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

ALASKA COMMUNICATIONS SYTEMS	)	
	)	
v.	)	
	)	
DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT	)	OAH Nos. 11-0120-PRO & 11-0178-PRO
	)	RFP No. 2011-0500-0036

REVISED DECISION[1]

I. Introduction

The Department of Education and Early Development (Department) issued a solicitation for proposals to design, build and maintain a broadband communications network. Three proposals were received and deemed responsive, and the Department issued a notice of intent to award the contract to GCI Communication Corporation (GCI). Alaska Communications Systems (ACS) filed a protest asserting that the GCI proposal was not responsive because (1) GCI did not offer dedicated bandwidth; (2) GCI did not offer most favored pricing; and (3) GCI's network did not provide a physical connection to routers in Anchorage, Fairbanks and Juneau. The procurement officer denied the protest on the first two issues and granted it on the third.

GCI, in turn, protested the procurement officer's decision on the third issue, arguing that the solicitation did not require a physical connection to all three routers, but only to one. The procurement officer in effect reconsidered his prior decision on that issue. He determined that GCI's characterization of the solicitation was correct and granted the GCI protest, effectively reversing his own prior decision.

ACS filed two appeals contesting the procurement officer's decision as to (1) dedicated bandwidth, (2) most favored pricing, and (3) connectivity.[2] The appeals were consolidated the

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[1] A proposed decision was issued on July 12, 2011. The parties submitted proposals for action and the commissioner returned the case to the administrative law judge pursuant to AS 44.64.060(e)(2) for the specific purpose of supplementing the record with memoranda responsive to the proposals for action for consideration by the commissioner. This revised decision is unchanged from the original proposed decision except for the addition of this footnote.

[2] ACS's protest had raised two additional issues: (1) the evaluation of the quality of service (RFP §7.02[b])) was flawed; and (2) GCI's proposal did not meet the bandwidth speed requirements of the RFP. After ACS filed its appeals, by stipulation the proposals were rescored on RFP §7.02[b]) and GCI clarified its proposal as to bandwidth speed. Subsequently, ACS abandoned those two additional issues. *See* Email, K. Cuddy to ALJ Hemenway, 5/23/2011 @ 4:26 p.m.

parties filed cross-motions for summary adjudication. In an oral ruling issued on June 16, 2011, the administrative law judge denied ACS's motion; the Department's was granted as to the issues of (1) dedicated bandwidth and (2) most favored pricing, and was denied as to the issue of (3) physical connection to routers in Anchorage, Fairbanks and Juneau.

The administrative law judge conducted a hearing on June 21, 2011. ACS presented testimony from an expert, Dr. Charles Jackson, and from Russell Girten, ACS's chief information officer. The Department presented testimony from Shawn Armstrong, the University of Alaska's manager of network engineering, and Craig Mollerstruen, GCI's vice president. On June 30, 2011, the administrative law judge issued a written memorandum and order sustaining the procurement officer's decision to deny ACS's protest. In brief, the administrative law judge ruled that the terms of the solicitation regarding connection to routers in Anchorage, Fairbanks and Juneau were ambiguous and that the procurement officer did not abuse his discretion in determining that the GCI proposal was responsive.

This decision more fully states the basis for the administrative law judge's oral ruling on the cross-motions for summary adjudication and the written memorandum and order.

II. Facts

A. The OWL Network

The Alaska State Library received a $5.35 million federal grant to design and deploy a web- and video-conferencing broadband network to as many public libraries in Alaska as possible.[3] Additional contributions were obtained from the Bill and Melinda Gates foundation and the Rasmuson foundation; total cash and in-kind funding for the project amounted to $8.3 million.[4] The envisioned network, called the Alaska OWL (Online With Libraries) Network, was to be logically and physically configured from existing and newly created Alaska broadband infrastructure, but totally separate and apart from any State of Alaska network.[5] The OWL Network was the central element in the OWL Project, which also included equipment acquisition and training in digital literacy and IT support.[6] Libraries participating in the OWL Network would be eligible for discounted pricing through the federal E-Rate program.[7]

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3 RFP p. 29.
4 RFP p. 29.
5 RFP p. 29.
6 *See* RFP p. 30.
7 RFP p. 32.

B. Terms Of Solicitation

To implement the OWL Network, the Department of Education and Early Development issued Request for Proposals No. 2011-0500-0036 (RFP). The RFP solicited proposals to design, build, operate and maintain a communications network to provide broadband Internet service[8] and to integrate a statewide network in support of web- and video-conferencing at public libraries in Alaska.[9] The RFP called for offerors to provide a minimum speed of 1.5 mbps down and 768 kbps up at each of the 93 libraries participating in the project, if possible during the initial 27-month term of the contract, with a long-range goal of providing higher speeds as appropriate over the course of three additional optional years.[10] Video-conferencing services were to be managed by the University of Alaska's Office of Information Technology, one of the Alaska State Library's ten partners in the OWL Project.[11] Video-conferencing capability was an essential component of the overall project and the RFP.[12]

Section 5.01 of the RFP ("Scope of Work") consisted of a two and one-half page narrative describing the project's short- and long-term goals, information regarding the network endpoints,[13] the Department's desire for a "defined level of end-to-end Quality of Service for each public library in the state," and available VSAT (small aperture satellite antenna) funding.[14] The paragraph describing network endpoints stated, "OA-OIT provides AK20/ (Internet2) routers at peering facilities in Anchorage, Fairbanks and Juneau and all offerors are asked to provide pricing for connection to these AK20 PoPs [points of presence]."[15]

