misrepresentation of fact in the IFS proposal.⁸³

B. Basis and Support for Evaluators' Ratings

1. *Understanding and Methodology*

Mr. Johns was awarded a total of 31 points from the three evaluators on this factor, out of a possible total of 60. All three awarded fewer points to Mr. Johns's proposal than to IFS's.

Mr. Johns makes a variety of objections to the evaluators' scores on this factor, asserting that the evaluators' written notes incorrectly characterize certain parts of his proposal, and that some of the evaluators' testimony explaining their scores does not reflect the contents of the proposal. A point-by-point response to each of Mr. Johns's specific points is unnecessary, because the issue to be decided is whether the record as a whole adequately discloses the basis for the evaluators' ratings and supports their scores, not whether each and every note or comment they made was precisely accurate.

The notes and the evaluators' testimony clearly demonstrate the basis for the evaluators' ratings on the first factor. All three evaluators concluded that Mr. Johns's proposal did not demonstrate an adequate understanding of the nature of the project and did not provide sufficient detail or was otherwise unsatisfactory regarding the manner in which the work would be performed.

⁸² Cf. Mikunda, Cottrell & Co., Inc. v. Department of Health and Social Services, OAH No. 07-0618-PRO at 4-6 (Department of Administration 2008).

⁸³ Mr. Johns's post-hearing memorandum references litigation involving IFS that was disclosed in its proposal, but he does not argue that IFS's disclosure was insufficient. *Id.*, at 3. Mr. Johns asserts that "IFS was by no means a 'pioneer' in either performance auditing...or operational reviews." *Id.* at 4. Mr. Johns did not prove that IFS's comment was false, much less that it was material (*i.e.*, that its truth or falsity would affect the outcome of the evaluation) or misleading.

These considerations are clearly within the scope of the first evaluation factor as stated in the request for proposals. With respect to whether the contents of the proposal reasonably support the evaluators' subjective opinions on this factor, it is important to remember that Mr. Johns's actual understanding and plans are not at issue: at issue is what the proposal demonstrated, not his own knowledge or intentions. Moreover, to the extent that Mr. Johns's post-evaluation comments provide additional details or clarity to the proposal as submitted, this is not grounds for concluding that the evaluators' assessment of the proposal as submitted was unreasonable.⁸⁴ The record provides sufficient support for the committee's scores on the first factor.⁸⁵

2. *Organization Experience and Qualifications*

Mr. Johns was awarded a total of 19 points from the three evaluators on this factor, out of a possible total of 60. All three awarded fewer points to Mr. Johns's proposal than to IFS's.

Mr. Johns's proposal was by a sole proprietor, and he intended to provide services as an individual without support from other professionals or staff.

All three evaluators stressed that this aspect of Mr. Johns's proposal led to lower scores. Mr. Johns argues that that any "key man risk" was mitigated because he will be

⁸⁴ For example, Mr. Johns states he had worked on site while working under contract to a different state agency, and that "working at the client's worksite is a standard practice while conducting an audit because it facilitates communication between the auditor and the auditee." 2/9/2010 at 7. His proposal did not include that information; moreover, the performance consultants whose work is being reviewed are not located in Juneau.

In another example, Mr. Johns asserts his experience is directly relevant to this engagement, and he asserts that the committee members' failure to appreciate that is a result of either their own lack of knowledge as to what services are required to conduct the requested audit, or a lack of understanding of how his experience relates to those tasks. *See, e.g.*, 2/9/2010 pp. 5, 6-7. Mr. Johns's observations suggest that his proposal may not have effectively expressed his experience and qualifications, but they do not establish that the evaluators' scores are unreasonable.

Another example is Mr. Johns's proposed time line, which extended to June 30, 2010, and thus exceeded the estimated time stated in the RFP. An evaluator could reasonably view this as a deficiency.

⁸⁵ For example, Mr. Johns's proposal at one point mentions a "four phased project plan," and at another a "six-step audit plan." Exhibit 3 pp. 3, 5. A lack of consistency in the description of the proposed methodology could adversely affect scores.

In another example, Mr. Johns's description of his competitive advantage states his qualifications, but does not distinguish his knowledge, experience, or methodology from potential competitors. Exhibit 3, p. 11.

