

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

ELECTIC POWER SYSTEMS, INC.)	
)	
v.)	
)	
DEPARTMENT OF TRANSPORTATION)	OAH No. 11-0169-PRO
<u>AND PUBLIC FACILITIES</u>)	Project No. 02513008

DECISION

I. Introduction

Electrical Power Systems, Inc., (EPS) protested the proposed award of a contract by the Department of Transportation and Public Facilities (Department) to Beacon Professional Services Corporation (Beacon). EPS asserted that Beacon’s proposal was non-responsive because Beacon’s proposal does not include any personnel registered by the Alaska Board of Registration for Architects, Engineers and Land Surveyors, and that there had been discrepancies in the scoring of the proposals. The Department denied the protest and EPS appealed.

The matter was submitted for a decision on the written record. Because EPS has not shown that registration in Alaska was required by the solicitation or that the procurement officer abused his discretion in concluding that registration was not required by law, and because the evaluation was not unfair, the procurement officer’s decision to deny the protest on those issues is sustained. The matter is remanded to the procurement officer to determine, in consultation with the Department of Commerce, Community and Economic Development, whether Beacon must obtain a certificate of authorization.

II. Facts

The Department of Transportation and Public Facilities issued Request For Proposals (RFP) No. 02513008 on November 29, 2010. The solicitation requested proposals to provide professional design and engineering services in connection with a planned modification and upgrade to the electrical generation and distribution systems on the fleet of ferries operated by the Alaska Marine Highway System (AMHS).¹

¹ RFP, Proposed Statement of Services (PSOS) at 1.

Price was not an evaluation criterion.² The evaluation criteria required identification of the individuals performing the functions of professional and technical staff (specifically listing structural engineer, electrical engineer, mechanical engineer, naval architect).³ Offerors were required to comply with applicable law, including the requirement to obtain, prior to submitting a proposal, a certificate of registration under AS 08.48.211 for any individual who would act as the professional responsible in charge for architecture or engineering,⁴ and the requirement for a corporation offering architectural or engineering services to obtain corporate authorization pursuant to AS 08.48.241 prior to contract award.⁵ Absent compliance with the latter two requirements, the RFP noted that contract award was prohibited by Alaska law.⁶

Beacon submitted a proposal identifying its principal, Michael O. Aholt, as the project manager with responsibility, among other things, to “control the direction and status of ongoing engineering work.”⁷ Detailed technical quality assurance was to be provided by Mr. Aholt for overall technical content, and by Ron Prentice for electrical engineering.⁸ Mr. Prentice was to provide or otherwise oversee preparation of any necessary electrical engineering calculations and related technical documentation.⁹ Mr. Prentice has substantial experience in marine electrical engineering; he has provided electrical engineering and design services on a number of prior AMHS projects.¹⁰ Mr. Aholt, a registered Professional Engineer in Naval Architecture and Marine Engineering in the State of Washington, was to provide his Professional Engineer’s stamp for all necessary documents.¹¹ Beacon did not identify any individual to work on the project who is registered under AS 08.48; in particular, it did not identify any individual who is registered under AS 08.48 to act as the professional responsible in charge for any purposes under AS 08.48. Beacon did not possess a certificate of authorization under AS 08.48.241.

² RFP, Part B, p. 1. *See* AS 36.30.270.

³ RFP, Part C, p. 1.

⁴ RFP, Part D, p. 2. (“Certificate of Registration for each individual to be in ‘responsible charge’ (AS 08.48.341(14)) for Architecture, Engineering or Land Surveying...issued prior to submittal of proposals.” AS 08.341(14) defines the practice of landscape architecture. The reference in the RFP to that definition is clearly erroneous; the relevant statute is AS 08.48.341(19), which defines “responsible charge” as “the direct control and personal supervision of work.” *See also*, RFP, Part C, p. 1.

⁵ RFP, Part D, p. 2.

⁶ RFP, Part D, p. 2. The RFP references AS 39.90.100. That statutory provision addresses whistleblower protection. The reference in the RFP is clearly erroneous; the relevant statute is AS 36.90.100.

⁷ Beacon Proposal, p. 6.

⁸ Beacon Proposal, p. 7.

⁹ Beacon Proposal, p. 8 (“...Ron Prentice will review all developed documentation from a detailed electrical engineering perspective as an additional quality assurance measure and as a matter of due diligence.”).

¹⁰ Beacon Proposal, pp. 9, 10.

¹¹ Beacon Proposal, pp. 7, 8.

