

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

RESOURCE DIMENSIONS, LLC)	
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v.)	
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DEPARTMENT OF COMMERCE, COMMUNITY AND ECONOMIC DEVELOPMENT)	OAH No. 11-0431-PRO
<hr style="width: 40%; margin-left: 0;"/>)	RFP No. 2012-0800-0564

DECISION

I. Introduction

The Department of Commerce, Community and Economic Development (Department) issued a solicitation for proposals for a study to quantify economic impacts resulting from the designation of critical habitats under the Endangered Species Act, to be published in a peer-reviewed journal. The Department issued a notice of intent to award the contract to McDowell Group, Inc. (McDowell). Resource Dimensions, LLC, filed a protest asserting that (1) the McDowell proposal was not responsive because (a) McDowell lacks the required experience in developing, conducting, and analyzing Endangered Species Act research, and (b) McDowell’s proposal lacked various supporting documents or information; and (2) the evaluation was unreasonable. The procurement officer denied the protest and Resource Dimensions appealed, raising the same issues.

The administrative law judge conducted a hearing and heard testimony from the procurement officer, the three members of the proposal evaluation committee, and senior staff from Resource Dimensions. Because Resource Dimensions did not show that McDowell’s proposal was not responsive, or that the objective facts do not reasonably support the evaluation, the appeal is denied.

II. Facts

A. Solicitation Purpose and Contents

The State of Alaska’s economy is highly dependent on industries whose activities may be adversely affected by the designation of critical habitat areas under the Endangered Species Act. In order to provide policy makers with well-researched and defensible information concerning

the economic effects of such designations, and as an aid in presenting the state's perspective on issues relating to the Endangered Species Act to the public and to the media,¹ the Department issued a solicitation for a study of those impacts. In order to ensure that the study would withstand critical scrutiny, the solicitation called for publication in a respected, peer-reviewed journal.

An initial draft of the technical portions of the solicitation, including the scope of work, minimum requirements, and evaluation questions, was prepared by Tim Sullivan, the project manager. Mr. Sullivan left his position and was replaced by Glen Haight. Mr. Haight modified the draft. Gina Chalcraft was the procurement officer for the solicitation. Using standard forms, she prepared the non-technical portions of the solicitation; she had no role in drafting the scope of work, minimum requirements, or evaluation questions.

As a minimum requirement for experience, the solicitation included this provision:

In order for offers to be considered responsive offerors...**MUST** meet the following minimum prior experience requirements.

- Offerers [sic] must...be able to show that they have prior experience in developing, conducting and analyzing endangered species act, economic and industry research.

Examples of research MUST be submitted in electronic format, on a CD.

An offeror's failure to meet these minimum prior experience requirements will cause their proposal to be considered non-responsive and their proposal will be rejected.^[2]

Section Five of the solicitation was a scope of work whose initial paragraphs described the study to be provided thus:

The study identifies and analyzes economic impacts from critical habitat designations under the ESA. The successful candidate will propose a review of several designations to provide a broad sample of situations and outcomes. Critical habitat designations throughout the United States are acceptable; examples in Alaska are preferred.

The successful candidate will determine the magnitude of economic impacts from critical habitat designations through interviews, review of post-designation studies, and other information. The study will identify direct and indirect costs from designations.^[3]

¹ See R. 146 (RFP at 24) (contractor to provide press release and Power Point presentation, and to deliver presentations to audiences in Juneau, Anchorage and Washington, D.C.).

² R. 133 (RFP p. 11) (bold in original).

³ R. 145 (RFP p. 23).

The scope of work also provided details on the types of economic costs to be studied, specifically including environmental studies and transaction costs, and called for interviews with industry and trade association executives for information regarding the impacts of “ESA listings, or potential ESA listings” on investment decisions.⁴

Section Six of the solicitation included specific requirements for the proposal format and content. In particular, this portion of the solicitation advised offerors, in bold print, to provide specified information, “**or your proposal will be considered nonresponsive,**”⁵ specifically including information regarding compliance with the minimum requirements and proposed subcontractors.⁶ Elsewhere in Section Six, offerors were directed to provide (without declaration that the failure to do so would render the proposal nonresponsive) resumés and the total cost and number of estimated hours for each of the personnel assigned to the project.⁷ As part of their cost proposal, offerors were directed to provide a list of all direct and indirect costs of performance, including overhead for each person working on the project, the percentage of the person’s time devoted to the project, and profit.⁸

The proposals were to be reviewed for responsiveness, and if deemed responsive to be evaluated based on the criteria listed in Section Seven of the solicitation.⁹ The criteria included two objective criteria worth 50% of the total points available, consisting of contract cost (40%) and the Alaska offeror’s preference (10%).¹⁰ The other criteria, which were subjective in nature, were also worth 50% of the total, consisting of project understanding (5%), methodology (20%), management plan (10%) and experience and qualifications (15%).¹¹

B. McDowell Proposal

1. *Experience and Qualifications*

McDowell is a well-established firm located in Southeast Alaska that has extensive experience in developing, conducting and analyzing economic and industry research in Alaska.¹²

⁴ R. 145 (RFP p. 23).