Further, with respect to the review of investment policies, Mr. Johns stated that he would identify and categorize the elements of a well designed investment policy, based on his own experience in developing such policies (which was not described), review of other public entities' policies, and a survey, among other things. The proposal does not suggest that Mr. Johns presently has sufficient knowledge and experience to effectively assess the Board's investment policies.

close to the work site and will devote his “full time and attention to the project.”⁸⁶ Being close to the work site and devoting full time to the project do not lessen the inherent risk of having a single individual responsible for the entire project. Moreover, as both Ms. Harbo and Mr. Trivette pointed out, having multiple participants in the project means that the final report will reflect input from individuals with different perspectives, experience, and professional expertise: it is not unreasonable to score a proposal lower because it will lack such inputs. Arguably, it would not have been unreasonable for an evaluator to score Mr. Johns’s proposal as a zero on this factor, which on its face calls for an assessment of organizational strength that Mr. Johns’s proposal wholly lacked, because he proposed to perform the job without additional professional support.⁸⁷ The record contains ample support for the evaluators’ scores on this factor.⁸⁸

3. *Professional Qualifications and Experience*

Mr. Johns was awarded a total of 24 points from the three evaluators on this factor, out of a possible total of 60. All three awarded fewer points to Mr. Johns’s proposal than to IFS’s.

Although Mr. Johns’s proposal demonstrates that he has substantial experience as a financial auditor and that he has participated in the conduct of performance audits, and managed one, his proposal does not show that he has previously been primarily responsible for the conduct of a performance audit of performance consultants for a public investment entity. All three evaluators testified that they deemed Mr. Johns’s experience as not substantially equivalent to this engagement.

The record supports the evaluators’ view of Mr. Johns’s prior experience as it was stated in his proposal. None of the studies Mr. Johns listed shows that he had participated in involved a performance audit of the investment performance of a public entity on a

⁸⁶ 2/5/2009 at 5.

⁸⁷ Mr. Trivette awarded only one point on this factor. His score for Mr. Johns’s proposal on this factor, as well as on the other factors, is substantially lower than the scores of Mr. Williams and Ms. Harbo. This does not indicate that they are unfair or unreasonable, or biased: scoring is subjective, and Mr. Trivette characterized himself as a “tough grader.”

⁸⁸ Mr. Johns suggests that because his proposal includes substantially more time than does IFS’s, the evaluation ignores the risk that IFS will not provide sufficient resources to do the job. 2/9/2010. But one might view the time issue differently: one might reasonably conclude that Mr. Johns’s substantially greater time commitment reflects lack of experience, and the need for him to get up to speed on issues that IFS is already familiar with. In any event, evaluators were instructed not to compare the proposals, and thus the relative time devoted to project is irrelevant to their scores.

broad basis. His proposal states that he had conducted financial audits,⁸⁹ provided expert advice on financing, investments, cash management accounting, and information systems,⁹⁰ that he was the project manager for a performance audit of large construction project,⁹¹ and that he has experience as a municipal finance director, with responsibilities for pension plan financing and accounting.⁹² None of this experience was shown to be substantially equivalent to the type of services requested in this RFP, even if much of it would be relevant to some degree.

With respect to professional qualifications, Mr. Johns has an MBA degree and is a licensed CPA. However, the evaluators testified that they considered a CFA a more useful professional accreditation than a CPA.

Because Mr. Johns's proposal indicates that his professional qualifications are less useful, his prior experience in performance and financial auditing is not directly equivalent, and he has limited experience in review of investment policies,⁹³ the record supports the evaluation committee's scores on this factor.

C. Consistency With Evaluation Factors

By law, an evaluation must be based solely on the factors identified in the request for proposals.⁹⁴ Mr. Johns argues that the evaluation was inconsistent with the request for proposals, because the evaluators on a number of occasions referenced specific concerns about matters that had not been specifically identified as factors to be considered or listed as questions to be answered. For example, he points out that members of the committee downgraded his proposal because it did not show the dates, length of service, or precise details of his employment and work duties with KPMG or IBM Global Services. But that this specific information was not requested does not mean that the evaluators could not consider its absence when they scored Mr. Johns's proposal:

[i]n general, specific questions listed in a request for proposals under each general factor "reflect the criteria that the [evaluators] were to consider in reaching an inherently subjective judgment regarding the relative merits of the proposals with respect to each broad factor." In the absence of any

⁸⁹ Ex. 3, p. 15.

⁹⁰ Ex. 3, p. 23 (Exhibit B).

⁹¹ Ex. 3, p. 15.

⁹² Ex. 3, p. 16.

⁹³ Mr. Johns's proposal states that on one occasion, he evaluated a public entity's investment policies and reports. Ex. 3, p. 14.

