

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

In the Matter of:)	
)	
DAVIS WRIGHT TREMAINE, LLP)	
& LAW OFFICES OF GKRSE)	
v.)	
)	
DEPARTMENT OF LAW)	OAH No. 11-0377-PRO
)	RFP No. 011-300-0398
_____)	

DECISION

I. INTRODUCTION

This appeal involves a contract for legal services in support of the Susitna-Watana hydroelectric project. The Department of Law, as the contracting agency, issued a Notice of Intent to Award (NOI) stating that the contract would be awarded to Davis Wright Tremaine, LLP and the Law Offices of GKRSE (DWT). A different law firm, Van Ness Feldman, P.C. (VNF), filed a protest. After considering that protest, the procurement officer rescinded the first NOI and issued a new NOI stating that the contract would be awarded to VNF. DWT protested this new award. DWT’s protest was denied, and this is the appeal of that denial.

The parties to this dispute are DWT and the Department of Law. VNF is not a party but was allowed to submit briefing on the issues raised by DWT. DWT has filed a Motion for Summary Adjudication. Oppositions to that motion were received from the Department of Law and from VNF. The Department of Law also cross-moved for summary adjudication in its favor.

The agency record in this matter was submitted electronically on a CD. The record includes a document titled “Index to Agency Record,” which lists documents as Exhibits 1 through 17.

For the reasons discussed below, the first NOI was properly rescinded, the second NOI was properly issued, and the contract was properly awarded to VNF.

II. FACTS

Request for Proposal (RFP) No. 011-0300-0398 was a request by the Department of Law for proposals to provide legal counsel to the Alaska Energy Authority.¹ The RFP anticipated the

¹ Record, Exhibit 1.

need for a wide variety of legal services over a three-year term, with options to renew for two additional two-year terms.

Relevant provisions of the RFP include:

- The proposal due date of June 29, 2011, including a statement that proposals received after the due date “will be rejected and returned to the sender.”²
- Reservation of the right to “waive deviations from the terms of the RFP if the State determines the deviations are not material.”³
- The requirement that all offerors hold a valid Alaska business license and “any necessary applicable professional license required by Alaska Statute.”⁴
- The requirement that potential conflicts of interest be disclosed.⁵

III. DISCUSSION

A. Standard of Review

The standard of review in a protest appeal varies depending on the issue presented.⁶ The commissioner exercises independent judgment as to questions of law, and questions of fact are reviewed *de novo*.⁷

Where the procurement official’s decision on a protest was based on an essentially sound understanding of the facts and fell within the range of discretion allowed by law, the commissioner may choose to defer to that exercise of discretion, rather than wholly to substitute his own judgment, so as to avoid undue disruption of the day to day administration of procurement. In past decisions, the commissioner has referred to this traditional but voluntary and flexible degree of deference as “due deference.”^[8]

B. Summary Adjudication Standard

Summary adjudication is appropriate where there is no genuine dispute as to a material fact.⁹ The moving party has the burden of showing the absence of any dispute as to material

² Exhibit 1, section I.A. The original deadline was 3:00 p.m. on June 17, 2011. This deadline was extended until June 29, 2011 by RFP Amendment 2. Exhibit 1 to VNF’s Opposition to Motion to Suspend Performance.

³ Exhibit 1, section I.H.3.

⁴ Exhibit 1, section I.L.

⁵ Exhibit 1, section VI.5.

⁶ *In re Waste Management of Alaska, Inc.*, Dept. of Administration Case No. 01.08 (2002).

⁷ *Id.*

⁸ *Quality Food Service v. Dept of Corrections*, OAH No. 06-0400-PRO (Commissioner of Administration 2006), pages 11 – 12.

⁹ 2 AAC 64.250.

fact.¹⁰ The non-moving party does not need to establish that it will prevail at trial, and all inferences of fact are drawn in the non-moving party's favor.¹¹

C. Decision to Accept VNF's Protest

DWT argues that VNF's protest was untimely and therefore should not have been accepted or considered. According to DWT, if the protest had not been accepted or considered, there would have been no basis for rescinding the original NOI awarding the contract to DWT. Due deference is given to the procurement officer's decision to accept a late protest.

