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JUNEAU

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

SILVERBOW CONSTRUCTION CO.,)
)
 Appellant,)
)
 v.)
)
 ALASKA DEPARTMENT OF)
 ADMINISTRATION, DIVISION OF)
 GENERAL SERVICES,)
)
 Appellee.)

Filed in Chambers
STATE OF ALASKA
FIRST JUDICIAL DISTRICT
AT JUNEAU
By TCurry on 1-28-13

1JU-11-01010CI

ORDER DENYING SILVERBOW'S APPEAL OF THE DECISION OF THE DEPARTMENT OF ADMINISTRATION, DIVISION OF GENERAL SERVICES

I. INTRODUCTION

Silverbow Construction Co. ("Silverbow") appeals the final administrative decision ("Decision") of the Department of Administration, Office of Administrative Hearings ("OAH") on two grounds. First, Silverbow alleges that the Department of Administration ("Department of Administration"), Division of General Services ("General Services") abused its discretion because it did not disqualify the winning bid of Alaska Commercial Contractors, Inc. ("Alaska Commercial") for a contract to renovate the exterior of the Governor's Mansion¹ on the grounds that it exceeded the ten-page limit in the Request for Proposal ("RFP"). Second, Silverbow alleges that General Services violated Silverbow's right to equal protection under Article 1, Section 1 of the Alaska Constitution by creating two classes of proposals and then treated them differently when it exempted Alaska Commercial's proposal from the ten-page limit.

¹ According to the RFP and the Office of Administrative Hearings, "The project that was the subject of the RFP consisted of furnishing all labor, supervision, materials and equipment for roofing and exterior renovations at the Governor's House in Juneau."

1 The court upholds the Department's decision and denies Silverbow's appeal on
2 both grounds. First, the length of Alaska Commercial's proposal—fifteen
3 pages²—represents a minor variance which did not confer a substantial advantage on
4 Alaska Commercial over other bidders. Thus, General Services had a reasonable basis for
5 its decision and did not abuse its discretion. Second, the record contains no evidence that
6 General Services created two classes of proposals, and then treated them differently
7 according to page number, visual appearance, or any impermissible ground. Thus, the
8 court denies Silverbow's equal protection claim.

9 II. FACTS AND PROCEEDINGS

10 Pursuant to Rule of Appellate Procedure 212(c)(2), the parties agree to the
11 following set of facts as originally found by the Office of Administrative Hearings.³ On
12 November 18, 2010, General Services issued Request for Proposal (RFP) number 2011-
13 0222 for renovation of the exterior of the Governor's Mansion. The RFP requested two
14 proposals: a Price Proposal, scored according to the Alaska offeror's preference (10
15 points) and price (20 points); and a Technical Proposal, scored according to the bidders'
16 responses to four technical criteria—project understanding and methodology (15 points),
17 experience and qualifications (10 points), a management plan (35 points), a project
18 schedule (10 points). The proposals were reviewed by a panel of six individuals, one of
19 whom first determined the "responsiveness" of the proposals—whether a proposal
20 complied with the RFP criteria and submittal instructions.

23 ² Silverbow contends that Alaska Commercial's proposal was fifteen pages long, however,
24 General Services did not count its one page response to the Alaska preference because it was not
25 a response criteria (i.e. no response was required). The one-page difference between the parties
does not affect the court's decision. See OAH Decision No. 11-0060-PRO at 4 n.21 (October 19,
2011) [hereinafter *OAH Decision*].

³ Appellee's Br. 1.

1 The RFP “submittal checklist” provided bidders with specific instructions on how
2 to prepare their proposals. It contained two statements regarding the formatting of the
3 proposals, both of which are at issue in this case. Paragraph eight of the submittal
4 checklist contained the following caution

5 The maximum number of attached pages (each printed side equals one
6 page) for criteria Responses shall not exceed: 10 pages. *Page limit applies*
7 *solely to the attachments to the Contractor’s Technical Proposal form.*
8 *CAUTION: Criteria Responses which exceed the maximum page limit or*
otherwise do not meet requirements stated herein, may result in
disqualification.