⁹⁴ AS 36.30.250(a); 2 AAC 122.260(b).

express limitation, evaluators are not limited to consideration of the specific listed questions, and they may consider any matters that were within the scope of the general factors identified. In reviewing the weight afforded to particular subsidiary issues, the question is not whether the point scores can be directly tied to particular items mentioned as within the scope of a general factor, but rather whether the weight afforded to any particular matter “was within the reasonable expectations of an offeror, based on the contents of the RFP as a whole.”^[95]

Plainly, the dates, length of service, and specific duties of Mr. Johns’s previous employment are matters within the scope of the factor “Professional Qualifications and Experience.” Mr. Johns has not shown that the weight afforded to those or any other matters in scoring his proposal was beyond the reasonable expectations of an offeror, in light of the contents of the RFP as a whole.⁹⁶

D. Generally Accepted Auditing Standards

Mr. Johns supplemented his initial protest, objecting that the IFS proposal is non-responsive because it does not offer to provide services in accordance with generally accepted auditing standards.⁹⁷ On appeal, he argues that the IFS proposal is “substandard” because it does not offer to comply with generally accepted auditing standards.⁹⁸

As Mr. Johns’s own proposal states, the RFP does not by its terms require compliance with generally accepted accounting standards.⁹⁹ Therefore, it was not error to deem the proposal responsive. And although IFS did not expressly commit to provide services in conformity with generally accepted auditing standards, Mr. Johns did not

⁹⁵ Empyra.com v. Alaska Permanent Fund Corporation, OAH No. 06-0520-PRO at 12-13 (Alaska Permanent Fund Corporation 2006), quoting In Re Make it Alaskan, Inc., No. 00.11 at 3, 9 (Department of Administration 2001). See also, Advanced Data Concepts, Inc., No. B-280967.8 at 4 (Comptroller General 1999) (“While the agency is required to identify the significant evaluation factors and subfactors, it is not required to identify the various aspects of each factor which might be taken into account, provided such aspects are reasonably related to or encompassed by the RFP’s stated criteria.”).

⁹⁶ Mr. Johns objects that the members of the committee did not downgrade the IFS proposal, although it did not provide this sort of detailed information, either. 2/9/2010 at 8. As previously noted, however, the proposals are scored independently, not in comparison. Moreover, the IFS proposal included multiple professionals with varied degrees, and it demonstrated broad organizational experience. The lack of specific employment data for the particular IFS individuals on this engagement could reasonably be considered of minor significance in light of the IFS proposal as a whole.

⁹⁷ 10/13/2009 at 2-3 (Protest Report, Att. 7).

⁹⁸ 2/9/2010 at 8-9.

⁹⁹ Ex. 2 at p. 3 (“In conducting this audit and review...I will adhere to generally accepted auditing standards.... Although not required by the subject RFP, such an approach is warranted...”).

establish that they would not do so. He therefore has not shown that the evaluators' scores for IFS were unreasonable.

IV. Conclusion

There is no evidence that any member of the evaluation committee was biased. The evaluators' scores are supported by the record and are based on the factors stated in the request for proposals. The appeal is therefore denied.

DATED March 5, 2010.

By: *Signed* _____
Andrew M. Hemenway
Administrative Law Judge

(See following Adoption on following page)

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

Adoption

Mr. Johns by emails dated March 15, 16 and 18, requested that the proposed decision dated March 5 be modified as follows:

1. Amend the reference to the procurement officer as the person responsible for making a determination as to responsibility or responsiveness.
2. Address whether the services to be provided are governed by the Alaska Accountancy Act.
3. Take into account that opposing counsel had directly contacted Mr. Johns regarding the case.

None of these matters necessitates a change to the proposed decision.

1. As the proposed decision observes, in its capacity as the procurement evaluation committee, the committee had no obligation to conduct further inquiries. Also, as the proposed decision recognizes, the issue of who had authority to determine responsiveness is immaterial to this appeal, because Mr. Johns did not show that the IFS proposal was non-responsive. For these reasons, reference to the procurement officer (rather than to the Board or its delegate) as the person responsible for making a determination of responsiveness or responsibility is at worst a harmless error.
2. The applicability of the Alaska Accountancy Act is implicit in the discussion of generally accepted accounting standards, at page 18, section III(D) of the proposed decision. As the proposed decision states, "the RFP does not by its terms require compliance with generally accepted accounting standards." Assuming that the Alaska Accountancy Act applies, even though the RFP did not expressly require compliance with it, the proposed decision observes that "Mr. Johns did not establish that [IFS] would not [comply with the generally accepted accounting standards]", nor did he establish that IFS's performance of the contract would violate the Alaska Accountancy Act.
3. Under Alaska law, neither party (or counsel) could contact the administrative law judge concerning this case without notice to the other party. However, nothing in Alaska law prohibited opposing counsel from contacting Mr. Johns directly concerning this case, without notice to the administrative law judge. The matters discussed in the direct contacts were subsequently brought to the administrative law judge's attention in the Board's motion to dismiss, which was denied by order dated January 11, 2010, on the ground that those matters were outside the scope of this appeal.

Accordingly, by written delegation from and on behalf of the Commissioner of Administration, I adopt the attached proposed decision dated March 5 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 April 19, 2010.

Signed

Andrew M. Hemenway, Administrative Law Judge