

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE COMMISSIONER OF ADMINISTRATION**

In the Matter of:)
)
JOSEPH AUSTIN,)
)
v.)
)
OFFICE OF PUBLIC ADVOCACY.)
)
_____)

OAH No. 11-0235-PRO
Agency No. RFP 2011-0200-0270

DECISION¹

I. INTRODUCTION

The Office of Public Advocacy (OPA) issued a Request for Proposals (RFP) seeking the services of criminal defense investigator.² Mr. Austin filed a protest prior to the opening of proposals. He raised four issues: 1) that the RFP had several unduly restrictive requirements; 2) that the person retained by this contract would in fact be legally classified as an employee and not an independent contractor; 3) that it was against OPA's interests to retain a single investigator on a flat rate contract instead of having a list of several investigators available at an hourly rate that OPA could select from depending on the needs of each individual investigative assignment;³ and 4) that the RFP was designed with the intent that only Link Fannon, OPA's incumbent contractor, could be awarded the contract.

Mr. Austin's protest was denied as untimely on May 27, 2011. In addition to ruling on the timeliness issue, the procurement officer addressed the merits of each of the issues raised in the protest. Mr. Austin appealed the denial on June 6, 2011.

A hearing was held on November 21 and 22, 2011. A proposed decision was issued on December 21, 2011. The parties submitted proposals for action pursuant to AS 44.64.060(e).⁴

¹ This final decision has been reissued to correct a manifest error on page 11, where Mr. Austin's name was mistakenly used instead of Mr. Fannon's name. One grammatical error was also corrected in that same paragraph.

² OPA provides legal advocacy in a variety of areas, including criminal defense services when the Public Defender Agency has a conflict.

³ The discussion of this third issue was deleted from the decision in response to Mr. Austin's proposal for action.

⁴ Mr. Austin submitted multiple pleadings after the hearing, not all of which were titled as proposals for action. Any post hearing pleading that requested a modification or reconsideration of the proposed decision was treated as a proposal for action. That multiple proposals for action were allowed in this case should not be viewed as precedent.

On January 26, 2012, the Commissioner modified her referral of this matter, and delegated the final decisionmaking authority to the Office of Administrative Hearings.

On January 30, 2012, the undersigned ALJ, acting as the Commissioner's delegee and pursuant to AS 44.64.060(e)(2), declined to adopt the proposed decision and returned jurisdiction to OAH to consider supplemental documents and to consider the arguments raised in the parties' proposals for action.

This final decision finds that the RFP contained two unduly restrictive requirements. The protest is sustained based on the unduly restrictive specifications. As a remedy, OPA may not renew this contract, and it will expire on June 30, 2012.

II. FACTS

An RFP for statewide investigative services was issued by OPA on April 22, 2011.⁵ The contract was scheduled to begin on July 1, 2011, for a one year period with five one-year optional renewals. Proposals in response to the RFP were due by May 16, 2011.⁶ Amendment Number One was issued on April 27 to provide clarification and answer questions from potential offerors.⁷ Amendment Number Two was issued on May 9, 2011.⁸ This amendment answered additional questions and also changed the work requirement from a weekly to a monthly requirement, changing from 37.5 – 50 hours per week to 150 – 200 hours per month.⁹ Amendment Number Three was issued on May 27, 2011, and added a requirement that offerors have a Municipality of Anchorage private investigator's license that would be in effect by July 1, 2011.¹⁰ Mr. Fannon was the only person who submitted a proposal.¹¹

Mr. Fannon was the incumbent contractor under a similar OPA contract for July of 2006 through June of 2011, referred to in this decision as the 2006 contract.¹² For that contract, Mr. Fannon submitted an offer to work for \$4,500 per month for a 37.5 hour work week, or \$6,100 per month for a 45 hour work week.¹³ OPA and Mr. Fannon executed a contract for \$6,100 per month for a 37.5 hour work week.¹⁴ Prior to the commencement of the contract, the payment

⁵ OPA 0053 – 0093.

⁶ OPA 0057.

⁷ OPA 0050.

⁸ OPA 0046.