9 Paragraph six of the submittal checklist includes a second caution: “CAUTION:
10 small print or typeface that is difficult to read will negatively influence evaluation of your
11 submittal.”

12 On January 13, 2011, four contractors submitted proposals in response to the RFP:
13 Alaska Commercial, JKM General Contractors LLC (“JKM”), North Pacific Erectors,
14 Inc. (“North Pacific”), and Silverbow. General Services issued an Intent to Award the
15 contract to Alaska Commercial on January 21, 2011, which listed Alaska Commercial as
16 earning the highest overall score of 2,419 points and Silverbow as earning the second
17 highest score of 1,655 points.⁴ General Services formally awarded the contract to Alaska
18 Commercial on February 4, 2011. Silverbow filed a protest with General Services on
19 January 28, 2011, pursuant to AS 36.30.560 and .565. It argued that Alaska
20 Commercial’s bid should have been disqualified on the grounds that it exceeded the ten-
21 page limit in the RFP. On February 3, 2011, General Services denied Silverbow’s protest.

22 On February 11, 2011, Silverbow filed an appeal of General Services’ February 3
23 decision with the Commissioner of Administration. In its appeal, Silverbow sought to
24

25 ⁴ These numbers reflect the overall score (i.e. scores on the Price and Technical Proposals).
North Pacific earned 1,651 points and JKM earned 1,270 points. OAH Decision at 3.

1 recover costs incurred in the preparation of its proposal. On April 7, 2011, OAH heard
2 the appeals of Silverbow and North Pacific, the other bidder who protested the award.
3 Because the case would be decided on the administrative record, Silverbow was allowed
4 to supplement the record. On October 19, 2011, an administrative law judge rendered a
5 final decision upholding General Services' denial of Silverbow's protest on the grounds
6 that Alaska Commercial gained no substantial advantage as a result of General Services'
7 acceptance of its fifteen-page proposal. Silverbow's appeal of that decision is the matter
8 now before the court.

9 **III. DISCUSSION**

10 The issues in this case are straight forward. To reiterate, Silverbow alleges that (1)
11 General Services abused its discretion by not disqualifying Alaska Commercial when its
12 proposal exceeded the ten-page limit in the RFP, and (2) that General Services violated
13 Silverbow's right to equal protection under Article 1, Section 1 of the Alaska
14 Constitution by exempting Alaska Commercial from the page limit, while not extending
15 the same opportunity to other bidders.

16 **A. Standard of Review**

17 The court reviews "the merits of agency action on matters committed to agency
18 discretion," such as awarding a contract, under the abuse of discretion standard.⁵ Under
19 this standard, the court inquires whether the decision was "arbitrary, unreasonable or an
20 abuse of discretion."⁶ "Where an agency fails to consider an important factor in making
21 its decision, the decision will be regarded as arbitrary." In *Lakloey, Inc. v. University of*
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25 ⁵ *Lower Kuskokwim Sch. Dist. v. Found. Servs, Inc.*, 909 P.2d 1383, 1388-89 (Alaska
1996).

⁶ *Id.*

1 *Alaska*, the supreme court reiterated that courts review “an agency's determination of [a
2 bidder's] responsiveness under the reasonable basis standard.”⁷

3 As to Silverbow’s equal protection claim, the court applies its “independent
4 judgment to decide constitutional issues,” and “will adopt a reasonable and practical
5 interpretation in accordance with common sense based upon the plain meaning and
6 purpose of the provision and the intent of the framers.”⁸

7 **B. The Department Did Not Abuse Its Discretion When It Waived A
8 Minor Informality.**