⁵ R. 147 (RFP p. 25).

⁶ R. 148 (RFP p. 26, Sec. 6.01, items (j) and (l)).

⁷ R. 149 (RFP p. 27, Sec. 6.06).

⁸ R. 149 (RFP p. 27, Sec. 6.07).

⁹ R. 149 (RFP p. 27, Sec. 6.08).

¹⁰ R. 151 (RFP p. 29, Secs. 7.05-7.06).

¹¹ R. 150 (RFP p. 28, Secs. 7.01-7.04).

¹² R. 106 (McDowell Proposal, p. 11) (“Over the past few years we have prepare [*sic*] detailed assessments of the economic impact of the oil and gas industry (for AOGA), the mining industry (for AMA), and the visitor industry (for DCCED)...We have conducted economic or socioeconomic impact assessments for virtually every

The firm has a staff of twelve professionals. McDowell did not claim to have any prior experience in developing, conducting and analyzing endangered species act research. Nor did McDowell claim that its subcontractor, Evergreen Economics, had specific experience of that nature, although it did specify that Evergreen Economics has substantial research experience “in natural resources and environmental impacts.”¹³ In particular, Dr. Ted Helvoigt, the firm’s principal, has conducted studies of the economic value of threatened salmon runs.¹⁴ Moreover, Dr. Andrew Plantinga, who was described as working “in association” with McDowell and Evergreen Economics,¹⁵ has substantial experience in studying economic costs associated with restrictive land-use conditions, particularly with respect to forests, which, according to the McDowell proposal, “includ[ed] set-asides under the Endangered Species Act.”¹⁶

2. *Supporting Documentation and Information*

The McDowell proposal, as presented to the evaluation committee, did not include any examples of the firm’s research.¹⁷ However, the proposal asserted that copies of relevant studies were “included in the attached CD.”¹⁸ Following the hearing, the record was supplemented to include two of the referenced studies.¹⁹

McDowell’s technical proposal identified key personnel, but did not identify the lower level project staff (last names of the lower level project staff were mentioned in the cost proposal). The proposal did not include formal resumés; rather, it provided narrative summaries describing the educational background, prior experience, and expertise of the five key project personnel.²⁰ Information regarding the billed cost and estimated number of hours of work of each of the project staff was provided as part of McDowell’s cost proposal.²¹ The McDowell proposal did not identify the overhead assigned to project personnel or state the firm’s anticipated project profit.

major mining project in Alaska....We have been engaged in considering the socioeconomic impacts of a variety of major transportation infrastructure projects in Alaska....”). *See generally*, R. 97-100 (thumbnail description of studies conducted).

¹³ R. 90 (McDowell Proposal, p. 11).

¹⁴ R. 101 (McDowell Proposal, App. p. 6).

¹⁵ R. 76 (McDowell Proposal, cover).

¹⁶ R. 93 (McDowell Proposal, p. 14).

¹⁷ It was undisputed that two members of the committee, Mr. Vincent-Lang and Ms. Ingle, were not provided with examples of McDowell’s research. Mr. Haight, the third member of the committee, testified that he did not recall whether McDowell had submitted copies of its research.

¹⁸ R. 90 (McDowell Proposal, p. 11).

¹⁹ Memorandum and Order Supplementing Record (April 6, 2012).

²⁰ R. 91-94 (McDowell Proposal pp. 12-15).

²¹ R. 120 (McDowell Proposal, Proposed Budget).

3. *Methodology*

The McDowell proposal describes a work plan consisting of nine primary tasks, beginning with an initial kick-off meeting to ensure a common understanding of plans and expectations (Task 1), and ending with the preparation of the written report, PowerPoint presentation, and submission of the manuscript for publication (Task 9). The preparatory steps (Tasks 2-4) consisted of a literature search for all prior economic analyses of critical habitat designations within Alaska, and across the United States as deemed relevant, reviewing and critiquing those studies, and preparing an annotated bibliography of the studies reviewed. The next step (Task 5) consisted of the development of an analytical database based on the literature reviewed, the projected contents of which were described in narrative fashion. In Task 6, McDowell proposed to conduct a meta-analysis of the data collected in Task 5, to test the hypothesis that the prior economic analyses had not accounted for some of the transaction costs associated with critical habitat designation. The proposal stated:

Meta-analysis is a well-established method of statistical analysis that combines information from multiple studies that focus on the estimation of one or more common measures. For this project, the common measure is the economic impacts to business and society of [critical habitat designations] under the Endangered Species Act. The meta-analysis would serve as a complement to the qualitative analysis of reviewing each study described in Task 3.

