

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

NORTH PACIFIC ERECTORS, INC.)	
)	
v.)	
)	
DIVISION OF GENERAL SERVICES)	OAH No. 11-0061 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. After reviewing the proposals submitted, the Division gave notice of intent to award the contract to Alaska Commercial Contractors, Inc. (Alaska Commercial). North Pacific Erectors, Inc. (North Pacific) filed a protest. The protest was denied, and North Pacific filed an appeal. The administrative law judge conducted a hearing. Both parties were represented by counsel. The procurement officer, a member of the proposal evaluation committee, and North Pacific’s owner and business manager testified.

North Pacific’s pre-hearing memorandum identified six issues: (1) Alaska Commercial’s proposal exceeded the page limit stated in the request for proposals; (2) the proposal evaluation committee was improperly composed; (3) the proposal evaluation committee did not follow the scoring methodology stated in the request for proposals; (4) the proposal evaluation committee was biased; (5) the evaluation was unreasonable; and (6) the terms of the request for proposals were defective in that (a) price was not adequately taken into account, and (b) the requirement for certification by the Cedar Shake and Shingle Bureau was unreasonable.¹

¹ Prehearing Memorandum of North Pacific Erectors, Inc. [hereinafter, “Prehearing Memorandum”], pp. 3-5.

North Pacific did not timely protest the contents of the solicitation, and therefore its objections regarding the weight afforded to price and the requirement for CSSB certification are waived. The remaining issues raised by North Pacific are without merit. The appeal is denied.

II. Facts

A. Solicitation Preparation and Contents

1. Solicitation Preparation

The Division of General Services, under a delegation from the Department of Transportation and Public Facilities,² issued a request for quotations to perform roofing and exterior renovations at the Governor's House in Juneau. Only one response was received, from Silver Bow Construction Co., and the Division cancelled the solicitation.³ It issued a new solicitation in the form of a request for proposals, No. 2011-0222-9843 (RFP), on November 18, 2010.

The procurement officer and project manager for the RFP was John Schauwecker.⁴ As the procurement officer, Mr. Schauwecker was responsible for the contents of the RFP. Jensen, Yorba and Lott, an architectural firm, prepared the technical specifications.⁵ A pre-proposal meeting and walk-through of the premises was conducted on November 30, 2010.⁶ Initially, proposals were due by December 10, 2010, but under a series of amendments to the initial RFP, the date was extended to December 22, December 29, January 6, and finally January 13, 2011.

In early January, Mr. Schauwecker left his position. After Mr. Schauwecker left, about ten days before the January 13 due date, Daniel Aicher, an employee in the Division of General Services' Anchorage office, was assigned as the procurement officer for the solicitation.⁷ Mr. Aicher had been working for the Division for about one year. This was the first request for proposals for construction services that he was involved

² [Division's] Post-Hearing Brief [hereinafter, "DGS Post-Hearing Brief"], Addendum (May 20, 2009 Delegation).

³ DA Testimony, #1 0:26, #2 2:13.

⁴ RFP, pp. 1, 2.

⁵ DA Testimony, #2 0:56; SAR II 142.

⁶ RFP, p. 1; *See* Post-Hearing Brief of North Pacific Erectors, Inc. [hereinafter, "NPE Post-Hearing Brief"], Ex. A.

⁷ DA Testimony 0:22, #2 0:54. At the direction of Tanci Mintz, Mr. Schauwecker issued Amendment No. 5 on January 3, changing the due date from January 6 to January 13, and substituting Mr. Aicher as the procurement officer. SAR II 108, 113.

with as a procurement officer (such services are more commonly acquired through an invitation for bids).⁸

2. *Solicitation Contents*

The RFP consisted of a packet of materials briefly describing the project scope and addressing the requirements for proposal format and contents, and extensive technical specifications for the work to be performed.

a. *Formal Requirements*

The RFP included a submittal checklist, which included specific instructions for the preparation of proposals. Proposals were to be submitted in two parts: a price proposal and a technical proposal.⁹ 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.¹⁰ The maximum collective page length for responses to all of the technical criteria was ten pages.¹¹ Offerors were cautioned that responses in excess of that length “may result in disqualification.”¹²

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%).¹³ 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.¹⁴ A proposal evaluation committee was to review and score the proposals on each of the four technical criteria, using a three-step procedure: (1) each evaluator would individually score each proposal on each scoring criterion, on a score of 0-5 (5 for the most responsive and lesser scores for the others, with 0 reserved for non-responsive proposals on the applicable criterion); (2) the committee would meet to discuss the proposals, and each evaluator could then make changes in his or his scores; (3) in its

⁸ DA Testimony, #1 0:18.

⁹ RFP p. 1.

¹⁰ RFP, Submittal Checklist, ¶4.

¹¹ RFP, Submittal Checklist, ¶8.

¹² RFP, Submittal Checklist, ¶8.

¹³ RFP, Proposal Evaluation Criteria.