9 The legislature vested the authority to devise and award procurement contracts in
10 the commissioner of administration and the chief procurement officer.⁹ Under AS
11 36.30.170, “the procurement officer shall award a contract based on the solicited bids
12 with reasonable promptness by written notice to the lowest responsible and responsive
13 bidder whose bid conforms in all material respects to the requirements and criteria set out
14 in the invitation to bid.” The Alaska Administrative Code defines “responsive bidder” as
15 “a firm or person who has submitted a bid that conforms in all material respects to the
16 solicitation.”¹⁰

17 In *Laidlaw Transit, Inc. v. Anchorage School District*, the supreme court held that
18 “a variance from the requirements of an RFP will render a proposal nonresponsive only if
19 that variance is material. A variance is considered material if it gives one bidder a
20 substantial advantage over other bidders and thereby restricts or stifles competition.”¹¹
21 Thus, whether General Services should have deemed Alaska Commercial’s proposal

23 ⁷ 157 P.3d 1041, 1048 (Alaska 2007) (citing *Laidlaw Transit Inc. v. Anchorage Sch. Dist.*,
24 118 P.3d 1018, 1032 (Alaska 2005).

⁸ *Hageland Aviation Servs, Inc. v. Harms*, 210 P.3d 444, 448 (Alaska 2009).

⁹ AS 36.30.005(a).

¹⁰ 2 Alaska Admin. Code (AAC) 12.990(12).

¹¹ 118 P.3d at 1032 (internal citations and quotation marks omitted).

1 nonresponsive because it exceeded the ten-page limit depends on whether the variance
2 gave it a “substantial advantage” over the other bidding contractors.¹²

3 In cases involving bid protests, courts attempt to balance two competing interests.
4 On the one hand, “the state owe[s] all bidders a fair and honest consideration of their
5 proposals.” In *Toyo Menka Kaisha, Ltd. v. United States*, the United States Court of
6 Claims echoed this sentiment:

7 Rejection of irresponsible bids is necessary if the purposes of formal
8 advertising are to be attained, that is, to give everyone an equal right to
9 compete for Government business, to secure fair prices, and to prevent
10 fraud . . . The requirement that a bid be responsive is designed to avoid
11 unfairness to other contractors who submitted a sealed bid on the
12 understanding that they must comply with all of the specifications and
13 conditions in the invitation for bids, and who could have made a better
14 proposal if they imposed conditions upon or variances from the contractual
15 terms the government had specified. The rule also avoids placing the
16 contracting officer in the difficult position of having to balance the more
17 favorable offer of the deviating bidder against the disadvantages to the
18 government from the qualifications and conditions the bidder has added.¹³

19 On the other hand, the supreme court has affirmed General Services’ discretionary power
20 to waive certain RFP requirements so that their unnecessarily strict enforcement does not
21 undermine the competitive bidding process:

22 Under the circumstances presented here, rigid enforcement of this
23 requirement would have elevated form over substance, frustrating the
24 district's and the regulation's clear intent to create a competitive bidding
25 process for pupil transportation . . . Here, strict enforcement of the RFP's
26 requirement to acknowledge each addendum would have undermined the
27 competitive bidding process by placing the district in the position it sought
28 to avoid, that of having no opportunity to compare multiple responsive
29 bids.¹⁴

12 *Id.* at 1033 cited in *Lakloey, Inc.*, 157 P.3d at 1048.

13 597 F.2d 1371, 1377 (Ct. Cl. 1979).

14 *Laidlaw Transit, Inc.*, 118 P.3d at 1033.