A meta-analysis is an important component of a systematic review of the critical habitat designation studies conducted in Alaska. The technique will allow us to develop evidence-based estimates of the impacts of critical habitat designations on businesses and investors. The meta-analysis allows us to combine the findings of multiple studies while accounting for the characteristics specific to each site. From this, we may be able to determine specific factors consistent across the studies, as well as to determine if the economic impacts estimated for a particular study differ materially from the impacts of other studies. The meta-analysis will also allow us to develop common cost areas that will be used to inform the data collection activities through interviews described in Task 7.

The meta-analysis approach allows us to overcome the problem of low statistical power, which would occur if we attempted to make inferences based on only a small number of [critical habitat designation] studies. Meta-analysis is a common approach in studies of health outcomes and has grown in popularity in recent years in the fields of natural resource and environmental economics. It has been shown that analyzing results taken from a group of similar studies can result in more accurate statistical analysis.^[22]

²² R. 85-86 (McDowell Proposal, pp. 6-7).

Task 7 involved preparing estimates of the indirect and induced costs of designations, using, among other things, the results of the interviews (Task 8) and of IMPLAN modeling, to the extent such modeling was deemed appropriate by the Department following discussions with McDowell staff.²³

C. Resources Dimensions Proposal

1. *Experience and Qualifications*

Resources Dimensions is twenty-year-old firm of twenty or so partners and senior staff, headquartered in Gig Harbor, Washington, that provides multidisciplinary economics policy and planning services. It has broad experience in a variety of natural resource, land use, and planning fields, and, in particular, has conducted a number of prior studies of the economic impacts of critical habitat designations under the Endangered Species Act, including at least three in Alaska. Julie Ann Gustanski, Ph.D., the firm's principal, "has lead numerous...industry and regional economic analyses."²⁴ Other project senior staff have similar experience in industry and economic research,²⁵ as well as specific experience in research regarding the economic impacts of critical habitat designations under the Endangered Species Act.²⁶

2. *Methodology*

Resources Dimensions' proposal described a work plan consisting of six primary tasks, in two phases: first, data collection (Tasks 1-3), and second, analysis and report (Tasks 4-6). Data collection included an initial project launch meeting to discuss communication protocols, identify issues and information sources, and set deadlines, with a revised work plan as the outcome.²⁷ Following this, a data set would be developed from "a broad body of relevant critical habitat designations as well as information contained in [Resource Dimensions'] proprietary files," (Task 2.1) concentrating on Alaska (Task 2.2), and from interviews (Subtasks Task 3.1-3.4), culminating in the preparation of a comprehensive database (Subtask 3.5-3.7). In phase

²³ See R. 87 (McDowell Proposal, pp. 7-8) ("We will discuss with DCCED staff the degree to which the IMPLAN model should be used for this task, and the advantages and disadvantages associated with use of IMPLAN. As discussed above, this proposal assumes that we use existing studies to calculate these impacts. We can expand this task to include a more in-depth IMPLAN analysis if desired by DCCED.").

²⁴ R. 23 (Resource Dimensions Proposal p. 17). See, e.g., R. 36 (Resource Dimensions Proposal p. 9) (referencing study of economic impacts of tourism industry in the Himalayas).

²⁵ See generally, R. 23-26 (Resource Dimensions Proposal, p. 18-20). Some of the studies referenced by staff members include industry research projects. See, e.g., R. 41-42 (Resource Dimensions Proposal pp. 14-15) (comparison of two snowmobile tourism segments; study of reclamation costs in Wyoming's oil and gas industry).

²⁶ See, e.g., R. 56 (Dr. Taylor co-authored 2009 article entitled "Modeling the Economic Impacts of Critical Habitat Designation").

²⁷ R. 9 (Resource Dimensions Proposal p. 3).

two, Resource Dimensions proposed using its previously-developed IMPLAN model as the basis for an extended, updated and improved IMPLAN model to show total economic impacts (Subtasks 4.1-4.2). In addition, Resource Dimensions proposed synthesizing the interview results to identify direct economic impacts on an industry-wide and regional basis (Subtasks 4.3-4.5). Task 5, in the Resource Dimensions proposal, focused on obtaining information regarding Section 7 consultations. Finally, in Task 6, the report would be prepared for publication and presentation.