Section 5.02 of the RFP ("Deliverables") identified the deliverables that offerors were expected to provide.[16] It included this statement:

> **Mandatory Requirements**: the Offeror must be capable of providing, configuring and managing 1.5 mbps down and 768 kbps up (1.5 mbps preferred) bandwidth with the lowest latency and highest QoS achievable between 93 public libraries in Alaska. [bold in original]

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[8] RFP p. 36. "Broadband", for purposes of the RFP, was defined as "a minimum of 1.5 mbps (down) and 768 kbps (up)[.]" RFP p. 11. *See also id.*, at 12 (defining "minimal broadband" as 1.5 mbps (down) and 768 kbps (up)), 30, 36 & Am. No. 3, Q32. *But see id*., at 5 (referencing speed of "at least" 512 kbps.

[9] RFP p. 1.

[10] RFP pp. 31, 34.

[11] RFP pp. 29, 31.

[12] RFP p. 30.

[13] For purposes of bandwidth, the "endpoint" is the library; for other purposes it is the library's public access point. *See* RFP, Am. No. 2, Q. 13.

[14] RFP pp. 34-36.

[15] RFP p. 35.

[16] RFP p. 36 ("Offerors are expected to provide the following deliverables…").

Following this statement were two bulleted items addressing pricing, the first of which stated:[17]

> **Pricing:** SOA expects most-favored pricing under this RFP. This means lower pricing will not be offered to any other customer of the Offeror for the same or highly similar services than the pricing the State receives under this RFP. In the event the Offeror lowers pricing to other customers, the State will automatically receive the lowest rate offered for identical services or the equivalent savings in terms of increased bandwidth speed and/or data throughput of equal value. [bold in original]

The bulleted pricing items were followed by this statement:[18]

> The following additional capabilities in the bulleted items below should be priced out separately for each library in the common pricing spreadsheet [Appendix I].

Eight bulleted items followed that statement, including these four:[19]

> **QoS** [Quality of Service] **with individual SLAs** [Service Level Agreements]: Each end point location must have adequate dedicated bandwidth for quality web and video conferencing documented in an appropriate SLA. Alaska OWL staff will expect to meet with staff of the successful Offeror to set a baseline and agree on SLA targets for libraries as their Internet services come online…
> **Internet2 Connectivity**: All public libraries in the offer must be capable of connecting at full contracted speeds to Internet2 routers in Anchorage, Fairbanks and Juneau.
> **IP Multicasting**: Each library capable of capturing its own activities via web- and video-conferencing applications must have sufficient dedicated bandwidth to be capable of transmitting programming to any or all of the other participating libraries through IP multicasting.
> **Traffic-shaping capability**: A network traffic-shaping capability that reserves bandwidth for web- and video-conferencing when those applications are in use is preferred in both satellite and terrestrial segments of the network. [bold in original]

Additional information was provided in response to offeror questions, via amendment: The average anticipated video-teleconferencing speed was expected to be 384 kbps in each direction, but offerors were not informed of the number of sites expected to be connected simultaneously for that purpose;[20] a committed information rate (CIR) or equivalent quality of service level was required for things such as multiple video-conferencing sessions;[21] vendors were required to provide rendezvous points for multi-cast (one video stream to many locations),

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17 RFP p. 36.
18 RFP p. 37.
19 RFP p. 38.
20 RFP, Am. No. 2, Q. 8. This question specifically asked for information on the number of simultaneous sites were anticipated for video-conferencing, as well as up and down speeds; the answer addressed speeds, but not the number of anticipated simultaneous sites.
21 RFP, Am. No. 2, Q. 10.

but a layer 2 solution would be considered;[22] and the network manager would have the ability to schedule sessions so as to avoid exceeding the network capabilities.[23] Amendment No. 2 includes this exchange:

> Q26: Please identify your bandwidth requirements for the connections to AK/20.
> [A] An Ethernet circuit with configurable bandwidth allocations should be capable of meeting end users needs and expanding as AK20 capacity, currently 10 mbps, expanding to 100 mbps and higher.

Cost represented 50% of the evaluation. Offerors' proposed costs were to be stated in a spreadsheet, Appendix I to the RFP. The spreadsheet called for offerors to show a monthly cost at each of 93 participating libraries for service at speeds of (a) 1.5 mbps (down) and a minimum of 768 kbps (up), and (b) 3.00 mbps (down) and a minimum of 768 kbps (up). The total cost of the proposals was the sum of all 93 monthly costs for both options, multiplied by the 27-month initial term of the contract, plus other costs (as specified in the RFP).[24] For purposes of evaluating cost, offerors' total costs were divided by the average speed, up and down, in category (b), yielding a cost comparison reflecting differences in each offeror's highest offered upload speed.[25] Thus, upload speed (because upload speed for price purposes was set by the offeror's proposal) but not download speed (because download speed for price purposes was set by the cost spreadsheet) was factored into the cost comparison. However, combined upload and download speed (independent of cost) was 5% of the evaluation under another evaluation factor.[26]

C. Additional Information

The University of Alaska's Office of Internet Technology (OIT) was a partner with the Alaska State Library in the development and implementation of the OWL Project. Rich Greenfield, the university's information technology manager, worked closely with the Department in the development and drafting of the RFP. Steve Smith, the university's Chief

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[22] RFP, Am. No. 2, Q 19, Q 22.