¹⁴ See Request for Proposals, p. 1; Submittal Checklist, p. 1, ¶9, 11.2; Proposal Evaluation Procedure, ¶1.6

discretion, the committee could thereafter conduct discussions and make final evaluations.¹⁵

b. Technical Specifications

The project entailed furnishing all labor, supervision, materials and equipment for roofing and exterior renovations at the Governor's House in Juneau.¹⁶ The engineer's estimated cost for the project was \$1-1.5 million.¹⁷ A key element of the work was replacing the roofing. The RFP's technical specifications called for installation of western red cedar shingles¹⁸ and required (1) obtaining the shingles from a single source and single manufacturer (of the offeror's choice) certified by the Cedar Shake and Shingle Bureau (CSSB) to provide "Certi-label" products, and (2) use of a "qualified installer who is an approved affiliate member of CSSB."¹⁹ The latter two requirements regarding CSSB certification had not been a part of the cancelled solicitation, nor were they included in the initial RFP; they were added in Amendment No. 1, issued on December 3,²⁰ based on the architect's determination that these requirements would provide an adequate means of ensuring that the shingles and installer were of sufficient quality.²¹

Offerors were advised that the Governor's House is a personal residence as well as a public facility, and that due to the nature of the building and the activities conducted there, particular care would need to be taken to coordinate construction activities, and that access to private areas of the building was subject to approval by the House Manager.²²

B. Proposal Submission and Evaluation

Four proposals were submitted on January 13, from Alaska Commercial, JKM General Contractors, LLC (JKM), North Pacific, and Silver Bow Construction Co.

¹⁵ RFP, Proposal Evaluation Procedure.

¹⁶ RFP, p. 1.

¹⁷ RFP, p. 1.

¹⁸ RFP, Technical Specifications, Section 07137, Part 2.1(A).

¹⁹ RFP, Technical Specifications, Section 07317, Parts 1.5(A) & (C).

²⁰ See SAR 52. The RFP as issued was not included in the record. The administrative law judge takes official notice of its contents, which are available online as a public notice (accessed September 2, 2011). A party objecting to consideration of the contents of the initial RFP may raise that objection in a proposal for action. See 2 AAC 64.300(a).

²¹ SAR 142.

²² RFP, Technical Specifications, Section 01100, ¶1.7.

(Silver Bow). North Pacific is a well-established firm based in Juneau, with more than 30 years' experience in construction projects under its owner, Jim Williams. Alaska Commercial is a Juneau firm established about three years ago by two former key employees of North Pacific, Jason Murdoch and Doug Courtney.

Tom Mayer, a Division staff person in Juneau, reviewed the proposals to confirm that they contained all required documents and forwarded them to Mr. Aicher in Anchorage.²³ Mr. Aicher reviewed the proposals to determine whether they were responsive. He immediately noticed that the Alaska Commercial proposal included a 15 page response to the technical criteria, which was 50% more pages than 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.

In mid-December, Mr. Schauwecker had constituted a proposal evaluation committee with himself as the chair, and including Ted Fosket, Dan Aicher, Gareth Jones (a maintenance worker) and Paul Disdier (an experienced painter) of the Department of Administration, Kimberly Mahoney (an engineer) of the Department of Transportation and Public Facilities, and Brian Meissner, an architect with ECI/Hyer who regularly provides contract services to the Division.²⁴ Later that month, after Mr. Schauwecker's planned departure became known, Tanci Mintz, the state's leasing and facilities manager, reconstituted the committee by substituting herself for Mr. Fosket.²⁵ As the manager of state facilities and leasing, Ms. Mintz directly supervises Mr. Aicher and Mr. Jones, and indirectly (through Mr. Jones) supervises Mr. Disdier.

Mr. Aicher provided copies of the RFP and all of the proposals to the members of the committee that had been put together by Mr. Schauwecker and Ms. Mintz.²⁶ On January 14, Mr. Aicher notified committee members that the evaluation would be conducted on January 18 and 19 and provided a memorandum stating the evaluation procedure to be followed, using as a template a memorandum from a prior Department of

²³ DA Testimony, #1 1:14; #2 0:24.

²⁴ DA Testimony, #2 0:59; PD Testimony, #2 1:28; SAR II 118 (Email, J. Schauwecker to T. Fosket, *et al.*, 12/13/2010 @ 1:20 p.m.). Mr. Disdier testified that Mr. Jones had contacted him and asked if he would participate as a member of the committee.

²⁵ SAR II 113 (Email, T. Mintz to J. Schauwecker, 12/30/2010 @ 12:16 p.m.).

²⁶ DA Testimony, #1 0:52, 0:59. Mr. Aicher initially identified Jae Shim as the ECI/Hyer representative on the committee, due to concerns that Mr. Meissner might not be able to attend. In the end, however, Mr. Meissner participated as planned. DA Testimony, #1 0:29.

Administration solicitation.²⁷ With the memorandum, he provided a copy of the Division of General Services' "RFP Evaluators Guide."²⁸ Mr. Aicher identified himself as the committee chair and Erika Fagerstrom, the residence manager for the Governor's House, as a non-voting member of the committee.²⁹ Because she had no expertise in construction-related fields and no prior experience in evaluating a solicitation for construction services, Mr. Aicher deemed Ms. Fagerstrom unqualified to participate as a voting member of the committee.³⁰

The proposal evaluation committee, including Ms. Fagerstrom, convened in Anchorage on January 18. Linda Perez, an employee of the governor's office, attended the meeting by teleconference. Mr. Aicher authorized Ms. Fagerstrom's and Ms. Perez's presence because the Governor's House is a private residence in addition to being a public facility, as a courtesy to the governor's office.³¹ Ms. Mahoney pointed out that the evaluation procedure stated in the memorandum Mr. Aicher had sent out differed from the procedure stated in the RFP, and it was agreed that the procedures stated in the memorandum (reflecting the Department of Administration's standard procedure) would be used rather than the procedures stated in the RFP (reflecting the Department of Transportation and Public Facilities' standard procedure).³²

The voting members of the committee independently reviewed the proposals and then independently scored the proposals.³³ All six evaluators rated the Alaska Commercial proposal the best overall and on three of the four evaluated criteria. On the fourth criterion, the project schedule, three of the six rated Alaska Commercial the best, two rated Silver Bow the best, and one rated North Pacific the best.³⁴

²⁷ DA Testimony, #1 0:44, #2 1:03; R. 215-217.