⁹ This reduced the amount of work required under the contract since there are usually more than four weeks in a month.

¹⁰ OPA 0045.

¹¹ OPA 0037; OPA 0043; Exhibit 64.

¹² RFP 2007-0200-6684.

¹³ Exhibit 27.

¹⁴ Exhibit 28.

was increased to \$7,300 per month for a 45 hour work week.¹⁵ According to Procurement Officer Staci Augustus, the increase from \$4,500 to \$6,100 as payment for the 37.5 hour week was due to a clerical error.¹⁶ She testified that the subsequent increase to \$7,300 was done in violation of the procurement code.¹⁷

Mr. Fannon was awarded the contract for the 2011 RFP.¹⁸

III. DISCUSSION

A. Timeliness of Protest

OPA filed a Motion for Summary Adjudication prior to the hearing. In that motion, OPA asserted that Mr. Austin's appeal should be dismissed because his protest was late.¹⁹ Mr. Austin's protest concerns "alleged improprieties or ambiguities in a solicitation."²⁰ As such, it was due 10 days before the date proposals were due.²¹ Mr. Austin's protest was received after that deadline. A procurement officer does, however, have discretion to consider a late protest for good cause.²² Good cause includes both sufficient reason for the delay and other circumstances that warrant consideration of the protest's merits.²³ It is not necessary to establish both. Important factors to consider when deciding whether there is good cause to accept a late protest are the timing of the protest, the nature of the objections raised, and the strength of the evidence presented.²⁴ The procurement officer determined that good cause did not exist to accept Mr. Austin's late protest.²⁵

Deference is given to the discretionary decisions of procurement officers, but the State Procurement Code gives substantial oversight of those decisions to the commissioner.²⁶ The commissioner is not limited to simply correcting an abuse of discretion.²⁷ In this case, it is appropriate for the commissioner to reach a different conclusion about whether there is good cause to accept the late protest because of the nature of the objections raised.

¹⁵ Exhibit 29.

¹⁶ Testimony of Staci Augustus.

¹⁷ *Id.*

¹⁸ OPA 0037.

¹⁹ His protest was sent by facsimile on Sunday, May 15, 2011. Exhibit 5.

²⁰ AS 36.30.565(a).

²¹ *Id.* The RFP may specify a later date, but this RFP did not do so.

²² AS 36.30.565(b).

²³ *In re Scientific Fisheries Systems, Inc.*, Department of Administration Case No. 98-08 (2002).

²⁴ *Payroll City v. Dept. of Environmental Conservation*, OAH No. 05-0583-PRO (Commissioner of Administration 2006), page 5.

²⁵ The procurement officer's May 27th denial of the protest is in the OAH file attached to the case referral notice.

²⁶ AS 36.30.005(a).

²⁷ *In re Waste Management of Alaska, Inc.* Dept of Administration Case No. 01.08 (2002), page 12.

Mr. Austin's protest alleged that the RFP was specifically designed to avoid competition and direct the contract to one favored individual. This would directly implicate the integrity of the procurement process. Although his initial protest was not very detailed, Mr. Austin provided more explanation on June 6, 2011 when he appealed the denial of his protest. In addition, on July 21, he filed a lengthy response to the Procurement Officer's Protest Report that included 55 exhibits and an affidavit.

Mr. Austin asserted that the incumbent contractor (a potential offeror under the solicitation) had received favorable treatment in the form of excessive payments under the existing contract. This is something OPA itself could determine was accurate by reviewing its own records. There was also an assertion that the incumbent contractor had been offered employment with OPA, but had refused that offer because he wanted to be an independent contractor, and only then was the prior RFP issued.

Mr. Austin asserted that after the incumbent contractor had performed under the prior contract for nearly five years, a new RFP was issued with modified minimum requirements that closely matched the incumbent's experience and training, but that other experienced investigators, including OPA's own staff investigators, could not meet. The assertions made by Mr. Austin, if true, would suggest that the 2011 RFP was designed in order to ensure that only the incumbent contractor would meet the minimum requirements.