D. Evaluation

Four proposals were submitted. Gina Chalcraft, the procurement officer for the solicitation, reviewed the proposals to confirm that they included all of the required contents, using the checklist included with the solicitation, which included a box for “Examples of Research on CD.”²⁸ She did not review McDowell’s description of the firm’s experience to determine whether the firm had met the minimum requirements for experience. She deemed three of the proposals responsive.²⁹ Those proposals, from Resource Dimensions, McDowell, and R Squared, were evaluated by a proposal evaluation committee consisting of Mr. Haight, project manager and the head of the section of economic development in the Division of Economic Development, Moira Ingle, an attorney working on Endangered Species Act issues for the Department of Fish and Game, and Douglas Vincent-Lang, the acting statewide co-ordinator for Endangered Species Act issues.³⁰

The proposal evaluation committee had been selected by Mr. Haight. The committee was not provided copies of the firms’ cost proposals or of the CDs submitted with the written proposals, which contained examples of the firms’ research on prior projects. With the proposals, Ms. Chalcraft provided the committee copies of the Department of Administration’s Guide for Evaluators.³¹ The members of the committee reviewed and scored the technical proposals independently and submitted their scoresheets to Ms. Chalcraft, without a formal meeting to discuss the proposals and their scores.

²⁸ Testimony of G. Chalcraft. *See* R. 166 (RFP p. 44).

²⁹ The protest report states that only two proposals were responsive. Ms. Chalcraft testified, however, that four proposals were submitted, one of which was not responsive. Ms. Chalcraft submitted three proposals to the evaluation committee. R. 965.

³⁰ R. 965; *see* Department’s Post Hearing Brief at 12 (corrected score sheet).

³¹ *See* R. 965-972.

One of the proposals, from R Squared, was not competitive.³² All three of the evaluators, however, deemed the Resource Dimensions and McDowell proposals to be highly competitive. Of the total possible 50 evaluated points, Resource Dimensions received 44.49, and McDowell 44.65.³³ Mr. Haight awarded Resource Dimensions 45 and McDowell 38; Mr. Vincent-Lang awarded Resource Dimensions 45.5 and McDowell 46; and Ms. Ingle awarded Resource Dimensions 43 and McDowell 50. In sum, the committee as a whole deemed both Resource Dimensions and McDowell as well qualified, and their proposals essentially equal.

III. Analysis

On appeal, Resource Dimensions argues that (1) the McDowell proposal was not responsive because (a) McDowell lacks the required experience in developing, conducting, and analyzing Endangered Species Act research,³⁴ and (b) McDowell's proposal lacked various supporting documents or information;³⁵ and (2) the evaluation was unreasonable.³⁶

A. Required Experience

The terms of the solicitation state that in order to be responsive, an offeror "must...be able to show that they have prior experience in developing, conducting and analyzing endangered species act, economic and industry research." Resource Dimensions' protest asserted that McDowell's proposal was not responsive because it did not show that McDowell has the required experience.

The procurement officer denied the protest, largely relying on the opinions of the members of the evaluation committee to the effect that McDowell was capable of performing the work even though it "does not report direct prior experience evaluating economic impacts imposed by listing of endangered species."³⁷ The procurement officer also noted that some of the project staff proposed by McDowell "reference work on economic work related to listed species."³⁸

³² See R. 963 (email, M. Ingle to G. Chalcraft, et al., 9/28/2011 @ 11:05 a.m.) ("R2's [proposal] was responsive but basically a non-starter because of the methodology they proposed."). In Mr. Haight's view, that proposal was not responsive. Testimony of G. Haight. However, the procurement officer did not formally declare that proposal non-responsive.

³³ See Department's Post-Hearing Brief at 12 (corrected score sheet).

³⁴ Resource Dimensions' Post-Hearing Brief at 1-11.

³⁵ Resource Dimensions' Post-Hearing Brief at 11-15.

³⁶ Resource Dimensions' Post-Hearing Brief at 15-23.

³⁷ R. 949 (Decision at 1); Testimony of G. Chalcraft.