[23] RFP, Am. No. 3, Q 35, Q 37.

[24] Offerors were also required to show prices at designated higher download speeds (6.0, 12.0, and 24.0 mbps) with associated offeror-designated upload speeds (minimum 768 kbps) for all locations, for anticipated future upgrades in the three optional contract years, but those higher speeds were not included in the total cost or in the evaluation. *See* RFP p. 37.

[25] The RFP called for a price comparison based on the "initial" speed. The price spreadsheet did not specify the time frames to which offered prices applied. As applied by the procurement officer, each offeror's average initial speed was deemed to be the average of the higher speeds, up and down, listed on the evaluated portion of the price spreadsheet.

[26] RFP p. 42 (§7.01[c]).

Information Technology Officer, also provided input to the Department during the development of the RFP.[27] The Department issued the RFP and was responsible for its contents.

The University of Alaska operates a proprietary backbone computer network.[28] That network includes a high-capacity backbone link to Seattle, where the university network physically connects to (among other things) the Internet2; that is the university's single physical point of connection to the Internet2. The Internet2 is a proprietary network connecting major research institutions in the Lower 48 states; it has no physical presence in Alaska. Access to the Internet2 is restricted to subscribers of the network, which include the University of Alaska.[29] For purposes of the OWL Network, access to the Internet2 network provides two significant benefits: first, it provides access to the research databases and other resources of its members that are not available on the Internet; second, it provides for higher quality video-conferencing capabilities than Internet-based video-conferencing, due to engineering characteristics of the Internet2 that are not present on the Internet. Access to the Internet2, for both reasons, was an important feature of the OWL Network. However, with respect to video-conferencing, access to the Internet2 comes into play only for interstate video-conferencing; because the Internet2 has no physical presence in Alaska, intra-state video-conferencing does not utilize that network. Interstate video-conferencing on the OWL Network not conducted over the Internet2 would be conducted on the Internet or on an interstate proprietary network (if any) available for that purpose through the contractor.

The AK20 network is a proprietary network of the Alaska Distance Education Consortium (ADEC), a group composed of the University of Alaska and a variety of other research and educational institutions in Alaska, including various public libraries.[30] It is under the direction of Dr. John Monahan, a university employee, and the university provides substantial administrative support to it.[31] ADEC and AK20 have Internet2 access through the university as a Sponsored Education Group Participant.[32] The RFP called upon offerors to

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27 *See* email, R. Girten to S. Smith, 4/12/2011 @ 2:12 p.m.; Testimony of S. Armstrong.

28 A proprietary network is one to which access is restricted, as compared with a public network such as the Internet.

29 *See* ACS Reply at 3, note 5.

30 Testimony of S. Armstrong.

31 *See* ACS Reply at 2-3.

32 *See* ACS Reply at 2, note 5.

provide access to the Internet2 by means of connections to routers (identified in the RFP as "AK20/ (Internet 2) routers" or as "Internet2 routers") in Anchorage, Fairbanks and Juneau.[33] In fact, there is no AK20 router in Juneau. There are 10 mbps AK20 routers in Anchorage and Fairbanks. The AK20 network plans to increase the speed of those routers to 100 mbps in the future, and hopes (but has no specific plan) to provide a Juneau router at some time.

Under the present AK20 configuration, OWL Network traffic to the Internet2 passing through the 10 mbps AK20 routers in Anchorage or Fairbanks will be routed over the AK20 network to the university's backbone network 100 mbps router in Fairbanks, and then over the university's backbone network to the Internet2 through a high capacity (12 gbps) Internet2 router in Seattle.[34]

D. The GCI Proposal

The GCI proposal is based on its existing SchoolAccess program, which focuses on delivering E-Rate-supported services to Alaska schools.[35] GCI envisioned connecting all of the libraries to a wide area network (WAN) core in Anchorage, with connections between the Anchorage core and GCI's Internet backbone, as well as the Internet2 backbone.[36] The core in Anchorage would connect to the Internet through GCI's 30+ gbps Internet backbone[37] and to Internet2 through the university's 100 mbps router in Fairbanks.[38] The library-core connections would utilize one of seven different delivery methods, depending on the location of the library.[39] The proposal specified "private tunneling" in locations using a terrestrial cable,[40] dedicated bandwidth in locations using a private line or a local or inter-exchange carrier point of presence,[41] and "guaranteed bandwidth" at other locations.[42] At all locations, GCI proposed a network providing "adequate symmetric guaranteed bandwidth during the business day for web and video conferencing" between the libraries and the core,[43] multicasting,[44] and traffic shaping to give video traffic priority access to bandwidth over web traffic.[45]

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33 RFP pp. 35, 38.
34 *See* S. Armstrong Affidavit, ¶4.
35 GCI Proposal, pp. 5, 49, 57, 63.
36 GCI Proposal, p. 6.
37 GCI Proposal, p. 6 ("The WAN core will be connected to GCI's 30+ Gbps Internet backbone….").
38 GCI Proposal, pp. 7, 9, 11, 13, 15, 17, 19, 21.
39 GCI Proposal, pp. 9-21.
40 GCI Proposal, p. 9.
41 GCI Proposal, pp. 11, 13.
42 GCI Proposal, pp. 15, 17, 19, 21.
43 GCI Proposal, pp. 9, 11, 13, 15, 17, 19, 21.