A total of six proposals were received; all were deemed responsive and were submitted to a proposal evaluation committee composed of three voting members.¹² The three members of the committee independently scored the proposals from 1 to 5 on each of eight evaluation criteria identified in the RFP.¹³ The members' scoresheets do not contain any written comments or notes to explain the basis for the score awarded. The committee convened by teleconference on February 1, 2011, and discussed their scores; some members made minor adjustments to their scores as a result of the discussion and the final scores were recorded by the procurement officer, Bob Saviers.¹⁴ Mr. Saviers added points for geographic location, and tallied the results, but did not record any notes explaining the reasons for any significant differences in the evaluators' scores. Beacon received zero points for geographic location and a total of 1225 points; EPS received 15 points for geographic location and a total of 965 points. Beacon was the highest-ranked offeror and the Department issued notice of intent to award the contract to Beacon.

III. Discussion

EPS's protest raised four issues: (1) Beacon's proposal represents that Mr. Prentice is an electrical engineer, but he is not; (2) Beacon's proposal does not include any personnel registered under AS 08.48; (3) the procurement officer did not provide notes to explain the evaluators' scores; and (4) EPS should have been awarded 45 points for geographic location rather than 15.¹⁵ All four issues were raised in its appeal as well.¹⁶ The matter was submitted for a decision on the written record.

A. Beacon Did Not Misrepresent Mr. Prentice's Status

The procurement officer denied the protest on this issue on the ground that the Department was not misled as to Mr. Prentice's status.¹⁷ But whether the proposal misrepresented Mr. Prentice's status depends on what the proposal says, not on whether the Department was misled. EPS argues that Beacon's description of Mr. Prentice as qualified to provide professional electrical engineering services amounts to a misrepresentation that he is licensed or registered as an electrical engineer, when in fact he is not.

¹² Memorandum, B. Saviers to J. Falvey, February 2, 2011.

¹³ The proposal evaluation committee's scoresheets are attached to the Protest Report.

¹⁴ Mr. Savier's compilation is attached as an exhibit to the Protest Report.

¹⁵ Protest, March 4, 2011.

¹⁶ Appeal, March 22, 2011.

¹⁷ Contracting Officer's Decision, p. 2.

While Beacon certainly characterized Mr. Prentice as qualified by experience to provide the professional electrical engineering services that were necessary to accomplish the work called for in the RFP, the proposal does not state that Mr. Prentice holds a license, certificate, or registration as a professional engineer in any capacity in any jurisdiction. Accordingly, the contracting officer correctly concluded that Beacon did not misrepresent his status.

B. The RFP Did Not Require Licensure Except As Required By Law

EPS's protest acknowledged that an individual licensed in another jurisdiction in naval architecture and marine engineering may provide those professional services in Alaska without registration under AS 08.48,¹⁸ but asserted that out-of-state licensure as a naval architect and marine engineer is insufficient to satisfy the terms of the RFP, which EPS says required that the professional responsible in charge for the electrical work must be registered in Alaska under AS 08.48, and that Beacon must hold a certificate of authorization.¹⁹

On appeal, EPS conceded that given oversight of the electrical engineering work by a naval architect and marine engineer licensed in another state, "the requirements of the state statutes and the solicitation have been met," at least as to individual licensure.²⁰ EPS made this concession for the same reason that the Department denied the protest: the executive administrator of the Board of Registration for Architects, Engineers and Land Surveyors (Board) had informed the Department that (1) because the Board does not provide registration for naval architect and marine engineers, AS 08.48 does not apply to persons providing those services on vessels located in Alaska; and (2) given the educational and training requirements for licensure as a naval architect and marine engineer, an individual with such a license is competent to act as the professional responsible in charge for purposes of the electrical engineering work at issue in this solicitation.²¹

¹⁸ See Protest at 2 ("EPS recognizes that the Project Managers for BPSC and EBDG are licensed PEs for Naval Architecture and Marine Engineering and are recognized as such in the State of Alaska.").

¹⁹ Protest at 2 (referencing requirements for individual to be in responsible charge to provide Alaska registration, in RFP part D, p. 2 and Evaluation Criteria, Section 3); and at 3 (referencing AS 08.48.241).

²⁰ Comments on Protest Report, p. 3. EPS argues that under AS 08.48.281, Beacon could not submit a proposal (*i.e.*, offer to provide engineering services) unless it first obtained a certificate of authorization pursuant to AS 08.48.241. *Id.* However, the RFP specifically provided that respondents did not need to obtain a certificate prior to submitting a proposal, but rather only prior to contract award. See *supra*, note 6. If this provision in the RFP was contrary to AS 08.48.281, EPS was obliged to file a protest raising that issue at least ten days prior to the due date for proposals. AS 36.30.565(a).