By the time OPA's motion for summary adjudication was ripe for decision, Mr. Austin had provided a detailed explanation of the basis for his protest and the facts in support of his position. Moreover, only one offer had been received, that from the incumbent contractor, a fact that on its face lends support to the allegation that the solicitation was structured in a manner that favored that individual. The additional issues raised on appeal, including whether this was an employment agreement rather than a contract for personal services as an independent contractor, and whether the specifications are unduly restrictive are subsidiary to the fundamental issue raised in the original protest: Did the agency, in bad faith, construct the solicitation with the intent of favoring the incumbent contractor in the award and terms of the new contract? Prior to the hearing, the motion for summary adjudication was preliminarily denied by the ALJ based on a finding of good cause to accept and consider Mr. Austin's late protest. For the foregoing reasons, the motion for summary adjudication is denied and all of the issues raised on appeal will be considered.

B. Unduly Restrictive Requirements

1. RFPs May Not Contain Unduly Restrictive Requirements

Mr. Austin challenges the requirements related to three components of the RFP: (1) prior investigative experience; (2) training in crime scene reconstruction; and (3) licensing. The State Procurement Code prohibits unduly restrictive requirements.²⁸ A requirement is unduly restrictive if it is “not reasonably necessary to satisfy the agency’s actual needs.”²⁹ The minimum requirements in an RFP should reflect the agency’s actual needs and not all possible needs.³⁰ The procuring agency has the burden of establishing a *prima facie* case that the requirements are reasonably necessary. The burden then shifts to the protestor to show that the agency is clearly mistaken.³¹

2. Prior Experience Investigating in Rural Alaska

Mr. Austin challenged two requirements relating to prior investigative experience as unduly restrictive. The first stated that investigators:

[M]ust have experience with the unique challenges of conducting investigations in Alaskan bush communities and villages.^[32]

The second required:

[E]xperience in tracking witnesses in the bush in the course of investigating homicides.^[33]

Beth Trimmer, OPA’s Deputy Director, testified about the need for these two requirements. She has been an attorney for eighteen years, and employed by OPA for 5 years. She testified that rural witnesses can be difficult to locate and that sometimes the residents of a village work to make it harder to find a witness. She noted that in some villages not everyone has a telephone. It was her view that locating witnesses in rural parts of Alaska can be different from locating witnesses in urban areas. She testified that an investigator uses different methods to find witnesses in rural areas of the state.

Ms. Trimmer was asked whether it was the intent of these requirements to exclude a person who has conducted multiple homicide investigations in Anchorage, and multiple felony investigations in rural Alaska, but no homicide investigations in rural Alaska. She agreed that

²⁸ AS 36.30.060(c).

²⁹ *In re Scientific Fisheries Systems, Inc.*

³⁰ *In re Richard C. Sanders*, OAH No. 05-0240-PRO (Commissioner of Administration 2005), page 14.

³¹ *Id.*

³² RFP §2.08(c), Record at OPA 0065.

³³ RFP § 2.08(d), Record at OPA 0065. “Tracking” of witnesses refers to locating them; it does not refer to following a trail through a forest or the tundra.

under the wording of the RFP such an individual would not qualify, but that was not the intent of this RFP.

Andy Klamser testified on behalf of Mr. Austin. Mr. Klamser has been a private investigator since 1997, and was a police officer for 20 years before that. He testified that it is easier to find witnesses in rural Alaska because there is usually someone in the village who will help the investigator make contact with the witnesses. He did note, however, that sometimes it can be harder to make phone contact although, again, a relative or friend can be used to assist in that process. Mr. Klamser testified that contacting witnesses was similar, regardless of the specific felony charge being investigated.

Richard Norgard has been a private investigator, an investigator for OPA, and an investigator for the Public Defender's Office. Frank Wake has been a private investigator since 1976, and has been an investigator in Alaska since 1987. Both witnesses, testifying on behalf of Mr. Austin, stated it can be easier to find witnesses in rural Alaska than in the more urban areas, and that the ease of contacting witnesses in rural Alaska was the same regardless of whether the crime being investigated was a homicide or other type of felony.