E. Evaluation[46]

The total cost of the GCI proposal for the initial 27-month contract term was $20,809,389.29. The average initial speed offered was 3.75 mbps.[47] The evaluated cost (total cost divided by 3.75) was $5,549,170.48. GCI was the lowest cost proposal, both in terms of total cost and evaluated cost, and it received the maximum 50 points for cost. GCI received 28.11 points on the technical portion of the evaluation and a total of 88.11 points altogether (including 10 points for the Alaska bidder preference).[48]

The total cost of the ACS proposal was $27,776,674.44. The average initial speed offered was 4.5 mbps.[49] The evaluated cost (total cost divided by 4.5) was $6,172.594.32; ACS received 44.95 points for cost. ACS received 30.66 points on the technical portion of the evaluation and a total of 85.61 points altogether (including 10 points for the Alaska bidder preference).

III. Analysis

A proposal is not responsive if it does not conform in all material respects to the request for proposals.[50] The RFP provided that the procurement officer could reject any proposal that

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[44] GCI Proposal, pp. 9, 11, 13, 16, 17, 19, 21. "Multicasting" is the transmission of data to multiple recipients on a network at the same time using one transmission stream to switches which then distribute the data simultaneously to end users via branching paths. *See* RFP p. 12.

[45] GCI Proposal, pp. 9, 11-12, 13, 16, 17, 19, 21.

[46] As previously noted, ACS initially protested the evaluation under §7.02[b], dealing with quality of service. The parties stipulated to a revised scoring on §7.02[b], and ACS abandoned that issues on appeal. The scores stated in the text reflect the revised scoring as shown on the revised evaluation spreadsheet submitted with the supplemental protest report.

[47] *See* n. 24, *supra*.

[48] This is the total shown on the revised evaluation spreadsheet. The revised spreadsheet includes the evaluators' revised scores on §7.02[b]. *See* note 1, *supra*. The revised scores for that factor show a total gain from all five evaluators for GCI of 0.32 points and for ACS of 3.81 points. Those revisions amount to a gain on the overall evaluation for GCI of .064 points (0.32 ÷ 5), and for ACS of .762 (3.81 ÷ 5) points. The difference, a net gain of .698 points for ACS, is insufficient to affect their rank, given the overall gap of 2.25 points between the two proposals on the original evaluation spreadsheet (84.95 for ACS; 87.20 for GCI).

Because the agreed-upon revisions to the scores on RFP §7.02[b] did not affect the rank as shown on the original spreadsheet, it is not necessary to consider the implications of other differences between the original and revised spreadsheets, which are not explained on the current record. The revised spreadsheet shows a score of 16.25 points for GCI from evaluator DR for §7.01, as compared with a score of 12.5 points from the same evaluator for §7.01 on the original evaluation spreadsheet. (The score shown on the revised spreadsheet reflects the scores shown on DR's scoresheet in the record.) The two spreadsheets are also inconsistent with respect to the score shown for ACS by evaluator RR for §7.01: 19 on the original spreadsheet and 18.5 on the revised spreadsheet. Both discrepancies may be disregarded: individually and combined, neither affected the outcome.

[49] *See* n. 24, *supra*.

[50] 2 AAC 12.990(9).

did not "comply with all of the material and substantial terms, conditions and performance requirements of the RFP."[51]

On appeal, ACS asserts that GCI's proposal was not responsive because (1) GCI did not offer dedicated bandwidth; (2) GCI did not offer most favored pricing; and (3) GCI's network did not provide a physical connection to Internet2 routers in Anchorage, Fairbanks and Juneau.

A. Dedicated Bandwidth

The RFP mentions dedicated bandwidth twice. It states:[52]

> **QoS** [Quality of Service] **with individual SLAs** [Service Level Agreements]: Each end point location must have adequate dedicated bandwidth for quality web and video conferencing documented in an appropriate SLA. Alaska OWL staff will expect to meet with staff of the successful Offeror to set a baseline and agree on SLA targets for libraries as their Internet services come online…
> …
> **IP Multicasting**: Each library capable of capturing its own activities via web- and video-conferencing applications must have sufficient dedicated bandwidth to be capable of transmitting programming to any or all of the other participating libraries through IP multicasting.

The substance of this language is that at all locations, offerors must provide enough ("adequate" or "sufficient", in the words of the RFP) dedicated bandwidth for (a) "quality" web- and video-conferencing and (b) for IP multicasting. In a cross-motion for summary adjudication, the Department argued that GCI had, after the protest was filed, provided clarification that it will provide dedicated bandwidth at all locations, and that the procurement officer's decision to accept the proposal, in light of that clarification, was not an abuse of discretion.[53]

ACS opposed the cross-motion on the ground that whether GCI actually can provide dedicated bandwidth, as it asserted in response to the Department's request for clarification, is a disputed factual issue, and that summary adjudication should not be granted in the face of such a dispute.[54]

The Department replied that ACS's objection goes to GCI's ability to perform, which is a question of responsibility, not responsiveness, and as such should be deemed outside the scope of a protest.[55] Alternatively, assuming the procurement officer's determination of responsibility

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51 RFP p. 8.
52 RFP p. 38.
53 Cross Motion at 6, 10.
54 ACS Reply at 6.
55 Department Reply at 6.

may be protested, the Department argues that the procurement officer's decision was not an abuse of discretion.[56]

The administrative law judge issued an oral ruling granting the Department's motion on this issue, based on: (a) GCI's express clarification that it would provide dedicated bandwidth; (b) the absence of a requirement for any specific amount of dedicated bandwidth at any location, and (c) the procurement officer's discretion to determine responsiveness and responsibility.

