

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

SILVER BOW CONSTRUCTION)	
)	
v.)	
)	
DIVISION OF GENERAL SERVICES)	OAH No. 11-0060-PRO
<hr/>)	RFP No. 2011-0222-9843

DECISION

I. Introduction

The Division of General Services (Division) issued a request for proposals to perform exterior renovations at the Governor’s House in Juneau. The Division gave notice of intent to award the contract to Alaska Commercial Contractors, Inc. (Alaska Commercial) and Silver Bow Construction Co. (Silver Bow) filed a protest. The protest was denied, and Silver Bow appealed. On appeal, both parties were represented by counsel and agreed to submit the matter for a decision on the written record.¹

Silver Bow’s appeal raises a single issue: whether the procurement officer erred by accepting Alaska Commercial’s proposal notwithstanding that it exceeded the ten page limit stated in the request for proposals. The procurement officer did not abuse his discretion and therefore Silver Bow’s appeal is denied.

II. Facts

A. Solicitation Contents

The Division of General Services issued Request for Proposals No. 2011-0222-9843 (RFP) on November 18, 2010. 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.² The engineer’s estimated cost for the project was \$1-1.5 million.³ The RFP included a submittal checklist with specific instructions for the preparation of proposals. Proposals were to be submitted in two parts: a price proposal and a technical

¹ The written record consists of the protest appeal documents (listed in the prehearing order), a joint supplemental record (including subsequently-provided copies of the original score sheets) submitted by the Division in this case and a companion case, North Pacific Erectors, Inc. v. Division of General Services, OAH No. 11-0061-PRO, and an unofficial transcript of portions of a hearing in the companion case, submitted by Silverbow.

² RFP, p. 1.

³ RFP, p. 1.

proposal.⁴ Offerors were to submit a response to each technical evaluation criterion, and were cautioned that responses to all criteria must not exceed the stated maximum page length.⁵ The maximum total page length for all technical criteria responses was ten pages.⁶ Offerors were cautioned that responses in excess of that length “may result in disqualification.”⁷

The RFP provided for proposals to be evaluated based on four technical criteria and two price criteria. The technical criteria were: (1) project understanding and methodology (15%); (2) management plan (10%); experience and qualifications (35%); and (4) schedule (10%). The price criteria were: (1) Alaska offeror preference (10%); and (2) price (20%).⁸ The price proposal was to be submitted in a separate envelope and, with the Alaska offeror preference, would be awarded points by the procurement officer.⁹ A proposal evaluation committee was to review and score the proposals on each of the four technical criteria.

B. Proposals and Evaluation

Four proposals were submitted on January 13, 2011, from Alaska Commercial, JKM General Contractors, LLC (JKM), North Pacific Erectors, Inc. (North Pacific), and Silver Bow Construction Co. (Silver Bow). Dan Aicher, the procurement officer for the solicitation, reviewed the proposals to determine whether they were responsive. He noticed that the Alaska Commercial’s responses to the technical criteria exceeded the ten-page limit stated in the RFP. Mr. Aicher deemed the Alaska Commercial proposal responsive notwithstanding its length. All the other proposals were deemed responsive as well.

The proposal evaluation committee consisted of six voting members: Mr. Aicher (chair), Tanci Mintz, Gareth Jones, Paul Disdier, Kim Mahoney and Brian Meissner. The committee convened in Anchorage on January 18, 2011. The members of the committee independently reviewed the proposals and then independently scored the proposals. Each of the six evaluators rated the Alaska Commercial proposal the best overall on the technical criteria. Their combined scores ranked Alaska Commercial the best on each of the four technical criteria.¹⁰

After the first round of scoring, the committee discussed the proposals and the evaluators then independently rescored the proposals. The evaluators submitted their score sheets to Mr.

⁴ RFP, p. 1.

⁵ RFP, Submittal Checklist, ¶4.

⁶ RFP, Submittal Checklist, ¶8.