Mr. Austin, the protestor in this case, is a former Anchorage Police Department investigator, and has been a private investigator since 1994. He has investigated cases in rural Alaska and testified that it is no more difficult to find homicide witnesses than witnesses from other types of crimes, and that it can be easier to find witnesses of all types in rural Alaska.

Based on the evidence presented, OPA has established a *prima facie* case that conducting investigations in some areas of Alaska is different than conducting investigations in urban centers. This would include many villages that are not connected to the road system. OPA had a need for an investigator to conduct investigations in remote villages, and it could reasonably decide that prior experience in this type of investigation was a minimum requirement. Mr. Austin has not shown that OPA was clearly mistaken to require that respondents have prior experience in conducting investigations in rural Alaska.

However, OPA has not established a *prima facie* case that it was reasonably necessary to require prior experience finding witnesses in rural Alaska *in the course of homicide investigations*.³⁴ Ms. Trimmer testified that it was not OPA's intent to exclude someone with prior homicide investigation experience simply because that experience was in an urban area. She conceded, however, that this requirement would exclude an offeror with experience

³⁴ In Amendment Number Two, the procurement officer reiterated that prior homicide experience was required. OPA 0047, Answer 10.

conducting investigations in rural Alaska if the offeror had only conducted urban homicide investigations. Other witnesses all testified that ease of locating witnesses was the same regardless of the type of felony investigation. The requirement for specific experience in homicide investigations in rural Alaska was not reasonably necessary to meet OPA's actual needs. It was unduly restrictive.

3. *Training in Crime Scene Reconstruction*

The next minimum requirement challenged by Mr. Austin is the requirement to have "received training in crime scene reconstructions and evaluation."³⁵ Ms. Trimmer testified that crime scene reconstruction (CSR) experts can cost tens of thousands of dollars. OPA was looking for an investigator with some prior training in this area to assist its attorneys in evaluating whether an expert was necessary. She testified that while some attorneys were able to make that decision on their own, others had a tendency to simply want to hire an expert without analyzing whether an expert was appropriate.

Mr. Austin's witnesses tended to minimize the utility of this type of training, noting that there are other types of investigative training used more often than CSR training. The contracting agency is generally in the best position to decide what its minimum needs are, however, and OPA could reasonably determine that having someone with this type of training was essential as a means to avoid the high cost of unnecessarily retaining CSR experts. OPA established a *prima facie* case that this requirement was reasonably necessary. Mr. Austin has not met his burden of proving OPA was clearly mistaken.

A more difficult question concerns how an offeror would prove that he or she had the CSR training. Attachment B to the RFP describes the evidence that would show a person had this training.³⁶ This document states that acceptable evidence consists of "Copy of training certificate, letter from instructor, copy of transcripts." Mr. Austin testified that even though he had received CSR training, and taught CSR to others, he would not be able to demonstrate this with any of the acceptable forms of evidence listed in Attachment B. Mr. Klamser also testified that he had CSR training, but no acceptable evidence to demonstrate that.

Ms. Trimmer testified that this list was meant to show the types of evidence that would be acceptable, but other evidence of CSR training could be submitted as well. However, the procurement officer, Staci Augustus, testified that submitting one of the items on this list was the only way to prove an offeror had the required training. She later clarified this statement by

³⁵ OPA 0065.

³⁶ OPA 0090.

saying that these were examples of what could be submitted as proof, and if someone had listed this training on a resume she would have called an assistant attorney general for advice as to whether that was acceptable. She testified that some form of evidence was needed to prove that the offeror had received this training.