³⁸ *Id.*

On appeal, Resource Dimensions argued that: (1) the procurement officer disregarded the express requirement for experience with Endangered Species Act research, which the McDowell firm lacks; (2) McDowell could not rely on its subcontractor's experience to satisfy that requirement; and (3) the subcontractor lacks the required experience. Prior to the hearing, on cross-motions for summary adjudication, the administrative law judge ruled that the requirement for Endangered Species Act research is a mandatory minimum requirement that may not be disregarded, but that McDowell may rely on its subcontractor's experience to satisfy that requirement.³⁹ Whether the subcontractor has the necessary experience was a question reserved for the hearing.⁴⁰

1. *Standard of Review*

The nature and extent of the firm's experience are factual issues, which are determined by the commissioner *de novo* based on the record established at the hearing. In deciding whether a proposal meets a solicitation's minimum requirements for responsiveness, the commissioner will afford the procurement officer's initial determination of responsiveness with an appropriate degree of deference.⁴¹ In this case, the procurement officer did not make an independent determination of responsiveness, but rather relied on the evaluators' opinion that McDowell was qualified to perform the work notwithstanding the lack of any direct experience in Endangered Species Act research and notwithstanding the express requirement for such experience as a condition of responsiveness. Accordingly, the commissioner will decide whether the experience that McDowell and its subcontractor have meets the solicitation's minimum requirements based on her own independent judgment, in light of the solicitation, the proposal, and the evidence and testimony at the hearing.

2. *McDowell's Experience Is Limited to Dr. Plantinga's*

McDowell, as a firm, did not claim to have experience with Endangered Species Act research. Similarly, the proposal did not state that its subcontractor, Evergreen Economics, had experience in developing, conducting and analyzing Endangered Species Act research. Furthermore, to the extent that the various studies listed in the resumé of Evergreen Economics' principal, Dr. Helvoigt, mention endangered species, testimony at the hearing established that

³⁹ Memorandum Denying Summary Adjudication, January 24, 2012.

⁴⁰ Memorandum and Order on Reconsideration, February 15, 2012.

⁴¹ See e.g., *Quality Sales Foodservice v. Department of Corrections*, OAH No. 06-0400-PRO at 11-12 (Commissioner of Administration 2006); *In re Waste Management of Alaska, Inc.*, at 12-13, Department of Administration No. 01-08 (2002).

those studies were industry research rather than Endangered Species Act research.⁴² Thus, if the McDowell proposal is to be deemed responsive to this requirement, it can only be on the basis of the experience of Dr. Plantinga.

Dr. Plantinga is not listed as McDowell's subcontractor, but as a "technical advisor" who is working "in association" with McDowell and Evergreen Economics;⁴³ the project organizational chart shows him as working under the direction of Dr. Helvoigt, the project manager.⁴⁴ While the precise nature of Dr. Plantinga's contractual relationship with McDowell and Evergreen Economics is unknown, it is clear that he will play a significant role in the project. Just as the experience of a subcontractor may, to the extent that a solicitation expressly or impliedly permits, be attributed to the offeror, so, too, may the experience of key personnel identified in the proposal. In this case, the solicitation may reasonably be construed to permit consideration of the experience of a subcontractor; similarly, it may reasonably be construed to permit consideration of the experience of key personnel who will work "in association" with McDowell and its subcontractor. Accordingly, Dr. Plantinga's experience will be considered for purposes of determining the responsiveness of McDowell's proposal.

McDowell's proposal did not identify any specific research project that Dr. Plantinga had been engaged in that related to the Endangered Species Act. The only research project listed in his comprehensive list of publications that appears to address that topic is a study of the economic impacts of the Northwest Forest Land Plan that was conducted in 2004 and published in 2010.⁴⁵ Dr. Plantinga was a co-author of that study. Unless that study (the Northwest Forest Study) constitutes Endangered Species Act research within the meaning of the solicitation, then Dr. Plantinga lacks the required experience and the McDowell proposal must be rejected as non-responsive.

⁴² See Resource Dimensions Post-Hearing Brief at 687; D. Scarsella testimony. The Department did not present any witnesses to rebut Mr. Scarsella's testimony or to establish the nature of Dr. Helvoigt's work, as it relates to the Endangered Species Act. Review of the one research study authored by Dr. Helvoigt that was included in the record confirms that is not Endangered Species Act research.

⁴³ R. 76 (McDowell Proposal, cover page); R. 91.

⁴⁴ R. 91 (McDowell Proposal, p. 12).

⁴⁵ See R. 114 (McDowell Proposal, App. p. 19) ("The Economic Consequences of Reserving Federal Land for Biodiversity Protection in the U.S. Pacific Northwest," U.S. Department of Agriculture, Economic Research Service, October 2004"); McDowell CD, "Local Employment Growth, Migration, and Public Land Policy: Evidence from the Northwest Forest Plan", 35(2) *Journal of Agricultural and Resource Economics* 316 (2010) (Eichman, Hunt, Kerkvliet and Plantinga, 2010), discussed extensively in Resource Dimensions' Post-Hearing Brief, at 8-10. The latter study notes that the earlier report is a "previous version." *Id.*, at 310, note 2.