²¹ Comments, p. 3. See Protest Report at 2, Ex. A (email, R. Jones to R. Welsh, 3/29/2011 @ 11:21 a.m.).

Even apart from EPS's concession, the terms of the solicitation do not support its protest. The RFP, read reasonably as a whole, does not require registration under AS 08.48 except insofar as registration is required under Alaska law. The RFP states, "Contractor and all Subcontractors shall comply with the following applicable requirements of Alaska Statutes" and lists a number of "applicable" Alaska statutes, including requirements regarding certificates of registration for individuals, and certificates of authorization for a corporation. But while the relevant provisions of AS 08.48 concerning registration and certificates of authorization apply to the RFP, whether any particular individual must be registered, and whether a particular corporation must be authorized, depends on what the relevant provisions of law say, not on what the RFP says. The RFP requires compliance with Alaska law, but it does not establish what Alaska law requires.

For these reasons, to the extent that EPS's protest is based on the terms of the solicitation rather than on the requirements of Alaska law, it was properly denied.

C. Execution Of A Contract Is Subject To Compliance With Alaska Law

Under AS 08.48.281(a), a person may not offer or act to practice the profession of architecture or engineering in Alaska without registering under AS 08.48, unless AS 08.48 does not apply to that person. Moreover, under AS 39.90.100(3) the Department may not award a contract to a corporation that is not authorized under AS 08.48.241, and corporate authorization requires appropriate licensure.²² The fundamental issue raised by EPS is whether Mr. Aholt or Mr. Prentice must be registered under AS 08.48 in order to offer or provide their professional services, and whether Beacon must obtain a certificate of authorization prior to contract award.

1. *AS 08.48.281*

Alaska Statute 08.48.281(a) states:

A person may not practice or offer to practice the profession of architecture [or] engineering...in the state...unless the person has been registered under [AS 08.48] or is a person to whom these provisions [AS 08.48] do not apply, or, in the case of a corporation,...unless it has been authorized under [AS 08.48.241].

In this case, it is undisputed that neither Mr. Aholt nor Mr. Prentice is registered under AS 08.48. Thus, unless AS 08.48 does not apply to Mr. Aholt and Mr. Prentice, they are prohibited by law from offering or providing professional architecture or engineering services in Alaska.

²² See AS 08.48.241(a)(2), (3).

The Department has articulated two reasons why AS 08.48 does not apply to Mr. Aholt and Mr. Prentice. First, as to Mr. Aholt, it argues that AS 08.48 does not apply because the Board of Architects, Engineers and Land Surveyors does not provide registration for naval architects and marine engineers.²³ Second, as to Mr. Prentice, the Department argues that he is exempt from the requirement for registration pursuant to AS 08.48.331(a)(5).²⁴

AS 08.48.331(a)(1)-(14) lists fourteen specific categories of persons to whom AS 08.48 “does not apply.” None of those categories provides an express statutory exemption from application of AS 08.48 for persons practicing in the field of naval architecture and marine engineering. Nonetheless, the Department contends, based on the previously-mentioned email from the Board’s executive administrator,²⁵ that AS 08.48 “does not apply,” within the meaning of AS 08.48.281(a), to persons who are licensed in another jurisdiction as naval architects and marine engineers and who provide professional architectural or engineering services relating to a marine vessel in Alaska, and that it also “does not apply,” within the meaning of AS 08.48.331(a)(5), to persons to whom such a licensee provides direct professional supervision while providing those services.²⁶

Whether and how the registration requirements as they are set forth in AS 08.48 generally, and in AS 08.48.331(a)(5) in particular, apply in light of a specific factual situation is a question within the primary jurisdiction of the Board of Architects, Engineers and Land Surveyors, and enforcement of the practice limitations stated in the AS 08.48.281(a) is primarily the responsibility of the Department of Commerce, Community and Economic Development. The executive administrator’s email was in response to an inquiry from the Department that correctly stated the circumstances of this RFP, and the executive administrator’s statement regarding compliance with AS 08.48 is not susceptible of misinterpretation. Under these circumstances, the procurement officer could reasonably rely on the executive administrator’s email in making a determination of responsiveness under AS 36.30.

²³ See Contracting Officer’s Decision at 2; Protest Report at 2.

²⁴ See Contracting Officer’s Decision at 2, note 2; Protest Report at 2.

²⁵ See Protest Report at 2, Ex. A (email, R. Jones to R. Welsh, 3/29/2011 @ 11:21 a.m.).