A potential offeror looking at Attachment B would likely conclude that the list contained the only acceptable evidence of CSR training. For the experience requirements, an offeror is specifically allowed to submit “short description[s] of the [offeror’s] experience and or observations of conducting such investigations.”³⁷ The opportunity to provide a description of one’s training is not specified as acceptable proof of the CSR training requirement.³⁸

While requiring CSR training may be appropriate, it is important to allow potential offerors a meaningful opportunity to demonstrate they meet that requirement. Only one person responded to the RFP. That in itself suggests that the RFP might be unduly restrictive.³⁹ OPA did not show that the specific types of evidence listed on the RFP were the only acceptable evidence of the desired training, much less why that was so. In fact, Ms. Trimmer testified that other types of evidence than those listed would be acceptable, and the testimony of Mr. Austin and Mr. Klamser is to the effect that acceptable CSR training can be provided in ways that are not accompanied by the specific types of evidence listed in the RFP. Based on the evidence in this case, Mr. Austin has shown that the requirement to have the specified evidence as the only acceptable methods of showing that an offeror has the desired CSR training was clearly mistaken.⁴⁰

4. *Fairbanks Private Investigator’s License*

The final requirement challenged by Mr. Austin is the requirement that an offeror be “currently licensed as a private investigator through the City of Fairbanks.”⁴¹ Responses to the RFP were due 24 days after issuance of the RFP. The Fairbanks’s city code states that applications for a private investigator’s license are submitted to the city clerk, who has up to 20

³⁷ *Id.*

³⁸ The wording in Attachment B suggests that on the job training – thereby excluding some potential offerors – but the testimony of Ms. Trimmer and Ms. Augustus suggest that on the job training would meet OPA’s requirements.

³⁹ Having only one response is not proof of a problem with an RFP, but it is a warning signal that the terms of the RFP may have unnecessarily restricted competition.

⁴⁰ The parties may also have different definitions of Crime Scene Reconstruction. At times, OPA’s testimony seemed to suggest that CSR included a broad range of efforts to analyze evidence from or at a crime scene. Mr. Austin’s witnesses seemed to be using a more limited definition of CSR. If a new RFP is issued, and if CSR training remains a requirement, OPA may wish to define this term.

⁴¹ OPA 0065.

days to act on that application.⁴² Thus, only people who already had this license would have a meaningful opportunity to compete for this contract.⁴³

In his initial protest, Mr. Austin only asserted that this requirement was unnecessary, as the person awarded the contract would not likely be conducting investigations in Fairbanks and, if Fairbanks' investigations were indeed contemplated, the license was easily obtained. Only in his appeal of the protest denial did he assert that it would take an excessive amount of time to obtain the license.

Ms. Augustus testified that listing this as a requirement rather than stating that one must have proof of an application was probably an oversight on her part. She stated that if this had been pointed out to her, the RFP could have been amended.

The RFP allows time for review and encourages people to bring potential problems to the attention of the procurement officer.⁴⁴ This is the type of potential problem that offerors are more likely to be aware of than the contracting agency or the procurement officer. When Mr. Austin learned that it could take three weeks to obtain this license, he should have brought that to the attention of the procurement officer.⁴⁵ Had he done that, more time could have been allowed for responding, or the RFP could have been modified to substitute proof of a license application instead of a license.

As discussed below, the current contract will not be renewed and OPA will have an opportunity to issue a new RFP. At that time, OPA and the procurement officer can determine how best to ensure that anyone awarded this contract will have the necessary investigator's license.

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C. Status as Independent Contractor

Mr. Austin argues that the nature of the services rendered under this contract, and the authority retained by OPA to direct the manner in which those services are provided, establishes an employee/employer relationship. He further argues that it is improper to hire employees through the procurement process.

⁴² Exhibit 19, Fairbanks Municipal Code §14-127.

⁴³ Based on Ms. Trimmer's testimony, OPA did need to award this contract to someone who would have this license as of the date the contract period began.

⁴⁴ OPA 0059.

⁴⁵ None of the questions Mr. Austin asked prior to filing his protest stated he had concerns about the RFP or its minimum requirements. While those concerns can be inferred from some of the questions, especially in hindsight, the questions asked did not put OPA on notice that any potential offeror thought there were unduly restrictive requirements.