²⁸ DA Testimony, #1 0:48; #2 1:05; R. 218-225.

²⁹ R. 215.

³⁰ DA Testimony #1 0:31.

³¹ DA Testimony, #1, 0:31-32, 0:35-36.

³² DA Testimony, #2, 1:12; PD Testimony #2 1:37.

³³ DA Testimony, #1 1:02, #2 2:19, 2:30.

³⁴ The evaluators' scoresheets are in the record. Only Mr. Aicher completed two separate sheets for the first and second rounds of scoring. However, several others show two scores and thus indicate the first and second scores; others appear to have had the initial scores erased for some criteria, thus indicating that scores were changed in the second round but not showing the initial score. See R. 232-238; DA Testimony #2 2:08.

Following a lunch break the committee reconvened and the voting members of the committee discussed the proposals.³⁵ Neither Ms. Fagerstrom nor Ms. Perez commented on the proposals or provided substantive information to the committee.³⁶ Four of the six voting members of the committee expressed negative comments concerning North Pacific's past performance on projects:³⁷ Ms. Mintz noted that a current state contract with North Pacific for work at the Alaska Office Building was the subject of a warranty dispute; Mr. Disdier and Mr. Jones expressed the opinion that North Pacific had not adequately supervised the painting subcontractor at that job;³⁸ Mr. Meissner noted prior experience with North Pacific with "light and inconsistent" on-site supervision, but stated he did not factor that into the scoring. Members also expressed negative comments regarding North Pacific's project plan,³⁹ concern due to lack of knowledge regarding their proposed subcontractors,⁴⁰ and that a particular North Pacific employee mentioned in the proposal might be difficult to work with.⁴¹

The committee members then independently rescored the proposals. None of the changes made any difference in Alaska Commercial's ranking overall or in any of the four evaluation criteria. Mr. Disdier lowered his ratings for North Pacific in all four evaluation criteria⁴² and Ms. Mintz lowered her rating for North Pacific in the project schedule category.⁴³

The members of the committee submitted their scoresheets to Mr. Aicher, who compiled the results, added in the results of the price and Alaska bidder preference criteria, and determined that Alaska Commercial was the highest ranked offeror. He issued a notice of intent to award the contract to Alaska Commercial.

³⁵ DA Testimony, #1 1:03.

³⁶ DA Testimony, #1 0:32-33, 2:29; PD Testimony, #2 1:47.

³⁷ R. 246-247.

³⁸ PD Testimony, #2 1:59. The notes of the committee meeting state that Mr. Disdier referred to lack of supervision of subcontractors in other prior contracts as well. R. 246.

³⁹ Mr. Jones ("Schedule was vague"); Mr. Meissner ("Generally poor understanding of project complexities in comparison to other proposals"; "Did not provide an understanding of schedule"). R. 246-247.

⁴⁰ Mr. Disdier ("Unsure about their subcontractors"); Mr. Jones ("Apart from Alcan Electric, [Mr. Jones] had limited experience working with some of the listed sub-contractors."). R. 246.

⁴¹ PD Testimony, #1 1:52, 2:04.

⁴² PD Testimony, #2 1:27; R. 235-236.

⁴³ R. 232.

III. Discussion

A. Issues On Appeal

North Pacific filed a protest and appeal raising three issues: (1) the Alaska Commercial response exceeded the ten page limit,⁴⁴ (2) the scores for the North Pacific proposal were unreasonable,⁴⁵ and (3) price was afforded too little weight.⁴⁶ The protest also suggested that (4) the award may have been affected by bias.⁴⁷ In its prehearing memorandum, North Pacific identified the same four issues⁴⁸ and three more: (5) the proposal evaluation committee was improperly composed;⁴⁹ (6) the proposal evaluation committee did not follow the scoring methodology stated in the request for proposals;⁵⁰ and (7) the requirement for CSSB certification was unreasonable.⁵¹ The Division contends that the latter three issues are waived because North Pacific did not raise them before the procurement officer, either in the initial protest or in its appeal.⁵²

1. *Objections to Contents of Solicitation*

Under Alaska law, a protest regarding the contents of the solicitation must be filed in advance of the due date, and a protest regarding other matters must be filed within ten days after the notice of intent to award a contract is issued.⁵³ An untimely protest may be accepted for good cause,⁵⁴ however, and the commissioner has discretion on appeal to consider an issue that was not raised in a timely protest if there was good cause to accept

⁴⁴ Protest, p. 1; Appeal, pp. 2-4.

⁴⁵ Protest, p. 1; Appeal, pp. 6-10.

⁴⁶ Protest, p. 2; Appeal, p. 11.

⁴⁷ Protest, p. 2; Appeal, p. 13.

⁴⁸ Prehearing Memorandum, pp. 3 (proposal length), 5 (price; bias; unreasonable evaluation).

⁴⁹ Prehearing Memorandum, pp. 3-4.

⁵⁰ Prehearing Memorandum, p. 4.

⁵¹ Prehearing Memorandum, p. 5.

⁵² [Division's] Prehearing Brief, pp. 1, n. 1, 5-6.