1 Protests over variances granted to winning bids in the following cases provide
2 some guidance as to when a variance would confer a substantial advantage and when it
3 would not. In *Laidlaw Transit Inc.*, the supreme court held that the school district had a
4 reasonable basis for concluding that the winning bidder's failure to sign an addendum to
5 the RFP acknowledging its receipt, as bidders were instructed to do, did not give it a
6 substantial advantage over other bidders because the addendum language was already
7 included in the RFP.¹⁵ Thus, all bidding contractors were equally aware of the addendum.
8 In contrast, in *State Department of Administration v. Bowers Office Products, Inc.*, the
9 supreme court held that the Department of Administration should have rejected the
10 winning bid where the bidder failed to acknowledge an amendment to the RFP because
11 the amendment was designed to avoid performance default and testimony revealed that
12 not enforcing the acknowledgment requirement would put the winning bidder in a
13 privileged position.¹⁶ In *King v. Alaska State Housing Authority*, the winning bidders'
14 tardy submission of a financial deposit was deemed a minor variance because there was
15 no evidence that doing so conferred a substantial advantage on the winning bidder.¹⁷ In a
16 later decision in the same case, the supreme court found no reasonable basis for an
17 administrative decision based on a faulty numerical analysis, and appellants were entitled
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20 ¹⁵ *Id.* at 1032. In *Laidlaw Transit Inc.*, the winning bid also failed to fully comply with
21 several other requirements of the RFP, but that these deficiencies did not substantially advantage
22 the winning bid over (1) the winning bid did not specify facilities it had acquired for the
23 operation as the RFP required (though it identified possible locations in which to locate such
24 facilities); (2) the winning bid provided only a national driver handbook instead of an Anchorage
25 specific handbook (though the proposal stated that local guidelines would be developed upon
award of the contract); (3) the winning bid lacked specificity regarding employee compensation
due to on-going salary negotiations and pending changes in minimum wage laws; and (4) the
winning bid was signed only by a development manager, and not an authorized corporate officer
as the RFP required.

¹⁶ 621 P.2d 11, 14-15 (Alaska 1980).

¹⁷ *King v. Alaska State Hous. Auth.*, 512 P.2d 887, 893 (Alaska 1973).

1 to recover expenses incurred in preparing their bid.¹⁸ With these holdings in mind, the
2 court reviews the Department's Decision to determine whether it was rationally based.

3 The Department articulated several bases for its Decision. First, it grounded its
4 Decision in its own precedent that formatting requirements are generally treated as minor
5 informalities. Under 2 AAC 12.990(8), minor informalities are defined as "matters of
6 form rather than substance which are evident from the bid document, or are insignificant
7 matters that have a negligible effect on price, quantity, quality, delivery or contractual
8 conditions and can be waived or corrected without prejudice to others." OAH determined
9 that

10 formatting requirements in a solicitation are, by definition, matters of form,
11 not substance.¹⁹ As such, they may be treated as minor informalities and
12 waived by the procurement officer, absent a showing of prejudice to other
13 offerors or a specific statement in the solicitation that the failure to comply
with the formatting requirements will necessarily render a response non-

14 responsive.²⁰
15 Though the Department remains open to the possibility "That a proposal in excess of the
16 stated ten-page limit might, in some hypothetical case, have that effect" it determined that
17 that "does not mean that in this case it was an abuse of discretion to accept Alaska
18 Commercial's proposal." The Department supported this conclusion with the fact that
19 Silverbow's proposal contained fewer pages, but more words, (10 pages, and 6,226
20 words), while Alaska Commercial's proposal contained more pages, but fewer words (15
21 pages and 5,773 words). Thus, Alaska Commercial's extra pages did not enable it to
include more content, and thus, did not confer a substantial advantage over other bidders.

23 ¹⁸ *King v. Alaska State Hous. Auth.*, 633 P.2d 256, 263 (Alaska 1981).

24 ¹⁹ OAH Decision at 4 (citing *Brenntag Pacific, Inc. v. Dep't of Transp. and Pub. Facilities*,
OAH No. 09-0347-PRO).

25 ²⁰ *Id.* citing *Kendrick Bus. Servs/Intermedia JV v. Dept. of Commerce and Econ. Dev.*,
Alaska Tourism Marketing Council, No. 97-006 (rejecting contention that failure to comply with
mandatory formatting requirements requires a finding of nonresponsiveness).

1 In addition, Silverbow has not shown that Alaska Commercial's extra pages at all
2 affected price, quantity, quality, delivery or contractual conditions. For this reason, the
3 court concurs with the Department's Decision on this ground.