Protests must be filed within 10 days of the issuance of a NOI.¹² However, a procurement officer has discretion to consider a late protest for good cause.¹³ Good cause includes both sufficient reason for the delay and other circumstances that warrant consideration of the protest's merits.¹⁴ 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.¹⁵

VNF raised three issues in its protest, which was filed on August 16, fifteen days after the August 1 deadline for a timely protest: 1) the evaluation of bids weighed litigation support at 20% of the total even though the RFP expressly stated it would be weighed at only 5%; 2) the evaluation relied on a criterion not required by the RFP; and 3) DWT's proposal was late and should not have been accepted.¹⁶

The procurement officer determined that VNF did not have actual or constructive knowledge of the asserted errors "until it had received and had the opportunity to review a copy of the procurement file."¹⁷ While this is true, VNF could have filed a timely protest if it had requested a copy of the procurement file sooner. The protest period ended August 1, 2011, and VNF didn't request the information it needed to file its protest until August 5, 2011.¹⁸ Had VNF requested this information shortly after the July 22, 2011 NOI, it would likely have had actual knowledge of the asserted errors before August 1, and could have filed a timely protest rather than a protest that was 15 days late. By waiting until after the time for filing a protest had

¹⁰ *Alaska Rent-A-Car, Inc. v. Ford Motor Company*, 526 P.2d 1136, 1138 (Alaska 1974).

¹¹ *Alaska Rent-A-Car*, 526 P.2d at 1139.

¹² AS 36.30.565(a).

¹³ AS 36.30.565(b).

¹⁴ *In re Scientific Fisheries Systems, Inc.*, Department of Administration Case No. 98-08 (2002).

¹⁵ *Payroll City v. Dept. of Environmental Conservation*, OAH No. 05-0583-PRO (Commissioner of Administration 2006), page 5.

¹⁶ Agency Record, Exhibit 8.

¹⁷ Agency Record, Exhibit 9, page 2.

¹⁸ Agency Record, Exhibit 7.

expired to even request information relating to the receipt and evaluation of proposals, VNF failed to preserve its ability to file a timely protest on those grounds. Moreover, VNF received the information requested on August 5, and did not even file its protest within ten days of that date. In light of VNF's delay in obtaining the necessary information, and its delay in filing a protest after receiving that information, VNF has not shown sufficient reason for filing its protest late. However, VNF did bring relevant matters to the attention of the procurement officer before a contract had been awarded, and at a time when appropriate remedial action was still feasible in the event the protest was sustained.

The procurement officer also found that VNF asserted a claim that the procurement code had been violated, and that the claims were serious and substantial.¹⁹ Two of the three issues raised in VNF's protest concern the propriety of the evaluation. That proposals are evaluated consistently with the factors and weights assigned them in the request for proposals is central to the integrity of procurement by competitive sealed proposals. The third issue was whether a late proposal should have been accepted. All three issues concerned matters of significance. The available evidence in support of at least two of the issues raised was, it appears, undisputed.²⁰

The procurement officer might have chosen not to accept VNF's protest with respect to the late proposal based on her prior conclusion that DWT had not obtained a material advantage. However, in light of the nature of the grounds asserted, and the evidence available at the time, and giving due deference to the procurement officer's discretionary decision to accept the protest, the commissioner will consider the merits of VNF's late protest on all issues raised.

D. Acceptance of Late Proposals

The procurement officer originally believed she had discretion to accept DWT's late proposal, and she determined that the proposal should be accepted.²¹ Under the facts of this case, if that discretion existed the procurement officer's decision to accept the proposal would be given due deference and would likely not be overruled.²² However, after receiving VNF's protest, the procurement officer determined that she did not have any authority to accept a late proposal. Because she determined that acceptance of DWT's proposal was legally flawed, she

¹⁹ Agency Record, Exhibit 9.