⁵³ AS 36.30.565(a). The Division does not rely on AS 36.30.565(a) as the ground for disregarding these issues, but rather on the familiar rule that arguments not raised before the superior court are waived on appeal. See [Division's] Prehearing Brief, pp. 1, n. 1, 5-6, citing Pasco v. State, 45 P.3d 325, 329 (Alaska 2002); Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission, 711 P.2d 1170, 1181 n. 22 (Alaska 1982). The rule is based on the idea that it is unfair to entertain on appeal an argument that the opposing party did not have the opportunity to litigate in the trial court. See, Harvey v. Cook, 172 P.3d 794, 802 (Alaska 2007). Pasco and Amerada Hess are of limited persuasiveness in the context of a procurement protest appeal to the commissioner, who hears the matter as the finder of fact as well as the final executive branch decision maker, particularly when, as in this case, the issues were raised in the protestor's comments, prior to the administrative hearing. See Comments at 8-9 (committee composition), 10 (scoring methodology), 13-15 (CSSB certification). AS 36.30.565, not a rule of appellate litigation in the courts, governs consideration of issues in a protest appeal.

⁵⁴ AS 36.30.565(b).

an untimely protest concerning that issue and the purchasing agency has addressed the issue raised, particularly if the argument made on appeal is ancillary or subsidiary to an issue raised in a timely protest.⁵⁵

In this case, North Pacific concedes that its objection to the weight afforded to price is an issue that should have been raised prior to the proposal due date, because it concerns the contents of the solicitation.⁵⁶ As grounds for considering that issue on appeal, North Pacific asserts that the Division violated applicable policy by not providing a greater weight to the price component of the solicitation.⁵⁷ However, the Division submitted evidence that the issue of the weight to be afforded price was the subject of discussion by the relevant officials in both the Department of Administration (including the chief procurement officer) and the Department of Transportation and Public Facilities before the solicitation was issued.⁵⁸ There is not good cause for the commissioner to address the issue any further on appeal.

As for the issue regarding CSSB certification, North Pacific contends that it did not need to raise that issue prior to the due date because it was not apparent on the face of the RFP,⁵⁹ and that even if it was apparent, the requirement is a “glaring flaw” that should be considered on appeal.⁶⁰ Neither argument is persuasive. The suggestion that a “glaring flaw” in an RFP is good cause to disregard the failure to raise it in a timely protest would vitiate the requirement to raise issues in a timely manner. The requirement to have a CSSB-certified installer was clearly stated in the RFP, and information as to the

⁵⁵ See generally, Computer Task Group v. Division of General Services at 4-5, OAH No. 07-0147-PRO (Commissioner of Administration 2007); Bachner Co., Inc. and Bowers Investment Co. v. Division of General Services, at 12, No. 02.06//07 (Commissioner of Administration 2002) (untimely issue considered where it was “inextricably linked” to a timely-raised issue), *affirmed*, State, Department of Administration v. Bachner Co., Inc., 167 P.3d 58 (Alaska 2007).

⁵⁶ Protest Comments, p. 13.

⁵⁷ The commissioner’s role in setting and enforcing procurement policy is a factor that may be considered in determining whether there is good cause to address an untimely issue on appeal. See Computer Task Group v. Division of General Services, *supra* note 61, at 5; Empyra.com v. Alaska Permanent Fund Corporation, at 11, n. 38, OAH No. 06-0520-PRO (Alaska Permanent Fund Corporation 2006); Payroll City v. Department of Environmental Conservation, at 5, OAH No. 05-0583-PRO (Commissioner of Administration 2005).

⁵⁸ See DGS Post-Hearing Brief at 10-11, *Addendum*; SAR II 131-134. Coordinating the two agency’s policies in this respect and otherwise is within the scope of the chief procurement officer’s duties. See AS 36.30.010(b)(6), (7).

⁵⁹ See Protest Comments, p. 13 (CSSB certification is an implicit sole source specification); Prehearing Memorandum at 5 (North Pacific does not concede that the requirement for CSSB certification was patent).

⁶⁰ Prehearing Memorandum at 5.

identity and location of CSSB-certified installers was readily available to any prospective offeror. In any event, North Pacific has not shown that it could not have timely obtained the necessary certification.⁶¹

2. *Other Objections*

With respect to the issues North Pacific raises concerning the composition of the proposal evaluation committee and the methodology it followed, North Pacific contends that these are matters that it could not have raised within the time allowed for post-proposal protests, because it was not provided with access to the relevant information until after the time for filing a protest had expired.⁶²

North Pacific could not reasonably be expected to raise every issue concerning the conduct and substance of the evaluation until it had identified the members of the committee, reviewed the evaluators' notes and the minutes of the committee meeting, interviewed committee members, or otherwise had an opportunity to determine what procedures were followed, what the basis for the evaluators' rating was, and whether factual errors infected the evaluation.⁶³ In this particular case North Pacific was not provided all the relevant information until after it had filed its appeal.⁶⁴ The specific arguments that North Pacific has made on appeal with respect to these matters are ancillary to the original protest's fundamental point that the evaluation was unreasonable. In addition, they raise concerns of broad interest and applicability in the procurement process that warrant consideration by the commissioner.⁶⁵ Finally, the Division, while maintaining its objection based on timeliness, provided a response on the merits, thus affording a basis for consideration by the commissioner. For these reasons, there is good cause to consider on appeal North Pacific's arguments regarding the composition of the procurement committee and the procedure it followed.

⁶¹ See Trastar, Inc. v. Department of Transportation and Public Facilities, at 9, OAH No. 09-0211-PRO (Commissioner of Administration 2009) (specification was not shown to be unduly restrictive where offeror did not show that it could not have timely obtain required certification).

⁶² NPE Post Hearing Brief at 6.