²⁶ AS 08.48.331 provides: “(a) this chapter does not apply to... (5) associates, consultants, or specialists retained by a registered individual [or other entity] authorized to practice... engineering... under this chapter, ... if responsible charge of the work remains with the individual [or other entity].” (emphasis added) The position articulated by the executive administrator effectively reads the term “registered individual” within the meaning of AS 08.48.331(a)(5) to include an individual who is licensed as a naval architect and marine engineer in another jurisdiction while practicing in that field on a marine vessel in Alaska.

On appeal, EPS (before it obtained counsel) conceded that the executive administrator's position was consistent with Alaska law and that Mr. Aholt is qualified to supervise the electrical engineering services that will be provided by Mr. Prentice. Under these circumstances, EPS has not shown that the procurement officer abused his discretion in deeming Beacon's proposal responsive.

2. *AS 39.90.100(3)*

In addition to arguing that under Alaska law either Mr. Aholt or Mr. Prentice was required to be registered in Alaska, EPS argues that unless Beacon holds a certificate of authorization under AS 08.48.241, AS 39.90.100(a)(3) bars the Department from awarding a contract to Beacon. AS 39.90.100(a)(3) provides:

The state...may not award a contract for architectural [or] engineering...services to...a corporation...that is not authorized under AS 08.48.241 to offer the architectural [or] engineering...services required by the contract.

This statute implements AS 08.48.241; it does not create an independent bar to contracting. Thus, if the requirement to hold a certificate of authorization stated in AS 08.48.241 does not apply to Beacon, AS 39.90.100(3) is not a bar to the execution of a contract.

The Department has not directly addressed this issue, and the executive administrator addressed only the status of an individual who is licensed in another jurisdiction to engage in the practice of naval architecture and marine engineering in Alaska; the administrator did not state that an out-of-state corporation may practice naval architecture and marine engineering in Alaska without obtaining a certificate of authorization.

Pursuant to AS 08.48.241(a) and (b), a corporation may obtain a certificate of authorization if it files with the Board:

- (1) an application for a certificate of authorization...;
- (2) a certified copy of a resolution...designating persons holding certificates of registration under this chapter as responsible for the practice or architecture [or] engineering...by the corporation...; [and]
- (3) a designation...setting out the name of one or more persons holding certificates of registration under this chapter who are in responsible charge of each major branch of the architectural [or] engineering...activities in which the corporation...specializes in this state... .

It would be consistent with the Board's treatment of individual practitioners for the Board to exempt a corporation from the certification requirement of AS 08.48.241 when the corporation's practice is restricted to naval architecture and marine engineering, and thus EPS

has not shown that it would be an abuse of discretion, on the current record, to award a contract to Beacon. It is possible that the Board would view the requirement for corporate authorization in a different manner. However, even if the Board is of the view that under the circumstances of this case a certificate of authorization is required, EPS has not shown that Beacon could not have obtained one in a timely manner prior to contract award. Because the Board has not spoken to this issue, and (as of the date this matter was submitted for decision on the record) no contract had been awarded, EPS has not shown that the notice of intent must be rescinded. In order to ensure compliance with AS 39.30.100(3), the procurement officer should solicit the view of the Board on the certificate of authorization issue prior to contract award.

D. No Scoring Impropriety Was Identified

EPS's protest identified two alleged errors in the scoring: first, there are no notes to explain the evaluator's scores; second, the score provided to EPS for geographic location was allegedly miscalculated.

I. *Notes Are Not Necessary*

The members of the proposal evaluation committee provided scores for the EPS proposal that differed by two or more points (and were not sequential) for five evaluation factors.²⁷ The instructions provided to the procurement officer state that in this situation, the procurement officer should direct the committee discussion of proposals to those elements of the evaluation.²⁸ The instructions also call for the procurement officer to make notes recording the "key elements of committee discussions and explaining why Evaluators differed in their ratings."²⁹

The procurement officer's compilation of the committee's scores indicates that he identified the five instances of disparate scoring for purposes of discussion, but does not include any notes explaining those differences.³⁰ Scoring disparities could be the result of an evaluator's misunderstanding or oversight regarding a proposal's contents, error on the part of an evaluator, or simply a subjective disagreement among the evaluators regarding the merits of a particular proposal, and a written explanation of scoring disparities helps ensure that the evaluation is fair

²⁷ The committee scoresheets (prepared by the procurement officer) and the individual evaluators' scoresheets are attached to the Protest Report. Mr. Phillips' scores for three of the eight evaluation factors were at least two points lower than either of the other two evaluators' scores. For two other factors, the evaluators' scores differed by at least two points and were not sequential.

²⁸ Evaluation Instructions For Chairperson, ¶12, ¶17, available at www.dot.state.ak.us/procurement/const-warrant (accessed June 22, 2011).