²⁰ That DWT's proposal arrived after the deadline is undisputed. One of the other issues raised by VNF concerned a scoring error, and, based on the protest report, it appears to have been resolved without any dispute as to the existence of that error.

²¹ There is no genuine factual dispute as to whether the procurement officer would have exercised discretion to accept the late proposal if permitted to do so because she did accept it when she thought acceptance was allowed.

²² Based on the evidence in this case, including the affidavits attached to DWT's reply memorandum, DWT did not gain a substantial competitive advantage through its late proposal because the delays occurred after the proposal had been completed and mailed.

rescinded the original NOI. Whether this second determination was correct is a question of law and the Commissioner exercises her independent judgment on that question.²³

Alaska law provides for different methods of procurement. Competitive sealed bidding is governed by AS 36.30.100 – 36.30.190. Competitive sealed proposals are governed by AS 36.30.200 – 36.30.270. Other types of procurement are governed by AS 36.30.300 – 36.30.320. For sealed bids, the invitation to bid must include the time and date by which the bid must be received.²⁴ Bids received after that time may not be accepted unless the delay was caused by the contracting agency.²⁵ For sealed proposals, the legislature also provided that any request include the date and time by which proposals must be received.²⁶ The legislature did not, however, provide a corresponding prohibition against accepting a proposal that is received late. By regulation, the Department of Administration has addressed this issue.

Unless otherwise provided in the request for proposals, a proposal, correction, modification, or withdrawal received after the date and time set for receipt of proposals is late, and may not be accepted unless the delay is due to an error of the contracting agency.^[27]

The phrase “[u]nless otherwise provided in the request for proposals” specifically permits an RFP to include a provision allowing the acceptance of a late proposal.

DWT argues that the RFP did in fact provide for acceptance of late proposals. The RFP included the following language:

The State reserves the right to:

* * *

3. Reject any or all proposals received and to waive deviations from the terms of the RFP if the State determines the deviations are not material.^[28]

This general clause allowing the waiver of non-material deviations from the RFP does not allow waiver of a deviation from a regulation.

2 AAC 12.250 explicitly prohibits the acceptance of a late proposal unless otherwise provided.²⁹ Regulations are interpreted “with due regard for the meaning the[ir] language

²³ After the summary adjudication briefing was complete, DWT submitted newly discovered evidence that suggests others within the Department of Law or Department of Administration may have been aware of her intent to accept DWT’s late proposal before she accepted it. These individuals may have explicitly or implicitly endorsed that action. Whether others agreed that the procurement officer could accept a late proposal is immaterial in this matter as this is a question of law for the Commissioner to resolve.

²⁴ AS 36.30.110(a).

²⁵ AS 36.30.160(a).

²⁶ AS 36.30.210(a).

²⁷ 2 AAC 12.250.

²⁸ Request for Proposals, page 2, §I.H.

²⁹ Or unless the delay is due to an error of the contracting agency.

conveys to others.”³⁰ To provide otherwise than that late proposals are unacceptable, as the regulation generally requires, a request for proposal should clearly demonstrate the purchasing agency’s intent to make the general rule inapplicable.³¹ Accordingly, 2 AAC 12.250 is interpreted to mean that the request for proposal must “otherwise provide” by expressly stating under what conditions a late proposal would be accepted. Under that interpretation of 2 AAC 12.250, absent an explicit provision in the RFP, a late proposal may not be accepted unless the delay is due to an error of the contracting agency.

DWT cites several cases in which courts in different jurisdictions have approved decisions to accept late bids or proposals.³² Most of those cases are distinguishable, however, because they reviewed whether the late proposal or bid constituted a material deviation from the requirements in the request for proposal or invitation to bid.³³ In one case, the court specifically noted that where there is a legal prohibition against acceptance of late bids, the agency does not have discretion to waive that prohibition.³⁴ Here, as discussed above, there is a legal prohibition against acceptance of late proposals unless there is an explicit provision in the RFP providing for acceptance.