⁶³ See, e.g., Bachner Co., Inc. and Bowers Investment Co. v. Division of General Services, at 12, No. 02.06/07 (Commissioner of Administration 2002) (untimely issue could not be identified until scoring reviewed in depth), *affirmed*, State, Department of Administration v. Bachner Co., Inc., 167 P.3d 58 (Alaska 2007).

⁶⁴ See NPE Post-Hearing Brief at 1, n. 1; AG Testimony, #2 3:05.

⁶⁵ See note 63, *supra*.

B. The Procurement Officer Did Not Err In Accepting The Proposal

The RFP states: “The maximum number of attached pages...for criteria Responses shall not exceed 10 pages.”⁶⁶ Following this, the RFP states: “Caution: Criteria Responses which exceed the maximum page limit...may result in disqualification.” This language 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 has discretion to reject a proposal if it contains criteria responses in excess of the ten page limit.

As the Division observes, this portion of the RFP was the submittal checklist, which set out the format for proposals and did not establish any specifications or requirements with respect to contract performance. In the absence of any specific statement that the failure to comply with the proposal formatting requirements will necessarily render a response non-responsive, the procurement officer has discretion to accept a proposal that fails to comply with a mandatory formatting requirement but meets the substantive requirements of the request for proposals.⁶⁷ In this particular case, the procurement officer determined that although the Alaska Commercial proposal exceeded the ten page limit, it contained substantially the same number of words as two of the other responses that met the ten page limitation. Neither the terms of the RFP, nor common sense, dictates that the Alaska Commercial proposal must be rejected because it is over length. The procurement officer did not abuse his discretion in accepting it.

C. Composition of Proposal Evaluation Committee

North Pacific argues that the proposal evaluation committee was improperly constituted because several of its members reported to Ms. Mintz. North Pacific contends that the members of the committee who report to Ms. Mintz may have been unduly influenced by her views.

North Pacific raises a legitimate concern: it is possible that a supervisor’s opinions will be given undue weight in an evaluation by members of an evaluation committee who report to that individual. For this reason, it may be sound procurement

⁶⁶ Submittal Checklist, p. 1, ¶8.

⁶⁷ 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).

practice to limit the number of evaluators who report to another member of the committee. However, “a purchasing agency has substantial discretion in the structure of a proposal evaluation committee”⁶⁸ and it is not inherently unfair or unreasonable to include the supervisor of other members of the committee as a member.⁶⁹

In this particular case, there is no evidence that the composition of the committee affected the scoring. All of the evaluators ranked the Alaska Commercial proposal higher than North Pacific’s, both before and after discussions. Moreover, the scores of the evaluators who are supervised by Ms. Mintz are substantially consistent with the scores of the two members of the committee whom she did not supervise. North Pacific has not shown that it was an abuse of discretion to include three individuals who are supervised by Ms. Mintz as members of the six person proposal evaluation committee.

North Pacific also asserts that the designation of Ms. Fagerstrom as a non-voting member of the committee, and her presence, along with Ms. Perez, during the committee’s evaluation was contrary to state law. Designating Ms. Fagerstrom as a non-voting member of the committee was of no significance, because notwithstanding that designation Ms. Fagerstrom did not act as a member of the committee: she did not evaluate proposals and she did not participate in the discussion of their merits. Similarly, the presence of Ms. Fagerstrom and Ms. Perez during the committee discussions was of no significance, because neither of them commented on the proposals or provided substantive information to the members of the committee. Absent any active participation by either Ms. Fagerstrom or Ms. Perez in the evaluation, the alleged error was harmless.

The protest regarding the composition of the committee is without merit.⁷⁰

⁶⁸ Mikunda, Cottrell & Co., Inc. v. Department of Health and Social Services, at 8, note 30, OAH No. 07-0618-PRO (Commissioner of Administration 2008).

⁶⁹ Cf. Empyra.com v. Alaska Permanent Fund Corporation, at 9, OAH No. 06-0520-PRO (Alaska Permanent Fund Corporation 2006) (where incumbent contractor was an offeror, it might have been sound procurement practice to include a non-employee of the purchasing agency as a member of evaluation committee, but failure to do so was not an abuse of discretion).

⁷⁰ North Pacific’s contention that Ms. Fagerstrom and Ms. Perez should have been required to execute conflict of interest statements is without merit. Only the voting members of the committee were required to execute those documents. In any event, there has been no showing that either Ms. Fagerstrom or Ms. Perez had a conflict, and they are presumed to have acted in good faith.

D. Scoring Methodology

The memorandum that Mr. Aicher sent to the committee members set out a scoring methodology that differed from that stated in the RFP. Under Mr. Aicher’s memorandum, evaluators were to determine scores by starting from a neutral score at the median of the possible scores, and adding or subtracting from that score based on the positive or negative aspects of the proposal being reviewed.⁷¹ Evaluators were instructed to provide brief comments on the reasons for the addition or subtraction of points.⁷² Under the RFP, evaluators were to award the maximum of five points to the most responsive proposal for each criterion, and lesser scores of four to one to the others, or zero points to a non-responsive proposal.⁷³ Tie scores were expressly permitted “for evaluation criteria addressing schedule.”⁷⁴

Before the committee members scored the proposals, the members agreed to utilize the scoring methodology described in Mr. Aicher’s memorandum, rather than the methodology stated in the RFP, thus permitting them to award ties scores in all categories and providing for all proposals to be initially provided a neutral score of three (the median of the available scores) and scored up or down from that. North Pacific contends that the failure to strictly comply with the scoring methodology stated in the RFP was a violation of AS 36.30.250(a) and 2 AAC 12.260(b).⁷⁵

AS 36.30.250(a) and 2 AAC 12.260(b) mandate that an evaluation must be based on the evaluation criteria stated in the request for proposals. The evaluation criteria are the standards by which the proposals are scored, not the methods of scoring. AS 36.30.250(a) says nothing about the scoring methodology. On that subject, 2 AAC 12.260(b) provides that “[n]umerical rating systems may be used, but are not required.” Under the regulation, either of the two point scoring methodologies would have been permissible. There was no legal requirement to follow the scoring methodology generally used in Department of Transportation and Public Facilities procurements.⁷⁶ In

⁷¹ R. 216.