(a) GCI's proposal included a specific statement that "Each library will have adequate dedicated bandwidth for quality web and video conferencing."[57] However, the proposed network's schematics refer to dedicated bandwidth at only some locations, and refer to "guaranteed bandwidth" at others.[58] Given these different characterizations, and the absence in the RFP of any specific requirement to expressly commit to provide dedicated bandwidth, whether GCI's proposal contemplated the provision of dedicated bandwidth at all locations was an appropriate topic for clarification. GCI provided clarification as requested. From a responsiveness perspective, with GCI's clarification in hand, the procurement officer did not abuse his discretion with respect to responsiveness on this issue.

(b) The relevant language of the RFP, quoted above, can reasonably be construed to mean that dedicated bandwidth was <u>not</u> required at sites where "quality" video conferencing, as defined through a mutually agreed-upon service level agreement (SLA), and IP multi-casting, could be provided through shared bandwidth. In that light, the responsiveness of the GCI proposal does not depend upon the existence of an offer to provide dedicated bandwidth at all locations, but rather on an offer to provide web- and video-conferencing at the level of "quality" specified in an SLA to be negotiated with the Department, as well as IP multicasting, at all locations. This, the GCI proposal did.

(c) Assuming, without deciding, that a procurement officer's affirmative determination of responsibility may be, in some circumstances, subject to a protest,[59] the existence of a factual dispute as to whether GCI actually can provide dedicated bandwidth at all locations does not preclude summary adjudication regarding responsibility, for two reasons.

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[56] Department Reply at 7.
[57] GCI Proposal at 3.
[58] *See* notes 41, 42, *supra*.
[59] *See* <u>Flagship Development, LLC v. Division of General Services</u>, at 11, OAH No. 06-0249-PRO (Commissioner of Administration 2006) (addressing responsibility without deciding whether that issue is within the scope of a protest appeal).

First, as previously explained, the RFP may reasonably be construed to not require dedicated bandwidth at all locations. Second, the existence of a factual issue regarding GCI's actual ability does not, by itself, create a substantial factual issue as to whether the procurement officer abused his discretion. It is in the nature of discretionary determinations that they may be accompanied by doubt. The procurement officer's willingness to accept a degree of risk of non-performance is subject to a deferential standard of review by the commissioner,[60] and a purchasing agency is in the best position to determine the degree of risk of non-performance that is acceptable in light of the available options.[61] In this case, the risk of non-performance with respect to dedicated bandwidth could reasonably be viewed as mitigated by a number of factors, such as GCI's affirmative guarantee of adequate bandwidth, anticipated up and down video-conferencing speeds of 384 kbps (significantly below guaranteed minimum speeds),[62] and the varied technical tools referenced in GCI's proposal regarding bandwidth availability for purposes of video-conferencing. As a matter of law, on the record at the time of the motion and on the current record, the procurement officer's determination of responsibility had a reasonable basis in the record and was not an abuse of discretion.[63]

B. Most Favored Pricing

With respect to obtaining the lowest price available for the services provided, the RFP stated:[64]

> **Pricing:** SOA expects most-favored pricing under this RFP. This means lower pricing will not be offered to any other customer of the Offeror for the same or highly similar services than the pricing the State receives under this RFP. In the event the Offeror lowers pricing to other customers, the State will automatically receive the lowest rate offered for identical services or the equivalent savings in terms of increased bandwidth speed and/or data throughput of equal value. [bold in original]

The Department's cross-motion for summary adjudication argued that the procurement officer had "found no evidence to support the suggestion by ACS that GCI is not offering the

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60 *See* Flagship Development, LLC v. Division of General Services, at 11, OAH No. 06-0249-PRO (Commissioner of Administration 2006).

61 *Cf.* In Re Waste Management of Alaska, Inc., at 16 (Department of Administration 2002).

62 RFP, Am. No. 2, Q8.

63 While the administrative law judge made an oral ruling on the motion for summary adjudication, he expressly permitted ACS to address this issue at the evidentiary hearing. ACS did not address this issue in its case in chief at the hearing, but did have the opportunity to cross-examine Mr. Mollerstruen on this issue. Mr. Mollerstruen's testimony substantially conformed to his prior assertions as presented in connection with the cross-motion.

64 RFP p. 36.

state its lowest prices," and that in any event, because the RFP itself provides that if a lower price is identified, the Department will "automatically" receive that lower rate, the procurement officer's decision to accept the proposal was not an abuse of discretion.[65]

ACS opposed the cross-motion, reasoning that in the absence of an express commitment in its proposal to provide most-favored pricing, the GCI will not be bound to a contractual obligation to provide such pricing.[66] Moreover, ACS argued, GCI has publicly advertised prices that are lower than those stated in its proposal.[67]

The administrative law judge issued an oral ruling granting the Department's motion on this issue, based on: (a) the absence of a requirement in the RFP that offerors expressly commit to provide most-favored pricing; (b) the Department's ability to expressly require most-favored pricing in a term of the contract resulting from the solicitation; and (c) the absence of unfair competitive prejudice to ACS.