While the Department of Law could have included in its RFP a provision for the acceptance of proposals that are mailed or otherwise submitted prior to the due date, but which are not timely received, it did not do so.³⁵ Accordingly, the procurement officer ought not to have accepted DWT’s late proposal.³⁶ Having exercised discretion to accept an untimely protest

³⁰ *Wilson v. State, Department of Corrections*, 127 P.2d 826, 829 (Alaska 2006).

³¹ *See generally*, Southerland Stat Const § 47.08 (5th Ed.)

³² *E.M. Gostovich v. City of West Richland*, 452 P.2d 737 (WA 1969); *Turner Construction Company v. New Jersey Transit Corp*, 687 A.2d 323 (N.J. App.Div. 1997); *Hewitt Contracting Company, Inc. v. Melbourne Regional Airport Authority*; 528 So.2d 122 (Fla Ct. App, 5th Dist 1988); *Quinn Construction Co. v. King County Fire Protection Dist No. 26*, 44 P.23d 865 (WA 2002).

³³ *E.M. Gostovich v. City of West Richland*, 452 P.2d 737 (WA 1969); *Hewitt Contracting Company, Inc. v. Melbourne Regional Airport Authority*; 528 So.2d 122 (Fla Ct. App, 5th Dist 1988). In *Turner Construction Company v. New Jersey Transit Corp*, 687 A.2d 323 (N.J. App.Div. 1997), a regulation barred acceptance, but the court allowed a waiver based on the absence of any material advantage where the late delivery was caused by agency error. That situation is expressly addressed in 2 AAC 12.250, and thus the court’s rationale is inapposite to this case.

³⁴ *Quinn Construction Co. v. King County Fire Protection Dist No. 26*, 44 P.3d 865, 870 note. 2 (WA 2002).

³⁵ Given the vagaries of mail delivery in Alaska, it would not seem unduly disruptive to the procurement process for purchasing agencies to routinely provide for the acceptance of a proposal that is timely mailed or otherwise submitted, so long as the agency is notified of the submission prior to the due date and the proposal is received within a stated time after the due date. Whether and how to provide for the problem of untimely delivery, in order to enhance competition without creating an undue administrative burden, depends on how the purchasing agency addresses that subject in the request for proposals. *See also*, 2 AAC 12.910 (“After opening bids or proposals, a procurement officer may request bidders or offerors to extend the time during which the state may accept a bid or proposal.”).

³⁶ 2 AAC 12.250.

on that issue, the procurement officer properly rescinded the prior award, and properly rejected DWT's proposal as untimely.

E. Equitable Estoppel

Equitable estoppel may bar the state from taking a position contrary to an earlier position. The Commissioner exercises her independent judgment in determining whether equitable estoppel is applicable here. This doctrine applies when four conditions are met:

(1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.^[37]

DWT argues that the Department of Law made an assertion by conduct and words when its procurement officer sent an e-mail stating that DWT's late proposal would be accepted. DWT's brief goes on to state that in reliance on this assertion it "allowed its sealed proposal to be opened and evaluated, thereby making public extensive valuable proprietary information."³⁸ In addition, DWT says that "public disclosure of this information significantly disadvantages Davis Wright in what is obviously a very competitive market place for legal services."³⁹

When DWT "allowed its sealed proposal to be opened and evaluated," it knew that under the state procurement code another offeror could file a protest, that the protest could be upheld, and DWT might lose the opportunity to be awarded this contract because of that protest. There was no assertion by word or conduct that the Department of Law would reject any protest concerning the decision to accept the late proposal. When the procurement officer asserted that she would accept DWT's late proposal, DWT allowed its proposal to be opened knowing that her decision could be challenged, and that a challenge might be successful. That is precisely what happened here.

In addition, other than the assertions in its pleadings, there is no evidence that DWT did rely on the procurement officer's statement or that it has suffered prejudice from the opening of its sealed proposal. Notably, DWT has filed affidavits directed at other factual issues in this appeal, but has refrained from addressing by affidavit or other evidence the question of whether it acted in reliance on the procurement officer's e-mail or the question of whether it did suffer prejudice.

³⁷ *Crum v. Stalnaker*, 936 P.2d 1254, 1256 (Alaska 1997).