⁷² R. 216.

⁷³ RFP, Proposal Evaluation Procedure, ¶1.1.

⁷⁴ RFP, Proposal Evaluation Procedure, ¶1.1.

⁷⁵ Comments, p. 10; Post Hearing Brief at 13.

⁷⁶ The evaluator’s guide states that neither the procurement officer nor the evaluation committee is “allowed to deviate from the procedure and evaluation requirements of the RFP.” This language implements AS 36.30.250(a) and 2 AAC 12.260(b). It does not create an independent legal requirement.

any event, because Alaska Commercial's proposal was rated higher than North Pacific's by all evaluators overall, and in all criteria, the choice of scoring methods had no impact on the outcome of the technical evaluation. For all these reasons, North Pacific's argument is without merit.

E. Bias

In the absence of any evidence of bias or prejudice, procurement officials are presumed to act in good faith and to exercise honest and impartial judgment.⁷⁷ To overcome the presumption, a protestor must provide direct evidence of actual bias or prejudice, rather than speculation.⁷⁸ No such evidence has been presented.⁷⁹

F. Reasonableness of Evaluation

In determining whether an evaluation is reasonable, the initial question 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]." ⁸⁰ The record includes notes of the proposal evaluation committee's meeting prepared by Division staff, annotated copies of the copies of the proposals reviewed by four of the evaluators (extensive for Mr. Aicher and limited for Mr. Meissner, Mr. Mahoney, Mr. Disdier),⁸¹ nine pages of handwritten notes by Ms. Mintz, and the testimony of two members of the committee, Mr. Aicher and Mr. Disdier. The notes and testimony provide an adequate basis for determining the basis for the

⁷⁷ See, e.g., Empyra.com v. Alaska Permanent Fund Corporation, at 9, n. 34, OAH No. 06-0520-PRO (Alaska Permanent Fund Corporation 2006), citing Bruner v. Petersen, 944 P.2d 43, 49 (Alaska 1997), Earth Resources v. State, Department of Revenue, 665 P. 2d 960, 962 n. 1 (Alaska 1983).

⁷⁸ See, e.g., Empyra.com v. Alaska Permanent Fund Corporation, at 9, n. 35, OAH No. 06-0520-PRO (Alaska Permanent Fund Corporation 2006), citing Navistar International Transportation Corp. v. United States Environmental Protection Agency, 941 F.2d 1339, 1360 (6th Cir. 1989).

⁷⁹ Mr. Williams testified that "the word on the street" was that the project would be awarded to Alaska Commercial. JW Testimony, #2 2:25. The only evidence to support such speculation is that Doug Courtney, one of Alaska Commercial's principals, was a next door neighbor of Mr. Schauwecker. JW Testimony, #2 2:29.

North Pacific also argues that critical observations by members of the evaluation committee concerning North Pacific's past performance are evidence of bias. Prehearing Memorandum at 5. That North Pacific disagrees with the evaluators' assessments of its past performance does not mean that those opinions are the product of bias. See *infra*, at 17-19.

⁸⁰ Johns v. Department of Revenue, at 12, OAH No. 09-0572-PRO (Commissioner of Administration 2009) (citations omitted).

⁸¹ Mr. Disdier's and Mr. Jones's copies of the North Pacific proposal were devoid of any annotations.

evaluators' ratings. These materials establish that the members of the committee considered each of the evaluation factors identified in the RFP.

Given an adequate record for determining the basis for the evaluation, an evaluation is reasonable if "the objective facts...reasonably support [the] evaluations."⁸²

North Pacific contends that the evaluation cannot be justified by an objective review of the contents of the proposals. In support of that general proposition, North Pacific makes two central points. First, North Pacific argues that its proposal was downgraded more than it should have been for the absence of CSSB certification, because CSSB certification is not a reliable criterion of quality products and the contracting officer had discretion to allow the substitution of other products or to permit use of a non-CSSB member installer.⁸³ Second, it argues that its proposal was unreasonably downgraded, primarily with respect to past performance,⁸⁴ prior experience,⁸⁵ and proposed subcontractors,⁸⁶ but also in other respects.⁸⁷

1. Absence of CSSB Certification

North Pacific argues that the evaluators placed too much importance on the absence of CSSB certification. As previously stated, North Pacific's argument that the requirement for CSSB certification was unnecessary was not raised in a timely protest, and is therefore waived.⁸⁸ However, the argument that CSSB certification was afforded too much weight in the evaluation is within the scope of North Pacific's protest that the evaluation was unreasonable and was specifically raised in the protest appeal, and will therefore be considered.⁸⁹

⁸² Johns v. Department of Revenue, at 13, OAH No. 09-0572-PRO (Commissioner of Administration 2009) (citations omitted).

⁸³ See Appeal, pp. 6-7.