(a) As the Department points out, the RFP says no more than that the Department "expects" most-favored pricing, and that lower prices offered to other customers "will automatically" apply. As with respect to dedicated bandwidth, the RFP did not include any requirement for offerors to make an express commitment to provide most-favored pricing. The procurement officer might have requested clarification on this issue, but chose not to. That decision was within his discretion, as was the decision to deem the proposal responsive.

(b) The Department expressly retained the right to add terms and conditions within the scope of the RFP during contract negotiations.[68] It would be well within the Department's authority to include terms and conditions in the contract that expressly require GCI to provide most-favored pricing and create mechanisms for implementing such pricing. Given the Department's ability to protect its interests through specific contractual language, and the absence of a requirement that offerors expressly commit to provide most-favored pricing in their proposal, the procurement officer's determination that GCI was responsive with respect to this issue was not an abuse of discretion.

(c) GCI's proposal was the lowest cost, both in terms of total cost and in terms of evaluated cost. Accordingly, even if GCI did not offer its best prices, as the Department

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65 Cross-Motion at 6, 10.
66 ACS Opp. at 7-8.
67 ACS Opp. at 8-9.
68 RFP p. 24.

"expected" it would, that did not create any unfair competitive prejudice for ACS: offering lower prices would simply have increased GCI's advantage.[69]

C. Physical Connection

The fundamental rule of responsiveness is that a proposal is not responsive if it does not conform in all material respects to the request for proposals. A purchasing agency must evaluate the responsiveness of a proposal on the terms stated in the request for proposals.[70] However, so long as the agency's interpretation is consistent with the literal terms of the RFP,[71] a purchasing agency has discretion to construe the terms of an RFP in manner that is reasonable in light of the RFP as a whole.[72]

In this case, the "Internet2 Connectivity" provision of the RFP was a material term. ACS argues that this provision of the RFP requires that proposals include multiple physical connections to AK20 routers, and that therefore the GCI proposal is not responsive.[73] The Department's position is that this provision of the RFP is subject to different interpretations. In particular, the Department argues, the RFP may reasonably be construed to require only one physical connection, so long as traffic through that physical connection has a logical connection, at full contract speeds, to the other AK20 routers. Based on that interpretation of the RFP, the Department contends that the procurement officer did not abuse his discretion in accepting the GCI proposal.

The relevant provision in the RFP states:

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69 *Cf* . Flagship Development, LLC v. Division of General Services, at 9, OAH No. 06-0249-PRO (Commissioner of Administration 2006) (no error in considering supplemental information that did not have the effect of changing the proposal's ranking).

70 *See* AS 36.30.150(a).

71 *See* Swanson General Contractors, Inc. v. Department of Transportation and Public Facilities, at 7-8, OAH No. 10-0559-PRO (Commissioner of Transportation and Public Facilities 2011) ("To reject a bid that is responsive to the terms of a solicitation as written could be unfair to a bidder who is unaware of the purchasing agency's intent, and would invite a protest from the bidder whose facially responsive bid was rejected.").

72 *See* In Re Bachner Company, Inc., No. 02.06/.07 (Commissioner of Administration 2002), *affirmed*, State, Department of Administration v. Bachner Co., Inc., 167 P.3d 58 (Alaska 2007).

73 ACS also argues that the GCI's proposal does not establish a network that is wholly separate from any State network, because it relies on the AK20 network to provide a connection from the Anchorage AK20 router to other locations on the AK20 network. This argument fails, for two reasons. First, the AK20 network may reasonably be characterized as something other than a "State of Alaska network" within the meaning of the RFP. While the AK20 is closely related to the University of Alaska, it has an independent existence. Second, the GCI-proposed network is entirely separate from the AK20 network. Traffic from the OWL Network passes over the AK20 network after it exits the OWL Network. Whether that traffic passes onto the AK20 network through a single physical connection or through multiple physical connections makes no difference.

> **Internet2 Connectivity**: All public libraries in the offer must be capable of connecting at full contracted speeds to Internet2 routers in Anchorage, Fairbanks and Juneau.[74]

In support of its argument that this provision requires multiple physical connections, ACS points to another provision of the RFP, which notes:

> UA-OIT [University of Alaska-Office of Information Technology] provides AK20/(Internet2) routers at peering facilities in Anchorage, Fairbanks, and Juneau and all offerors are asked to provide pricing information for connection to these AK20 PoPs [Points of Presence].[75]

In addition, ACS points to Amendment No. 2, which includes this exchange:

> Q26: Please identify your bandwidth requirements for the connections to AK/20. [A] An Ethernet circuit with configurable bandwidth allocations should be capable of meeting end users needs and expanding as AK20 capacity, currently 10 mbps, expanding to 100 mbps and higher.