⁷ RFP, Submittal Checklist, ¶8.

⁸ RFP, Proposal Evaluation Criteria.

⁹ See Request for Proposals, p. 1; Submittal Checklist, p. 1, ¶9, 11.2; Proposal Evaluation Procedure, ¶1.6.

¹⁰ See R. 232-238.

Aicher, who compiled the results. As had been the case before discussions, Alaska Commercial remained the highest ranked proposal on all four technical criteria. Overall, Alaska Commercial was by far the highest rated on the technical criteria, receiving 1,960 points out of a maximum possible score of 2,100. North Pacific (1,025 points) was awarded a slightly higher rating on the technical criteria than Silver Bow (995 points). JKM (800 points) was the lowest rated by a substantial margin.

Alaska Commercial's was the highest priced proposal (\$1,415,015), a bit higher than JKM's (\$1,371,561). Silver Bow's proposal was the lowest priced (\$941,105), slightly lower than North Pacific's (\$997,737). Based on the formula stated in the RFP, these prices resulted in an award of 600 points to Silver Bow, 566 to North Pacific, 410 to JKM, and 399 to Alaska Commercial.

Because of Alaska Commercial's far superior score on the technical criteria, Alaska Commercial (2,419) finished well ahead of Silver Bow (1,655) and North Pacific (1,651) in the overall combined point total for technical criteria and price.¹¹ JKM was the lowest rated overall (1,270). Mr. Aicher issued a notice of intent to award the contract to Alaska Commercial.

III. Discussion

Silver Bow raised a single issue in its protest and on appeal: that the Alaska Commercial proposal should have been declared non-responsive because it exceeded the ten page limit for technical criteria responses stated in the RFP.

In the RFP, offerors were instructed that "[a]ll criteria responses shall not exceed the number of pages stated below."¹² They were instructed to "[p]repare a distinct response for each criterion."¹³ The RFP stated, "[t]he maximum number of attached pages...for criteria Responses shall not exceed 10 pages."¹⁴ Following this, the RFP stated: "Caution: Criteria Responses which exceed the maximum page limit...may result in disqualification."¹⁵

Silver Bow argues that allowing an offeror to submit a proposal in excess of the ten page limit in itself provided that offeror with a material advantage.¹⁶ However, the formatting

¹¹ All four offerors qualified for the Alaska bidder preference, so this factor had no affect on the ranking.

¹² Submittal Checklist, p. 1, ¶4.

¹³ Submittal Checklist, p. 1, ¶5.

¹⁴ Submittal Checklist, p. 1, ¶8.

¹⁵ Submittal Checklist, p. 1, ¶8.

¹⁶ See Silver Bow Construction's Reply to General Services' Motion for Judgement on Record [hereinafter, "Reply"], at 2.

requirements in a solicitation are, by definition, matters of form, not substance.¹⁷ As such, they may be treated as minor informalities and waived by the procurement officer, absent a showing of prejudice to the other offerors¹⁸ or a specific statement in the solicitation that the failure to comply with the formatting requirements will necessarily render a response non-responsive.¹⁹

In this case, the RFP cannot reasonably be read to mean that all proposals containing criteria responses in excess of ten pages must be rejected as non-responsive. Rather, it can only reasonably be read to mean that the procurement officer had discretion to reject a proposal as non-responsive if it contained criteria responses in excess of the ten page limit.²⁰ Accordingly, whether the Alaska Commercial proposal should have been declared to be non-responsive depends on whether, in light of the proposals submitted, the greater number of pages in the Alaska Commercial proposal may reasonably be deemed to have had a substantial effect on the evaluation. That a proposal in excess of the stated ten page limit might, in some hypothetical case, have that effect does not mean that in this case it was an abuse of discretion to accept Alaska Commercial's proposal.