3. *McDowell's Experience Meets The Minimum Requirement*

The Northwest Forest Land Plan was promulgated in 1994 following litigation under, among other things, the Endangered Species Act, “in order to provide habitat for northern spotted owls and hundreds of other species associated with late-successional old-growth forests.”⁴⁶ The plan “reallocated over 11 million acres...from commodity production to ecosystem management.”⁴⁷ The Northwest Forest Study assessed the economic impact of those restrictions on two significant indicators of economic activity: county employment growth and net migration rates.⁴⁸

Resource Dimensions argues that the Northwest Forest Study should not be considered as satisfying the minimum requirement for experience in Endangered Species Act research because it was only secondarily related to the Endangered Species Act: the study was not of the economic impacts of the Endangered Species Act, but of the economic effects of the Northwest Forest Land Plan. Resource Dimensions points out that a “set-aside” is something different than a “critical habitat designation.” And, as Resources Dimensions notes, all that was at issue in the Northwest Forest Land Plan was land use, whereas critical habitat designations under the Endangered Species Act affect air space and waters, as well as land areas.

While the Northwest Forest Study was limited to a single event, namely, the promulgation of the Northwest Forest Land Plan, and to only limited economic impacts resulting from that event, namely employment growth and net migration, a study of the economic impacts resulting from promulgation of the Northwest Forest Plan can reasonably be characterized as Endangered Species Act research. If, for example, the federal government had solicited a study of the economic impacts that would result from listing the Northern Spotted Owl as a threatened or endangered species, one component of that study would surely have been the impacts resulting from the promulgation of the Pacific Northwest Forest Land Plan, without regard to whether the entire forest had been designated as critical habitat.

The Northwest Forest Study differs from the study requested in the solicitation not so much in that the Northwest Forest Study was only secondarily related to the Endangered Species Act as in that it looked at a pre-determined, limited number of impacts of a species' status as protected under the Endangered Species Act, rather than attempting to identify all impacts. But

⁴⁶ Northwest Forest Study at 316.

⁴⁷ *Id.*

⁴⁸ *Id.*

the solicitation does not, by its terms, in any way limit the type of Endangered Species Act research that is acceptable. In particular, it does not require any prior experience in identifying or estimating the economic impacts resulting from listing a species as threatened, or from the creation of critical habitat designations. Nor does the solicitation place any floor on the amount of prior experience required. That the only experience Dr. Plantinga has that relates to the Endangered Species Act is a single study of a limited set of economic impacts of one likely outcome of a listing under the Endangered Species Act does not mean that he has no research experience whatsoever relating to that act.

When a solicitation requires prior experience, but does not specify the degree of experience required, any degree of experience might reasonably be deemed sufficient to meet the requirement, unless it were shown that the amount of experience is insufficient to meet the agency's actual needs: that is, a firm with such limited experience could not reasonably be deemed capable of performing the work requested in a satisfactory manner.⁴⁹ But Resource Dimensions has not asserted that prior experience in assessing the economic impacts of Endangered Species Act listings is necessarily required in order to perform the work, or that McDowell is not capable of performing the study requested. Nor does the evidence support such an assertion: all three evaluators, including the project manager, who drafted the technical portions of the solicitation and who himself preferred Resource Dimensions' proposal to McDowell's, were of the opinion that McDowell has the ability to provide the requested study. The substance of Resource Dimensions' objection is not that McDowell lacks necessary experience (except insofar as it lacks the experience required by the solicitation) or that it is unqualified to do the study, but that the methodology McDowell proposed is not feasible. That is an argument that goes to whether the evaluation was reasonable, not to responsiveness.

Dr. Plantinga had only minimal experience in Endangered Species Act research, and it would certainly have been within the discretion of the procurement officer to deem McDowell non-responsive with respect to the experience requirement. However, she did not. In light of the testimony of the project manager that McDowell is qualified to perform the work, the absence of any allegation by Resource Dimensions that McDowell is unqualified, and the absence of limitations on the amount or nature of experience in Endangered Species Act research that was

⁴⁹ Minimum requirements should be construed to meet the agency's actual needs, rather than preferred attributes. See In Re Sanders, at 14, OAH No. 05-0250-PRO (Commissioner of Administration 2006).

required, Dr. Plantinga's experience is deemed sufficient to meet the requirement stated in the solicitation.