⁸⁴ See Post Hearing Brief at 15 (disputing incompleteness of prior project at the Governor's House and lack of supervision of subcontractors).

⁸⁵ See Prehearing Memorandum at 4 ("Contractor and subcontractor 'reputations' ignored NPE's considerable experience and ACC's relative inexperience."); Post Hearing Brief at 15 (disputing that NPE "had limited experience with some of its listed contractors).

⁸⁶ See Prehearing Memorandum at 5 ("Scoring was tainted by committee statements regarding subcontractor performance and supervision that were simply false, not factual and unsupported by evidence.").

⁸⁷ See Post Hearing Memorandum at 16 (re speculation concerning North Pacific employee, North Pacific's mention of hazardous substance abatement).

⁸⁸ *Supra*, p. 9.

⁸⁹ North Pacific's protest asserted that the scoring was unreasonable. The protest decision identified the absence of CSSB certification as one reason that the North Pacific proposal was not rated as highly as others. Protest Decision at 2. North Pacific's appeal argued that this requirement could have been waived

In reviewing the weight afforded to particular subsidiary issues, the question is whether the weight afforded to a particular matter “was within the reasonable expectations of an offeror, based on the contents of the RFP as a whole.”⁹⁰ In this case, the RFP quite plainly identified CSSB certification as an important factor: the roofing work was an important part of the project, and use of CSSB-certified shingles and a CSSB-certified installer was specifically identified as a requirement in the technical specifications. In light of the technical specifications, the evaluators could reasonably afford that requirement significant weight in the evaluation. For the same reason, a reasonable offeror would have understood that CSSB certification was an important component of the proposal.

Notwithstanding that this was an important specification, the architect who specified the use of CSSB-certified materials and installers has stated that it was not the only way to ensure the quality of the shingles and the installer.⁹¹ It may be that the contracting officer would have permitted the substitution of an alternative type of shingle and installation by a non-CSSB certified installer. However, the discretion to permit substitutions is vested in the contracting officer, not in the evaluation committee. The evaluators could not disregard the technical specifications, which required CSSB certification. Moreover, the evaluators had no way of knowing whether the particular substitutes offered by North Pacific would be acceptable to the contracting officer. The protest was correctly denied, insofar as it asserted that the evaluators placed too much significance on the absence of CSSB certification.

2. *Past Performance, Experience, Qualifications*

The Experience and Qualifications criterion was the single most important factor in the evaluation, counting for 35% of the total points and 50% of the technical evaluation. That criterion was wholly focused on the past performance, experience, and qualifications of the offeror’s own employees and of the employees of proposed subcontractors. It called for offerors to “describe and provide detailed relevant direct

and that it should not have been given substantial weight in the evaluation. *See* Appeal, pp. 6-7. North Pacific did not argue that the requirement should not have been included as part of the RFP at all until later. *See* Comments, p. 14; NPE Post Hearing Brief at 19-22.

⁹⁰ Empyra.com v. Alaska Permanent Fund Corporation, at 13, OAH No. 06-0520-PRO (Alaska Permanent Fund Corporation 2006), *quoting* Make it Alaskan, Inc. v. Department of Commerce and Economic Development, No. 00.11 at 9 (Department of Administration, May 1, 2001).

⁹¹ SAR II 142.

qualifications, experience for the prime and Subcontractor Company's and the primary key employee(s) who'll be directly performing the [specified] scopes of work," including specifically listed "detailed information" regarding the employees' names, trade, training and experience, and references. North Pacific's arguments regarding the propriety of the evaluation are primarily relevant to this criterion.

Looking only to the contents of its proposal with respect to Experience and Qualifications, North Pacific's argument that the evaluation was unreasonable is not persuasive. For that criterion, the RFP called for offerors to identify the employees of both the primary contractor (*i.e.*, the offeror) and the subcontractors who would perform the work in each of eight specific work categories, and to provide detailed information and multiple references for each of those employees. Given that this was by far the most heavily weighted portion of the RFP, and that the information called for was highly specific and detailed, it is apparent that the training, experience and ability of each key worker was a very important factor in the evaluation. North Pacific's proposal did not identify its own employees who would be performing the work that was not subcontracted. In light of the specific information called for, this was a significant deficiency in its proposal that would justify a lower rating on the Experience and Qualifications criterion.

But North Pacific's primary argument on appeal is not that its proposal on its face was undervalued. Rather, its primary argument on appeal is that the evaluators exercised their judgment as to past performance based upon undocumented and unverified assertions by other members of the committee, rather than on the contents of the proposal.⁹² Because the evaluators' ratings as to North Pacific's past performance were based on undocumented and unverified assertions, they are inherently unreasonable, North Pacific contends.⁹³

In considering this argument, it is important to keep in mind that the evaluators were authorized to rely on their own and others' knowledge of factual matters in making their assessments of the relative merits of the proposals: the solicitation expressly stated

⁹² Comments at 11-12; Prehearing Memorandum at 4-5; NPE Post-Hearing Brief at 15-17.

⁹³ See NPE Post Hearing Brief at 15-17 (characterizing evaluations as based on "pejorative speculation").

that they could do so.⁹⁴ Moreover, even absent any specific language in an RFP, evaluators may rely on their own personal knowledge of the past performance of an offeror, good or bad:

Individual evaluators serving on a [proposal] evaluation committee are not acting in a quasi-judicial adjudicative capacity. They are not required to approach the evaluation process with a blank slate. Rather, they are required to consider the proposals ‘honestly and fairly.’ ... The fact that individual evaluators have independent knowledge regarding the manner in which an existing contractor has performed does not prevent them from considering all [proposals] ‘honestly and fairly.’ They are entitled to exercise their independent judgment...regarding the past performance of the existing contractor even though it is based on personal knowledge, rather than on an independent assessment by the agency, an outside auditor, or a third party.^[95]

To say that evaluators may rely on their knowledge of factual matters based on their own direct experience, or on information obtained from third parties with direct experience with an offeror,⁹⁶ is not to say that they may base their evaluation on speculation. However, to rely on information based on an evaluator’s own direct experience with an offeror, or on information obtained from a third party with direct experience, is not to engage in speculation.