In this particular case, Alaska Commercial's responses to the technical criteria totaled fourteen pages.²¹ Although the Alaska Commercial proposal exceeded the ten page limit, it contained substantially fewer words (5,773) than the Silver Bow proposal (6,226), which was ten pages long.²² Alaska Commercial's proposal was longer than Silver Bow's, despite containing fewer words, because it used a larger font size and margins, and because it began the response to

¹⁷ See Brenntag Pacific, Inc. v. Department of Transportation and Public Facilities, OAH No. 09-0347-PRO at 4 (Commissioner of Administration 2009).

¹⁸ See 2 AAC 12.900(8) ("minor informalities" means matters of form rather than substance which are evident from the bid document...and can be waived or corrected without prejudice to the other parties.').

¹⁹ See Kendrick Business Services/Intermedia JV v. Department of Commerce and Economic Development, Alaska Tourism Marketing Council, No. 97-006 (Commissioner of Administration 1997) (rejecting contention that failure to comply with mandatory formatting requirements requires a finding of nonresponsiveness).

²⁰ Arguably, the quoted language could reasonably be read to mean that the ten page limit applies separately to each individual criterion response, rather than to the combined total number of pages for responses to all the technical criteria. However, that is not how the procurement officer read it, nor is it how any of the offerors read it.

²¹ The procurement officer and Silver Bow characterize the Alaska Commercial responses to the technical criteria as consisting of 15 pages. However, Alaska Commercial's technical proposal included a one page response to the Alaska offeror criterion, which was not one of the technical criteria. The total length of Alaska Commercial's responses to the technical criteria was 14 pages, although the technical proposal was 15 pages. None of the other technical proposals included a response to the Alaska offeror criterion, and thus for purposes of comparison the page in the Alaska Commercial technical proposal that consisted of a response to the Alaska offeror criterion should not be counted.

²² The Alaska Commercial proposal contained about the same number of words as the JKM proposal (5,606), which was eleven pages long, and substantially more than the North Pacific proposal (3,411), which was seven pages long.

each criterion on a new page, which resulted in a greater amount of empty space. From the standpoint of the amount of information provided, it is apparent that the length of the Alaska Commercial had no effect on the evaluation. In that respect, the greater length of the Alaska Commercial proposal did not provide it with a material advantage.

Because Alaska Commercial did not have any material advantage in terms of the amount of information provided, Silver Bow is reduced to arguing that the greater number of pages in the Alaska Commercial proposal enabled it to submit a proposal that had a superior visual appearance and presentation. These advantages, rather than a superior technical proposal, Silver Bow asserts, explain the higher scores awarded to the Alaska Commercial proposal.²³

Silver Bow's argument that the greater number of pages in the Alaska Commercial proposal made it a more persuasive and effective document, even though it contains fewer words than the Silver Bow proposal, is without merit. The Silver Bow proposal utilizes varied fonts (capitalization, bold, underlining and italics), which has the effect of breaking up the narrative into easily differentiated segments, thus enhancing the visual presentation. In addition, the Silver Bow proposal utilizes a highly structured organizational outline with headings, which enables a reader to easily identify the specific topics addressed. In both respects, visual appearance and organizational structure and presentation, the Silver Bow proposal is superior to the Alaska Commercial proposal, which, by comparison, is visually uninteresting and less effectively structured.

Silver Bow's argument that the greater length of the Alaska Commercial proposal explains the higher ratings provided to Alaska Commercial is similarly without merit. The issue of whether the evaluation was reasonable is outside the scope of this appeal.²⁴ Nonetheless, as an example of the manner in which the visual appearance allegedly affected the scoring, Silver Bow asserts that Alaska Commercial's high score on the technical criterion for the project schedule "can only be explained" by the evaluators having been unduly influenced by the "format and presentation" of the Alaska Commercial proposal.²⁵ But the length of Alaska Commercial's response to the schedule criterion was the same as Silver Bow's: two pages. Moreover, the visual appearance of the Silver Bow proposal was superior, because it included a

²³ See Silver Bow Construction's Supplemental Brief, at 6.