B. Supporting Documentation

Resource Dimensions argues that McDowell's proposal should be deemed non-responsive, or lacking sufficient information for evaluation, due to the absence of certain supporting documentation or information that was required by the terms of the solicitation, in particular, information required by the solicitation in Sections 6.01, 6.06, and 6.07.⁵⁰

The responsiveness of the McDowell proposal, with respect to these materials, will be determined based "whether, notwithstanding a failure to comply with the proposal format and content requirements, the proposal provides an adequate basis for evaluation."⁵¹

With respect to resués and cost data, addressed in Sections 6.06 and 6.07, the solicitation did not make submission of that information a requirement of responsiveness. Moreover, while the McDowell proposal lacks formal resués for all personnel, it does include narrative statements for the key project staff which are substantially equivalent to formal resués.⁵² The absence of additional information regarding other staff did not preclude a reasonable evaluation, because in light of McDowell's and Evergreen's experience and qualifications, evaluators could reasonably infer that other members of their staff would have experience and qualifications commensurate to the firms'. Cost data to be submitted with the cost proposal pursuant to Section 6.07, while potentially of value for purposes of contract administration, or in the event that the procurement officer elected to engage in discussions prior to contract award or in negotiations after award, was not subject to review by the proposal evaluation committee, and was irrelevant to the determination of the evaluated cost of the proposal. The absence of that data did not preclude an adequate evaluation by the proposal evaluation committee, and it did not affect the evaluation of cost. Because Sections 6.06 and 6.07 did not mandate submission of the information as a condition of responsiveness, and the information provided was reasonably sufficient for evaluation, the protest on this issue is denied.

⁵⁰ Resource Dimensions' Post-Hearing Brief at 11. To the extent that Resource Dimensions contends that the failure to provide a CD containing research examples rendered the McDowell proposal non-responsive, the preponderance of the evidence is that McDowell did provide such a CD. See Memorandum and Order Supplementing the Record (April 6, 2012).

⁵¹ Memorandum Denying Summary Adjudication, p. 2.

⁵² R. 91-94 (McDowell Proposal, pp. 12-15).

Section 6.01(l) required the submission of subcontractor information and stated that in its absence a proposal “will” (not “may”) be considered non-responsive. The information to be provided was this:

Subcontractors List: In addition to identifying each and every subcontractor and their employees throughout each element (i.e., Minimum Requirements, Conflict of Interest, Management Plan and Methodology, Organization, Offeror’s Experience, Project Manager and Key Personnel, and Price) of the proposal, for all subcontractors, provide names, addresses and telephone numbers; a description of contract services to be performed; and percentage of contract services to be provided by that Subcontractor. Throughout the proposal, any work to be performed by a Subcontractor shall be fully identified.^[53]

The proposal states that McDowell will have support “from Evergreen and Dr. Plantinga on a sub-contract basis,”⁵⁴ but only Evergreen Economics is specifically identified as a subcontractor.⁵⁵ The only employee of Evergreen Economics who is identified in the McDowell proposal is its principal, Dr. Helvoigt. Names, addresses and telephone numbers of the employees of subcontractors would have been necessary if the evaluators had chosen to contact an employee as part of the evaluation. In this case, none of the evaluators deemed it necessary to contact any of the employees. Thus, the lack of employee names, addresses and telephone numbers for Evergreen project staff did not preclude an adequate evaluation of the proposal.⁵⁶

In addition to information regarding the subcontractor’s employees, however, Section 6.01(l) required the submission of specific information regarding the contract services to be provided by a subcontractor: “a description of the contract services to be provided; and percentage of work to be performed by that Subcontractor,” and “any work to be performed by a Subcontractor shall be fully identified.” A description of the services to be provided by staff other than McDowell employees may be found sprinkled through the proposal. Dr. Helvoigt is identified as the project manager, who is described as “responsible for all phases of the work, as well as budget performance [and] is the primary point of client contact”⁵⁷ and as having “day-to-

⁵³ R. 148 (RFP p. 26, Sec. 6.02(l) (italic in original).

⁵⁴ R. 91 (McDowell Proposal, p. 12).

⁵⁵ R. 78 (McDowell Proposal, Introduction).

⁵⁶ Resource Dimensions asserts that the failure to identify all project staff enables McDowell to circumvent the requirement that no project personnel may be replaced without permission from the Department. However, a reasonable reading of the solicitation is that this requirement is limited to key personnel. In any event, the McDowell cost proposal did identify specific individuals, if only by last name.

⁵⁷ R. 89 (McDowell Proposal, p. 10).

day project oversight and management responsibility.”⁵⁸ Also, Evergreen is to provide analysts.⁵⁹ Dr. Plantinga is described as a technical advisor, although the nature of the technical advice he will provide, and the tasks to which it pertains, is not stated. The proposal describes a variety of analytical tasks and shows Evergreen Economics’ analysts as working in conjunction with McDowell staff.⁶⁰

The lack of additional detail as to the division of labor among the various project staff may be considered a defect in considering the strength of the McDowell proposal, but the proposal is not so altogether uninformative as to the identity and role of all project staff as to mandate rejection of its proposal as non-responsive.