In addition to the language in the RFP, ACS relies on the expert opinion of Dr. Jackson. Dr. Jackson reviewed the RFP and expressed the opinion that "GCI's interpretation of the RFP cannot be squared with the plain language and the standard industry meaning of the RFP's provisions."[76] Dr. Jackson's opinion rests on his view that: (1) because all traffic passing through a network router can travel to another router in the same network, "there is no plausible explanation for the RFP's reference of connections to three separate…routers if all that was intended was…to ensure that traffic from one router could get to the other two routers[;]"[77] (2) because redundancy in inter-network connections is highly desirable, "it would be exceedingly unusual for any network that highly valued access to Internet2 not to contemplate physically diverse connections to the [Internet2] network[;]"[78] and (3) the RFP's specific references to PoPs, peering facilities, and an Ethernet connection, with respect to Internet2 connections, signal physical connections, because PoPs, peering facilities and Ethernet connections are physical points of contact.[79]

Dr. Jackson approached the question as to whether the Department's interpretation was reasonable from the perspective of a sophisticated telecommunications organization, such as ACS or GCI. However, the Department of Education and Early Development is the purchasing

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74 RFP p. 38.
75 RFP p. 35.
76 Jackson Aff. ¶9.
77 Jackson Aff. ¶10. *See also id.* at ¶11.
78 Jackson Aff. ¶15.
79 Jackson Aff. ¶¶18-21.

agency, and it is the Department's interpretation, not ACS's or GCI's, that is at issue in this appeal.

ACS argues that the Department's reading is unreasonable "because it is contrary to the plain meaning of the RFP's language and undermines the very purposes that the RFP is expressly intended to serve."[80] But the "plain meaning" of the language that ACS points to is not self-evident: a "connection" could be a physical connection or a logical connection. ACS relies on extrinsic evidence in the form of Dr. Jackson's expert opinion (and testimony from Mr. Girten) to supplement the plain language of the RFP, and thus urges an interpretation that is not facially compelled. As for the argument that the Department's interpretation undermines the purposes of the RFP, that is a judgment that the Department, rather than ACS, is in the best position to make, and there is substantial evidence to support the procurement officer's implicit conclusion that the GCI proposal, even if it does not include multiple physical connections to AK20 routers, will meet the Department's actual needs as expressed in the RFP.

Looking at the specific language that ACS relies in the context of the RFP as a whole, the Department's reading is not unreasonable. Notably, nothing in the RFP states that the failure to propose a network including multiple physical connections to AK20 routers will render that proposal non-responsive. In fact, the RFP does not on its face mandate any connections to the AK20 network at all: rather, it states that all public libraries must be capable of connecting to Internet2 routers in Anchorage, Fairbanks and Juneau at full contracted speeds. Mr. Armstrong testified that there are no "Internet2" routers in these locations, and that the reference to "Internet2" routers should have been to "AK20" routers, but that is not what the RFP said. Nor is that how the procurement officer characterized the issue in rendering the decision finding GCI's proposal responsive,[81] or how ACS characterized the issue in its protest and appeal. Nonetheless, on appeal the Department acquiesced in Mr. Armstrong's view that the "connections" referenced in the RFP are to the AK20 network.

What the RFP said about connections to the AK20 network was this:

> UA-OIT [University of Alaska-Office of Information Technology] provides AK20/(Internet2) routers at peering facilities in Anchorage, Fairbanks, and Juneau and all offerors are asked to provide pricing information for connection to these AK20 PoPs [Points of Presence].[82]

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80 ACS Response to Supp. Brief at 7.

81 Protest Decision at 1-2 (April 4, 2011); Supplemental Protest Report at 4 (May 19, 2011).

82 RFP p. 35.

And, in Amendment No. 2, this exchange:

> Q26: Please identify your bandwidth requirements for the connections to AK/20.
> [A] An Ethernet circuit with configurable bandwidth allocations should be capable of meeting end users needs and expanding as AK20 capacity, currently 10 mbps, expanding to 100 mbps and higher.

Dr. Jackson's opinion was that these two provisions suggest that the reference to "connections" in the "Internet2 Connectivity" provision of the RFP was meant to be understood to refer to physical connections rather than to logical connections. While that may be what ACS understood the RFP to mean, and it could even be what the Department intended, it is not the only way to read those provisions, nor is the Department required to read them in that fashion. When a prospective offeror may reasonably be expected to identify an ambiguity or other deficiency in the terms of a solicitation, and fails to file a protest or otherwise to bring the matter to the attention of the purchasing agency prior to submitting a proposal, the purchasing agency is not bound to the interpretation that it intended, but rather may (for purposes of responsiveness) interpret the RFP in a manner consistent with the literal terms of the solicitation.[83]

Providing a single point of physical connection to an AK20 router, with a logical connection at full contract speeds to the other AK20 routers, is consistent with the literal terms of the RFP. The term addressing "Internet2 Connectivity" simply requires connections, which could mean either physical or logical connections. The price provision does not establish a substantive requirement with respect to the network configuration, and the price spreadsheet called for a single price, rather than separate pricing to each of three routers. In light of the pricing spreadsheet the Department might be seen to have elected to require only a single point of connection, notwithstanding the reference to pricing at multiple points as stated in the text.[84] As for Amendment No. 2, while the question refers to connections, plural, the answer refers to an Ethernet circuit, singular, and thus is susceptible to the view that a single physical connection only was required.