³⁸ Motion for Summary Adjudication, page 26.

³⁹ Motion for Summary Adjudication, pages 26 – 27.

DWT has not established that it is entitled to a ruling that the Department of Law is estopped from rejecting its proposal as untimely.

F. Determination that VNF is a Qualified Offeror

DWT argues that VNF's proposal should have been rejected because it is not authorized to conduct business in Alaska. The RFP states:

At the time the proposals are opened, all offerors must hold a valid Alaska business license and any necessary applicable professional licenses required by Alaska Statute. Proposals must be submitted under the name as appearing on the person's current Alaska business license in order to be considered responsive.^[40]

There is no dispute that VNF had a valid Alaska business license or that the proposal was submitted under the name as it appears on that license. DWT argues, however, that VNF does not have a necessary professional license.

DWT relies on AS 10.06.705 which provides, in part, "[a] foreign corporation may not transact business in this state until it has been issued a certificate of authority by the commissioner." DWT asserts that VNF does not have a certificate of authority.⁴¹

The Department of Law argues that this certificate is not required by the RFP.⁴² The Department of Law is correct. Professional licenses grant permission to practice a particular occupation or profession.⁴³ A certificate of authority under AS 10.06.705 does not give a person or corporation the right to engage in any particular occupation or profession. While the RFP could have required all offerors that were foreign corporations to provide proof that they held a certificate of authority, the RFP did not include this requirement.

DWT argues that even if the RFP didn't specifically require proof of a certificate of authority, there is an implied requirement that all offerors be legally qualified to enter into a contract. However, the lack of a certificate does not prevent VNF from being legally qualified to enter into a contract.⁴⁴ In addition, while the lack of a certificate does prevent a corporation from instituting a lawsuit,⁴⁵ this lack can be cured as long as the certificate is obtained before the statute of limitations runs.⁴⁶ Despite the lack of a certificate of authority, VNF is legally qualified to enter into a contract in Alaska.

⁴⁰ Agency Record, Exhibit 1, section I.L.

⁴¹ DWT has not supported this assertion with admissible evidence, but VNF does not claim to hold such a certificate.

⁴² Opposition brief, page 15.

⁴³ See business and professional licenses regulated by Alaska Statutes, Title 8.

⁴⁴ AS 10.06.715 (lack of certificate does not impair validity of a contract).

⁴⁵ AS 10.06.713.

⁴⁶ *Gratix v. Pine Tree, Inc.*, 677 P.2d 1264, 1267 (Alaska 1984).

DWT relies on a prior decision that suggests a different result should be reached here. In *Computer Task Group, Inc. v. Division of General Services*,⁴⁷ the Commissioner noted

Arguably, submitting a proposal in response to an RFP constitutes “transacting business” within the meaning of [AS 10.06.705] and requires a certificate of authority. If so, then possession of a certificate of authority at the time a proposal is submitted could be considered a matter of responsiveness, in light of the RFP’s requirement that all offerors be in compliance with state law. See RFP §1.16[a].^[48]

DWT asks for a ruling that an offeror who does not hold a required certificate of authority at the time it submits a proposal is nonresponsive as a matter of law.

In *Computer Task Group*, one question was whether a foreign corporation was entitled to a preference as an Alaska bidder.⁴⁹ One of the requirements for that preference is that the corporation be qualified to do business in Alaska.⁵⁰ After reviewing the text and statutory history of this statute, the Commissioner determined that a corporation must have a certificate of authority at the time it submits a bid in order to qualify for the Alaska bidder preference.⁵¹