In this particular case, North Pacific contends that the evaluation of the North Pacific proposal was unreasonable because it was based in part on assertions by committee members that were not based on the personal knowledge of the committee member or another person with direct knowledge of the relevant facts, and which the evidence at the hearing established was factually incorrect, namely with respect to these points: (1) North Pacific had limited experience with its subcontractors; (2) North Pacific

⁹⁴ “During the Evaluation Committee Meeting, Evaluators may discuss factual knowledge of...Proposers’ and proposed Subcontractors’ prior work experience and performance, including projects referenced in proposal, available written evaluations, etcetera, and may contact listed references or other persons knowledgeable of a Contractor’s and/or Subcontractor’s past performance.” Proposal Evaluation Procedure, ¶1.3.

⁹⁵ Empyra.com v. Alaska Permanent Fund Corporation, at 8, OAH No. 06-0520-PRO (Alaska Permanent Fund Corporation 2006), *quoting* Alaska Archives v. Department of Education and Early Development, at 5, note 8, Department of Administration No. 97-005 (Commissioner of Administration 1997) [citation omitted].

⁹⁶ It is a well established principle in federal procurement decisions that an evaluation may be based upon information obtained from third parties other than the references provided by the offeror. *See, e.g., In Re JBG Enterprises*, No. B-291432 (Comptroller General, December 9, 2002); *In Re Forest Regeneration Services, LLC*, B-290998 (Comptroller General, October 30, 2002); *Lynwood Machine and Engineering, Inc.*, B-285696 (Comptroller General, September 18, 2000).

had failed to complete a project at the Governor's House; (3) North Pacific had an ongoing contractual dispute regarding a prior project; (4) North Pacific had failed to exercise adequate supervision over subcontractors on one or more prior projects; (5) a current North Pacific employee may be difficult to work with; and (6) Alaska Commercial had more experience than North Pacific.⁹⁷

It is true that, as North Pacific points out, it had completed a project that one of the evaluators asserted during the discussions was unfinished.⁹⁸ However, apart from that one error, the evidence is that the allegedly objectionable comments made during the discussion were either factually correct,⁹⁹ unobjectionable,¹⁰⁰ or consisted of subjective judgments based on either personal knowledge¹⁰¹ or the contents of the proposal.¹⁰² Thus, the specific objections made by North Pacific do not demonstrate that the evaluation was unreasonable. Taken as a whole, the record provides adequate support for the evaluators' scores, notwithstanding that some of their specific comments may have been based on a mistaken understanding of the facts.¹⁰³

⁹⁷ See Post Hearing Brief at 15-16.

⁹⁸ Point (2): The discussion notes state that Mr. Jones asserted that a project North Pacific was working on at the Governor's House was as yet unfinished. R. 246. After the evaluation had been completed, Mr. Aicher confirmed that the project had been completed. DA Testimony, #1 2:50.

⁹⁹ Point (3): North Pacific had subcontracted a painting job at the Alaska Office Building, and the painting applied by the subcontractor had bubbled. See, e.g., JW Testimony, #2 2:17. At the time of the evaluation, responsibility for corrective work was being discussed; the matter was, thus, the subject of an unresolved contractual dispute.

¹⁰⁰ Point (6): One evaluator observed that Alaska Commercial had more experience than North Pacific, which is not the case. However, that comment was likely in reference to the principals of the respective organizations: two former long-time North Pacific employees were the key employees of Alaska Commercial, and their experience could reasonably be attributed to their new firm.

Point (1): A note of the discussion states that Mr. Jones commented "Apart from Alcan Electric, had limited experience working with some of the listed subcontractors." R. 246. North Pacific characterizes this as an observation that North Pacific had little experience with its subcontractors. The more reasonable reading is that Mr. Jones was indicating that he had little experience with the subcontractors, and thus no basis for assessing their past performance.

¹⁰¹ Points (4) and (5): see DA Testimony, #1 1:35, 2:52-2:56; PD Testimony, #2 1:52, 1:59, 2:04.

¹⁰² North Pacific argues that the evaluation is unreasonable based on speculation regarding the significance of a comment made concerning North Pacific's discussion of hazardous substances, and on a comment asserting that Alaska Commercial had more experience than North Pacific. See NPE Post Hearing Brief at 16. Speculation concerning the significance of a comment, when the significance of the comment is not self-evident, is not a sound basis for finding an evaluation unreasonable.

¹⁰³ See Johns v. Division of Retirement and Benefits, at 14, OAH No. 09-0572-PRO (Commissioner of Administration 2010) ("A point-by-point response to each of [the protestor'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' rating and supports their scores, not whether each and every note or comment they made was precisely accurate."); World Wide Movers, Inc. v. Department of Education, Department of Administration No. 97-004 (Commissioner of Administration 1997).

IV. Conclusion

The purchasing agency did not abuse its discretion in the composition of the proposal evaluation committee, there is no appearance of impropriety, and the scoring was reasonable. For these reasons, the protest 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 12th 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.]