The procurement code applies to all state expenditures through contracts except for those specifically excluded.⁴⁶ A contract is defined as an agreement for “the procurement or disposal of supplies, equipment for the state fleet, *services, professional services*, or construction.”⁴⁷

“Services” is defined as

[T]he furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance; it does not include employment agreements or collective bargaining agreements.^[48]

Professional services means

[P]rofessional, technical, or consultant’s services that are predominantly intellectual in character, result in the production of a report or a completion of a task, and include analysis, evaluation, prediction, planning, or recommendation.^[49]

The procurement code does not apply to contracting for services when those services are in fact provided through employment contracts.⁵⁰ The procurement code does apply, however, to contracting for professional services. Although there was not a lot of evidence on this subject, based on the evidence that is in the record, private investigators working for OPA provide recommendations about whether to hire a CSR expert. They locate and interview witnesses, and report back about the results of those interviews. This work does fit the definition of professional services, which can be acquired through a solicitation under the Procurement Code.

Mr. Austin argues that the extent of OPA’s control over Mr. Fannon exceeds the level of control proper for an independent contract and that, because of that control, Mr. Fannon is actually a state employee and not a contractor. Accordingly, Mr. Austin asserts, an RFP never should have been issued to obtain those services.

As found above, the solicitation process was not conducted in conformity with the Procurement Code because there were unduly restrictive requirements. It is not necessary in this case to determine whether the additional non-conformity of using the procurement process to hire a state employee also exists. No finding is made as to whether Mr. Fannon is in fact a state employee based on the extent of OPA’s control.

D. Evidence of Favoritism

⁴⁶ AS 36.30.850(b).

⁴⁷ AS 36.30.990(7)(emphasis added).

⁴⁸ AS 36.30.990(21).

⁴⁹ AS 36.30.990(19).

⁵⁰ Employment relationships are, by definition, contractual in nature. *Selid Const. Co. v. Guarantee Ins. Co.*, 355 P.2d 389, 393 (Alaska 1960).

Mr. Austin argued that the RFP was designed so that only Mr. Fannon would qualify for it. In support, Mr. Austin offered evidence that Mr. Fannon's 2006 contract with OPA was the result of favoritism. The most significant evidence concerned the amount paid to Mr. Fannon under the prior contract. He was initially awarded a contract that paid him \$1,600 more per month than the amount he bid. Shortly thereafter, this amount was increased by an additional \$1,200 per month through a novation. The novation was done in acknowledgement of a longer work week, but it was still \$1,200 more per month than Mr. Fannon bid for working the longer work week, and, according to the procurement officer, the novation was issued in violation of the Procurement Code.

There were also additional documents received by Mr. Austin, from OPA, after the close of the hearing in this matter. Those additional documents are now in the OAH record, and will be considered. These documents raise questions about how the 2006 contract was administered. One could infer from these additional documents, and the absence of some documents, that Mr. Fannon was not required to submit monthly invoices, detailed time records for invoices he did submit, or statements in support of travel reimbursement payments. There were also invoices in which Mr. Fannon billed 20 hours per day for several days in a row.⁵¹

The improper novation in Mr. Fannon's favor and the manner in which his contract was administered by OPA show that he was treated more favorably than the typical independent contractor working for the State of Alaska. This supports Mr. Austin's argument that this favoritism factored into the manner in which the 2011 RFP was written so that Mr. Austin would have a greater chance of being awarded the contract.

It is not necessary to determine whether the RFP was in fact designed so that Mr. Fannon would be awarded the contract. As discussed above, there were unduly restrictive requirements in the RFP. Under the facts of this case, the reason for including those requirements – whether an honest error or an intent to have the contract awarded to Mr. Fannon – does not change the determination of the appropriate remedy.

E. Remedy

As noted above, the minimum requirement of prior experience conducting homicide investigations in rural Alaska was unduly restrictive. In addition, the method of proving prior training in crime scene reconstruction was unduly restrictive. These unduly restrictive

⁵¹ It is possible, but unlikely for a contractor to have 20 billable hours within a 24 hour period. In such a situation, one would expect to see some evidence that that a more detailed description of what was done during those 20 hours was requested.

requirements may well have been the reason only one proposal was received in response of the RFP.