The dicta from footnote 24 quoted above addresses a question that was not at issue in *Computer Task Group*, but is at issue here. The definition of “transacting business” is best left to the Commissioner of Commerce, Community, and Economic Development (CCED), or to the appropriate civil court.⁵² Assuming that submitting a bid or proposal does constitute transacting business in Alaska, holding a certificate of authority at the time the bid or proposal is submitted is not a mandatory term for all bids or offers subject to the procurement code. As discussed above, contracts entered into in violation of AS 10.06.705 are still enforceable, and the lack of a certificate can be cured at a later date in at least some circumstances. To insist that all bidders or offerors have this certificate in advance of being awarded a contract could limit competition as some corporations may not wish to complete the required application if they are not awarded the contract. In addition, as can be seen from VNF’s brief, it is not always easy to determine whether a foreign corporation is required to have a certificate of authority. VNF claimed an exemption under AS 10.06.718(9) for conducting business in interstate commerce. It might be difficult for procurement officers to determine on a case by case basis whether a foreign

⁴⁷ OAH No. 07-0147-PRO (Commissioner of Administration 2007).

⁴⁸ *Computer Task Group*, page 6, n 24 (emphasis added).

⁴⁹ *Computer Task Group*, page 6.

⁵⁰ *Id.*, citing AS 36.30.170(b).

⁵¹ *Computer Task Group*, page 14.

⁵² It is not self-evident that offering to do business in Alaska is the same as actually transacting business in Alaska.

corporation was engaged in interstate commerce when selling products or services to state agencies.

Certainly an RFP or Invitation to Bid could include this requirement in appropriate circumstances, but it is not an automatic requirement. To the extent VNF is required to hold this certificate, that is an issue of contract compliance or an issue for review by the Commissioner of CCED.

G. Disclosure of Potential Conflicts

The RFP required proposals to contain a variety of information. The information “**MUST**” be in the specified order.⁵³ “Proposals which do not [comply with this requirement] may be declared non-responsive and be rejected.”⁵⁴

DWT argues that VNF’s proposal should have been rejected because it did not properly disclose all potential conflicts. The RFP states that proposals that do not include all required information “may be” deemed non-responsive. The procurement officer was not required to declare a proposal non-responsive for failing to disclose all potential conflicts in the order specified by the RFP. Due deference is given to the procurement officer’s decision.

The Department of Law previously submitted an affidavit from Assistant Attorney General Brian Bjorkquist.⁵⁵ In his affidavit, he states:

As a member of the [proposal evaluation committee] and contracting officer for the project, I reviewed Van Ness’s proposal and identified potential conflicts for our department’s internal conflict review analysis. Van Ness Feldman’s proposal contained sufficient information for identifying potential conflicts and enabling the Department of Law to conduct a thorough conflict check. Van Ness Feldman did not enjoy any material advantage by identifying potential conflicts in other sections of its proposal, as opposed to all in one section.^[56]

Due deference is given to the procurement officer’s decision not to declare VNF’s proposal non-responsive because of any failure to disclose conflicts, and that decision is not overturned.

H. Cross Motion for Summary Adjudication

The Department of Law opposed summary adjudication in favor of DWT and instead moves for summary adjudication in its favor on all issues. As discussed above, the procurement officer did not have the discretionary authority to accept DWT’s late proposal. Her decision to accept and consider VNF’s late protest is entitled to due deference and is not disturbed here.

⁵³ Agency Record, Exhibit 1, RFP section VI.C. (emphasis and capitalization in original).

⁵⁴ *Id.*

⁵⁵ Affidavit of Brian Bjorkquist, attached to Opposition to DWT’s Motion to Suspend Performance of Contract, filed October 17, 2011.

⁵⁶ Bjorkquist Affidavit, ¶ 9.

The procurement officer also properly concluded that a certificate of authority was not required for submission of a proposal and that VNF's proposal should not be rejected based on the manner in which it disclosed potential conflicts. Finally, because DWT has not shown that it is entitled to invoke equitable estoppel, the Department of Law is entitled to judgment in its favor on that issue.

IV. ORDER

Having considered the entire record in this matter, IT IS HEREBY ORDERED: the decision to issue the second Notice of Intent to Award to Van Ness Feldman, and the subsequent award of the contract to Van Ness Feldman, is UPHeld.

DATED this 22nd day of November, 2011.

By: Signed
Jeffrey A. Friedman
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 36.30.675. 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 28th day of December, 2011.

By: Signed
Name: Becky Hultberg
Title: Commissioner, DOA