4 The comparative word and page count between the two companies, set out above,
5 should have ended the debate whether Alaska Commercial received a "substantial
6 advantage" over other bidders. However, Silverbow further contends that General
7 Services "failed to consider an important factor" when it "granted Alaska Commercial the
8 opportunity to provide more information in its Technical Proposal and, in general, make
9 it more readable, it denied this same opportunity to Alaska Commercial's competitors."

10 In response, the Department examined whether there was any evidence that the visual
11 appearance of the proposals influenced the reviewing committee's evaluative process. It
12 found that the formatting and organizational structure of Silverbow's proposal was in fact
13 "superior" to that of Alaska Commercial, despite the fact that Silverbow's proposal
14 contained less white space.²¹ The Department even suggests that Silverbow's argument
15 that visual appearance was a decisive factor diminishes General Services' substantive
16 evaluation of the proposals.²²

17 The Department's Decision also rests on its interpretation of the cautionary
18 language in the RFP submittal checklist. "[T]he RFP cannot reasonably be read to mean
19 that all proposals containing criteria responses in excess of ten pages must be rejected as
20 non-responsive." Likewise, General Services now argues that the term "may" in
21 paragraph 8 of the submittal checklist ("Criteria Responses which exceed the maximum
22 page limit or otherwise do not meet the requirements stated herein, *may* result in

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24 ²¹ *Id.* OAH hones in on the fact that to the extent that visual appearance affected the
25 committee's evaluative process, Alaska Commercial's textual schedule, as opposed to a graphic
schedule, may have negatively affected its score. In contrast, Silverbow's proposal included a
graphic schedule.

1 disqualification”) may be reasonably interpreted to mean that General Services retained
2 discretion as to whether or not to render a proposal that exceeded the page limit non-
3 responsive. This argument is somewhat undercut by General Services’ inconsistent use of
4 the terms “shall,” “will” and “may” in paragraphs 6 and 8 of the submittal checklist.
5 However, in an analogous situation, the supreme court has overridden a literal
6 interpretation of mandatory language in an RFP in favor of a more reasonable
7 construction.²³ Again, the pivotal question is not the adequacy of the RFP, but whether
8 Alaska Commercial received a “substantial advantage” from the page limit variance.

9 An additional basis for General Services’ rejection of the Silverbow’s protest is
10 that disqualifying Alaska Commercial would have needlessly reduced competition in the
11 bidding process.²⁴ General Services highlights the fact that two proposals exceeded the
12 ten-page limit and two proposals failed to adequately respond to item 1.5(a) of the RFP.
13 Taking Silverbow’s argument in favor of strict adherence to the RFP to an extreme, all of
14 the proposals could have been deemed nonresponsive, thus terminating the solicitation. In
15 this way, the competitive bidding process would have been undermined entirely.

16 The court finds that the reasons set out above, as discussed in the Department’s
17 Decision and General Service’s Protest Response, provide several rational bases for the
18 decision not to disqualify Alaska Commercial’s proposal. Accordingly, the court finds
19 that the Department neither overlooked an important factors nor that it abused its
20 discretion.

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24 ²² *Id.* at 7.

25 ²³ *Laidlaw Transit Inc.*, 118 P.3d at 1033 (holding that similarly mandatory language—
”shall certify”—in an RFP “could not be reasonably construed as precluding the school district
from” “relax[ing] an unduly harsh application of the acknowledgement requirement”).

²⁴ Protest Response of Facilities Contacting Officer regarding RFP 2011-0200-9843.

1 **C. The Department Did Not Violate Silverbow’s Right to Equal**
2 **Protection Because It Did Not Treat Bidding Contractors Differently.**

3 Article 1, Section 1 of the Alaska Constitution states that “all persons are equal
4 and entitled to equal rights, opportunities, and protection under the law.” “Corporations
5 which have been granted permission to do business within a state are considered to be
6 ‘persons’ afforded protection under the equal protection clause.”²⁵

7 In *Pan-Alaska Construction, Inc. v. State Department of Administration, Division*
8 *of General Services*, the supreme court determined the proper analysis of constitutional
9 economic and commercial interests under the equal protection clause.