²⁴ Silver Bow's appeal is limited to the responsiveness of the Alaska Commercial proposal. The substance of the evaluation was the subject of a separate protest appeal, North Pacific Erectors, Inc. v. Division of General Services, OAH No. 11-0061-PRO. The proposed decision in that case concludes that the evaluation was reasonable.

²⁵ Silver Bow Construction's Supplemental Brief at 5-6.

graphic schedule, while Alaska Commercial's was entirely narrative.²⁶ Two of the evaluators gave the Alaska Commercial proposal low ratings on this criterion, one specifically noting the absence of a graphic schedule.²⁷ The others, however, gave it high ratings, including one who specifically noted that although the proposal lacked a graphic schedule, "this was not a deterrent given the thoughtful and project specific response to the questions,"²⁸ another who noted the absence of an "actual [*i.e.*, graphic] schedule,"²⁹ and a third who noted that Alaska Commercial had prepared a graphic schedule (although it was not included in the proposal).³⁰ Thus, to the extent there is evidence that the visual appearance of the Alaska Commercial proposal affected the evaluation, the evidence supports the conclusion that the visual appearance of that proposal negatively impacted its score.³¹

In summary, it is simply not plausible that the much higher scores awarded to the Alaska Commercial proposal on the technical criteria can be explained by some perceived superiority in its visual appearance. As has been explained, the Silver Bow proposal is the more visually compelling of the two. There is no evidence that the slightly smaller font size of the Silver Bow proposal affected any evaluator's judgment or scoring.³² The disparity in scores between the two is far beyond what might reasonably be attributed to differences in visual appearance. To suggest that the visual appearance of the proposals had a material effect on the outcome of the evaluation, in this particular case, is frivolous.

²⁶ Silver Bow suggests that the RFP required offerors to submit a graphic schedule. The RFP contains no such requirement. Alaska Commercial's proposal noted that it had prepared a graphic schedule that was available on request. Because the graphic schedule was not included with the proposal, the committee properly did not request or review Alaska Commercial's graphic schedule.

²⁷ R. 233, R. 467 (Mr. Aicher, 2 points); R. 238 (Mr. Jones, 1 point).

²⁸ R. 242 (Ms. Mahoney, 5 points). *See also* R. 232 (Ms. Mintz, 5 points); R. 235 (Mr. Meissner, 4 points); R. 236 (Mr. Disdier, 5 points).

²⁹ R. 403 (Mr. Meissner).

³⁰ R. 472 (Ms. Mintz). *See* note 26, *supra*.

³¹ It appears that Mr. Meissner initially gave Alaska Commercial three points on this criterion, as that is the notation marked on his copy of the proposal (a part of the supplemental record, unnumbered). However, after discussions he awarded four points. R. 235. This evidence suggests that the visual appearance (*i.e.*, absence of a graphical chart) initially caused him to downgrade the Alaska Commercial proposal, but that after discussions – in which Ms. Mahoney opined that the narrative made up for the absence of a graphic – he raised his score to four. Once again, to the extent this evidence sheds light on the effect of the visual appearance on the scores, it supports the conclusion that the Alaska Commercial proposal was negatively affected by its visual appearance.

³² Offerors were cautioned that "small print or typeface that is difficult to read will negatively influence evaluation of your submittal." Submittal Checklist, p. 1, ¶6. No minimum size print was specified, however, and Silver Bow's proposal was easily readable.

IV. Conclusion

The purchasing agency did not abuse its discretion in accepting Alaska Commercial's proposal. Therefore, Silver Bow's appeal is denied.

DATED September 21, 2011.

Signed

Andrew M. Hemenway
Administrative Law Judge

Adoption

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 Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 19th day of October, 2011.

By: Signed

Signature
Marc A. Luiken

Name
Commissioner

Title

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