The available remedies in a protest appeal include an award of proposal preparation costs, termination of an existing contract, declining to exercise options under an existing contract (non-renewal), cancellation of the solicitation with or without resolicitation, re-evaluation, and corrective administrative action (e.g., referral to the Attorney General for investigation under the Ethics Act, referral to departmental personnel for disciplinary proceedings, or referral to the Chief Procurement Officer for consideration of changes to applicable law or policies). The commissioner has a “substantial amount of discretion” in determining the appropriate remedy.^[52]

When a protest is sustained, the following factors must be considered: 1) the seriousness of the procurement deficiencies; 2) the degree of prejudice to other interested parties or to the integrity of the procurement system; 3) the good faith of the parties; 4) the extent the procurement has been accomplished; 5) costs or other impacts to the agency of a proposed remedy; and 6) any urgency of the procurement for the welfare of the state.⁵³

In this case, the procurement deficiencies were serious because they limited the available competition for this contract. There was also some degree of prejudice to other parties because some investigators who might have submitted a proposal were discouraged from doing so by the unduly restrictive requirements. Both of these factors weigh in favor of termination or non-renewal of the contract.

There is evidence that OPA has provided favorable treatment to Mr. Fannon that would not typically be provided to other state contractors. This factor weighs in favor of non-renewal or termination. The procurement has already been accomplished, so urgency of the procurement is not relevant.

The fourth and fifth factors weigh against terminating the contract. The contract is for one year, with four options to renew, and the first eight months of the contract’s one year term have already expired. Termination would have a negative impact on one interested party, Mr. Fannon, who was not responsible for any deficiencies in the RFP. Terminating the contract would also have a negative impact on the agency, as it would be without the services of an investigator until it could retain someone under a new contract.⁵⁴

⁵² *Nana Management Services, LLC v. Dept of Transportation and Public Facilities*, OAH No. 09-0068-PRO (Commissioner of Transportation and Public Facilities 2010), page 16 (internal footnotes omitted).

⁵³ AS 36.30.585(b); *Nana Management Services*, OAH No. 09-0068-PRO, page 17.

⁵⁴ Mr. Austin has suggested allowing the contract to continue for an additional 45 days before termination, allowing time for a new solicitation so that OPA is not without the services of an investigator. It is not evident from the record that OPA could correct the deficiencies in the prior RFP, issue a new RFP, and select a new contractor
OAH No. 11-0235-PRO

Under the circumstances of this case, the best remedy to impose is non-renewal. This will give OPA time to develop and issue a new RFP for investigative services. Mr. Fannon will receive the full benefit of the contract and will be able to submit a proposal in response to the new RFP. Other potential offerors will also have an opportunity to submit proposals. These proposals may offer superior service, lower cost, or both. This will give OPA an opportunity to obtain the best value for its money.

Finally, a novation to the 2006 contract occurred in violation of the procurement code. In addition, the documents provided by OPA through discovery show that the administration of the 2006 contract was, at best, lax. The chief procurement officer shall review that contract and its administration to determine whether there is a need for any administrative corrective action or referral to the Department of Law for investigation.

IV. CONCLUSION

The RFP issued by OPA contained unduly restrictive requirements that limited competition. Based on the factors considered above, non-renewal of this contract is the appropriate remedy. OPA is directed not to renew this contract at the expiration of its initial one year contract term. If it solicits a new RFP or Invitation to Bid, OPA should take into consideration the findings in this decision.

DATED this 12th day of March, 2012.

By: Signed
Jeffrey A. Friedman
Administrative Law Judge

from among those who submit proposals in that short a time frame. Given that there are only four months left in the contract, Mr. Austin's suggestion is not adopted.

Adoption

This Order is issued under the authority of AS 36.30.675, delegated pursuant to AS 44.64.030(c) to the Office of Administrative Hearings for final decision.

Pursuant to AS 44.64.060(e)(2), the undersigned considered all proposals for action submitted by the parties as well as the additional evidence submitted after the conclusion of the hearing. The original proposed decision was modified based on the arguments made in the proposals for action and the additional evidence.

The undersigned, on behalf of the Commissioner of the Department of Administration and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this 12th day of March, 2012.

Signed

Jeffrey A. Friedman
Administrative Law Judge

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