10 We apply a sliding scale approach to equal protection questions arising
11 under the Alaska Constitution. Under this method, [a]s the right asserted
12 becomes more fundamental or the classification scheme employed becomes
13 more constitutionally suspect, the challenged law is subjected to more
14 rigorous scrutiny at a more elevated position on our sliding scale.

15 Although economic and commercial interests traditionally result in minimal
16 scrutiny under our state equal protection analysis, Alaska's approach is
17 more protective of individual rights than that employed in the federal
18 courts. Even under the lowest form of judicial scrutiny, the means chosen
19 must bear a fair and substantial relation to the attainment of a legitimate
20 government objective.²⁶

21 Specifically, Silverbow contends that General Services unlawfully and unfairly
22 created two classifications of bidding contractors—those that complied with the ten-page
23 limit, and those that did not—and then treated those two categories of bidding contractors
24 differently when it accepted a fifteen-page proposal, and denied other bidders the
25 opportunity to do the same.

 A review of the record reveals the opposite. General Services in fact allowed two
bidders to submit proposals over the ten-page limit, JKM (11 pages) and Alaska

25 ²⁵ *Lynden Transp., Inc. v. State*, 532 P.2d 700, 706 (Alaska 1975).

²⁶ *Pan-Alaska Const., Inc.*, 892 P.2d 159, 162 (Alaska 1995) (internal quotation marks and
internal citations omitted).

1 Commercial (15 pages). While at first blush, additional pages could provide space for
2 additional content, thereby affecting the overall quality of the proposal, this would only
3 be the case if additional pages were consonant with additional words. In this case, Alaska
4 Commercial received no advantage over its competitors from the additional pages
5 because the proposal contained 453 fewer words than Silverbow's proposal, which
6 contained more words than any other proposal.²⁷ In addition, despite General Services'
7 caution in paragraph six of the "submittal checklist" against "small print or typeface that
8 is difficult to read," the record contains no evidence that the additional white space in
9 Alaska Commercial's proposal created a more visually appealing document, which in
10 turn favorably affected its evaluation. To the contrary, the Department found Silverbow's
11 proposal to be visually superior, and Alaska Commercial's proposal to be "visually
12 uninteresting."²⁸

13 For this reason, the court rejects Silverbow's argument that General Services
14 created two classes of bidders and that those classes were treated differently. It is
15 therefore unnecessary for the court to move to the next step of the equal protection
16 analysis to determine whether General Services' decision bore "a fair and substantial
17 relation to the attainment of a legitimate government objective." Silverbow's equal
18 protection claim is denied.


19 **IV. CONCLUSION**

20 While it is conceivable for a seemingly minor variance to confer a substantial
21 advantage on a bidding contractor, this is not one of them. The court finds that the
22 Department had a reasonable basis for its decision. The court also denies Silverbow's
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25 ²⁷ Protest Response of Facilities Contacting Officer regarding RFP 2011-0200-9843.
²⁸ OAH Decision at 5.

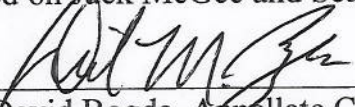
1 equal protection claim because the court cannot find an unfair classification or disparate
2 treatment of Alaska Commercial vis-à-vis other bidding contractors.

3 **DATED** at Juneau, Alaska this ~~26th~~ day of January, 2012.

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5 
6 LOUIS J. MENENDEZ
7 Superior Court Judge

8 **CERTIFICATION**

9 The undersigned hereby certifies that on the ^{30th} day of January, 2012 a true
10 copy of the foregoing document was served on Jack McGee and Sean Lynch via mail.

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12 David Bogda, Appellate Clerk
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