²⁹ Evaluation Instructions For Chairperson, ¶18.

³⁰ Committee Score Sheet (EPS) (specifically noting evaluation factors 1, 3, 5, 7 and 8).

and reasonable. But the procurement officer was not required by law to provide an explanation for any scoring disparities. 2 AAC 12.260(b) states:

The evaluation must be based only on the evaluation factors set out in the request for proposals. The relative importance or weighting value of each evaluation factor shall be set out in the request for proposals. Numerical rating systems may be used, but are not required. If a numerical rating system is not used, the procurement officer, or each member of the evaluation committee, as applicable, shall explain his or her ranking determination in writing.

This regulation expressly requires a written explanation only when a numerical rating system is not used: by negative implication, the regulation indicates that there is no legal requirement to provide a written explanation when a numerical rating system is used (as in this case). The regulation is the applicable law; the instructions provided to the procurement officer were neither the law nor part of the RFP and as such something that offerors are entitled to rely on. In addition, EPS elected to submit this matter on the written record rather than to proceed to a hearing at which the basis for the scores might have been explored. Because there was no legal requirement to provide a written explanation, and EPS did not request an evidentiary hearing, the failure to provide explanatory notes is not unfair to EPS.

2. *Geographic Location*

One evaluation factor was geographic location. The proposals were to be awarded points in each of three subcategories for that evaluation factor: zero or one point in one subcategory; zero, one or two points in the other two subcategories. The total number of points available for this evaluation factor was thus five points, and this factor was worth 5% of the overall evaluation.

EPS was awarded three points for this factor. For purposes of comparison, the points awarded for each evaluation factor scored by the evaluators was summed, and then multiplied by the weight afforded to that factor. For the geographic location factor, however, because points were awarded by the procurement officer rather than by each of the evaluators, the points awarded could not be summed prior to being multiplied. Thus, EPS was awarded $3 \times 5 = 15$ points for geographic location in the overall evaluation. This resulted in a relative diminution of the value of the points awarded for the geographic location factor as compared with those factors scored by the evaluators, and made the geographic location factor worth less than 5% of the overall evaluation.

The RFP did not state whether the points awarded for geographic location would be multiplied by the number of evaluators. However, it expressly provided that for each other factor for which points would be awarded by the procurement officer rather than by the evaluators, the number of points would be multiplied by the number of evaluators and then again multiplied by the weight for the factor. Read as a whole, the clear import of the scoring methodology is that points awarded by the procurement officer should be multiplied by the number of evaluators as well as by the weight of the factor, in order to be consistent and to avoid unwarranted diminution of factors scored only by the procurement officer. Accordingly, the correct score on the geographic location factor for EPS was 45, not 15: 3 (number of points) \times 3 (number of evaluators) \times 5 (weight of factor) = 45 (total number of points for purposes of comparison).

The remedy for an improper scoring methodology is to rescore the proposals using the correct methodology. In this case, providing EPS with the proper number of points, 45, for geographic location does not alter the ranking of the proposals. Accordingly, the notice of intent need not be rescinded.

IV. Conclusion

The solicitation did not impose any specific requirement for registration, and the procurement officer did not abuse his discretion in accepting, for purposes of a responsiveness determination, the executive administrator's representation regarding compliance with AS 08.48. In light of the executive administrator's position, and because EPS has not shown that Beacon could not timely obtain a certificate of authorization, EPS has not shown that the notice of intent must be rescinded for lack of a certificate.

The procurement officer's failure to provide explanatory notes for observed scoring disparities was not contrary to law and did not unfairly prejudice EPS. The procurement officer's use of an improper scoring methodology for geographic location did not affect the outcome of the solicitation.

For the foregoing reasons, EPS's protest is denied. This matter is remanded to the procurement officer to solicit the view of the Board of Architects, Engineers and Land Surveyors regarding whether Beacon must obtain a certificate of authorization under AS 08.48.241.

DATED June 23, 2011.

By: Signed _____
Andrew M. Hemenway
Administrative Law Judge

Adoption

The parties filed proposals for action. The Department proposed that the proposed decision be adopted without changes. EPS proposed that on remand to the procurement officer, the procurement officer be directed to issue written findings. The Department responded to EPS's proposal by filing a supplemental post-hearing exhibit consisting of a copy of email correspondence with the executive administrator of the Board of Architects, Engineers, and Landscape Architects.

The record is hereby supplemented to include the Department's supplemental post hearing exhibit. Remand to the procurement office is therefore unnecessary.

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 AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 22nd day of July, 2011.

By: Signed
Signature
Marc A. Luiken
Name
Commissioner
Title

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