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[83] Swanson General Contractors, Inc. v. Department of Transportation and Public Facilities, 7-8, OAH No. 10-0559-PRO (Commissioner of Transportation and Public Facilities 2011).

[84] Neither party requested clarification regarding this issue, and no evidence was submitted, or testimony elicited, regarding whether the Department intended that the stated prices should include the total cost of three separate physical connections (notwithstanding the lack of any actual connection in Juneau). Whatever the Department's intent, the record does not include any evidence regarding the effect that providing a single physical point of connection (as compared with multiple points) had on the cost of the parties' proposals.

More fundamentally, the Department's interpretation is consistent with the language of the RFP taken as a whole. The RFP broadly outlined the Department's goals and needs, and invited "*bold, thoughtful and innovative* proposals." [italics in original] From an overall point of view, the RFP, quite plainly, sought to maximize offerors' flexibility in responding, rather than to limit offerors to a pre-determined network architecture. The Department to a relatively high degree left it to offerors to devise the means of meeting its needs. This is not surprising, because the project involved the creation of an entirely new computer network, rather than continuation of or modification to an existing network. It is from this perspective that the interpretive issue in this case should be approached, keeping in mind that, at a minimum, the RFP must be construed in a manner is consistent with the plain language used.

From that perspective, what the offerors might have understood about the nature of the connections that were mentioned in the RFP is not dispositive. Neither of the offerors, highly sophisticated in their fields, sought clarification on that issue, filed a protest to the RFP terms, or otherwise alerted the Department to the ambiguity inherent in the use of the "connections" in the provision of the RFP regarding Internet2 connectivity, or raised a question as to whether the reference in that provision to Internet2 routers was meant to refer to AK20 routers, or as to the absence of any such router in Juneau. Instead, both submitted proposals reflecting their own interpretation and assumptions about what the Department was asking for, and why.

Under these circumstances, neither ACS nor GCI would be entitled to relief on appeal from the procurement officer's interpretation of the relevant terms in a manner that is consistent with the literal language used.[85] In the context of a request for proposals, as compared with an invitation to bid, absent any prior protest or request for clarification on the issue at hand, for purposes of responsiveness a purchasing agency may, so long as it acts in a manner consistent with the literal terms of the RFP, exercise its discretion to construe the RFP in a manner that, in the judgment of the agency, meets its actual needs and is in the best interests of the State.[86]

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[85] *See* In Re Waste Management of Alaska, Inc., Department of Administration No. 01.08 (2002), at 8.

[86] Indeed, when it comes to deciding whether or not a particular term is material in the context of an RFP, consistency with the literal language may not be necessary. *See* Gunderson v. University of Alaska, Fairbanks, 922 P.2d 229, 235 (Alaska 1996). In that case, the court affirmed a finding of responsiveness where an RFP expressly called for use of bottom-dump loaders, and the offeror proposed use of end-dump loaders. The court concluded that the requirement was not material, for purposes of responsiveness, because the purchasing agency determined that use of an end-dump loader would meet its actual needs. Gunderson suggests that even if the RFP in this case were construed to require three physical connections, the Department could disregard that requirement as not material, for purposes of a responsiveness determination, if three physical connections were not actually needed.

With respect to meeting the Department's actual needs, ACS argues that the envisioned network requires, at a minimum, three physical connections to the AK20 network for two main reasons: first, to provide essential redundancy for access to the Internet2; and second, to provide adequate bandwidth through the AK20 network to accommodate, potentially, all 93 sites in an interstate video-conference. But Mr. Armstrong testified that the absence of three physical connections would not impact the ability of the OWL Network to meet the Department's actual needs.[87] With respect to redundancy, Mr. Mollerstruen testified that GCI can provide OWL Network traffic with a path to the Internet2 through GCI's connection to the university's backbone network, without that traffic having been routed over the AK20 network. With respect to simultaneous usage, it is evident that even with three separate physical connections between the OWL Network and the AK20 network, there is not nearly sufficient capacity for all 93 sites to connect to an interstate video-conference over the Internet 2 at the same time. Access by all sites simultaneously, in that light, cannot be deemed necessary. In any event, even in the absence of an Internet2 connection, interstate video-conferencing can be conducted by other means. That the higher quality of service available on the Internet2 would perhaps not be available at all times for all users does not mean that the Department's actual needs will not be met.

IV. Conclusion

The Department had discretion to accept a proposal offering to provide a network that was configured in a manner consistent with the literal language used in the RFP and that meets the Department's actual needs. ACS did not show that the Department's interpretation of the RFP was inconsistent with the literal language used in the RFP, or that the network proposed by GCI will not meet the Department's actual needs, and there is substantial evidence that the GCI proposal meets those needs. Accordingly, the procurement officer's decision to deny ACS's protest was not an abuse of discretion. ACS's appeals are therefore denied.

DATED August 24, 2011. By: *Signed*
Andrew M. Hemenway
Administrative Law Judge

[87] Mr. Armstrong is an employee of the University of Alaska, not of the Department. However, as noted, the university worked closely with the Department in developing the RFP, and the university will be providing video-conferencing bridging services and controls access to the Internet2. Mr. Armstrong's testimony is of some value, even if it is not entitled to the weight that would be afforded to others with more direct knowledge of the Department's needs.

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 16th day of September, 2011.

By: *Signed*
Signature
Michael Barnhill
Name
Deputy Commissioner
Title

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