C. Evaluation

1. *Standard of Review*

In determining whether an evaluation is reasonable, the initial question is “whether the...record discloses the basis for the evaluators’ ratings and adequately demonstrates that they considered all of the important factors [as identified in the request for proposals].”⁶¹ The record in this case includes the evaluators’ annotated score sheets, and the testimony of all three evaluators at the hearing. The score sheets and testimony provide an adequate basis for determining the basis for the evaluators’ ratings. These materials establish that the members of the committee considered each of the evaluation factors identified in the solicitation.

Given an adequate record for determining the basis for the evaluation, an evaluation is reasonable if “the objective facts...reasonably support [the] evaluations.”⁶²

Resource Dimensions asserts that the procurement officer failed to independently review the merits of its protest in light of the minimum requirements and the evaluation criteria stated in the solicitation, but rather simply incorporated the responses of the members of the evaluation committee to the points raised. As a result, Resource Dimensions contends, the protest decision is both legally and factually flawed.⁶³ However, any defect in the procurement officer’s

⁵⁸ R. 91 (McDowell Proposal, p. 12); R. 120 (McDowell Proposal, Proposed Budget).

⁵⁹ R. 91 (McDowell Proposal, p. 12); R. 120 (McDowell Proposal, Proposed Budget).

⁶⁰ R. 91 (McDowell Proposal, p. 12).

⁶¹ Johns v. Department of Revenue, at 12, OAH No. 09-0572-PRO (Commissioner of Administration 2009) (citations omitted).

⁶² Johns v. Department of Revenue, at 13, OAH No. 09-0572-PRO (Commissioner of Administration 2009) (citations omitted).

⁶³ *See* Appeal at 12-13 (items 20, 21).

approach is moot, because in this case the commissioner will exercise her independent judgment as to whether the evaluation was reasonable.

2. *McDowell Evaluation*

With respect to McDowell's proposal, on appeal Resource Dimensions challenges the evaluation of the firm's experience and qualifications, and of the methodology it proposed.⁶⁴ Resource Dimensions also objects to the evaluation of the management plan.⁶⁵

a. Experience and Qualifications (15 Points)

Because McDowell, in the view of Resources Dimensions, did not meet the minimum experience requirement, Resource Dimensions asserts that the evaluators rated the McDowell proposal too high on this factor.⁶⁶ But, as the committee members explained, in the committee's view McDowell's broad, longstanding, and in depth experience in industry and economic research in Alaska could compensate for a lack of experience in Endangered Species Act research. Thus, if points had been awarded in the aggregate, to the extent that McDowell's Alaska experience exceeded what would be expected as a competitive norm, that experience could reasonably have been deemed sufficient to warrant an award of all the points available in this category even though the firm lacked Endangered Species Act experience, so long as the proposal met the minimum experience requirements.

However, the points on this factor were not awarded in the aggregate. Rather, points were awarded on each of three subfactors, and then combined. One of the subfactors was the subcontractor's experience and qualifications, worth five of the total of 15 points available on this factor. On that subfactor, Mr. Vincent-Lang awarded 4.5 points, Mr. Haight and Ms. Ingle awarded five. The subcontractor and Dr. Plantinga have extensive experience in statistical analysis and in economic impacts associated with environmental and land use issues, but that experience was not shown to be more than would be expected in a competitive offer. Therefore, absent more than minimally-acceptable experience in Endangered Species Act research, the subcontractor's experience and qualifications did reasonably support an award of the full five points on this subfactor.

⁶⁴ See [Resource Dimensions'] Appeal On A Protest, at 9 (items 8, 9), 11 (item 17d); Resource Dimensions, LLC's Post-Hearing Brief at 13-14; 16-18.

⁶⁵ See Resource Dimensions' Appeal at 11 (item 16a).

⁶⁶ Of the 15 possible points on the Experience and Qualifications factor, Mr. Haight and Ms. Ingle awarded McDowell 15 points, and Mr. Vincent-Lang awarded McDowell 14 points.

b. Methodology (20 Points)

On appeal, Resource Dimensions asserts that the methodology proposed by McDowell, which included a meta-analysis of existing data, was not feasible, that the evaluators lacked sufficient expertise to realize this,⁶⁷ and that as a result the McDowell proposal was over-rated on this factor.⁶⁸ To establish that the methodology proposed is not feasible, Resource Dimensions relied largely on the testimony of Dr. Gustanski, its principal. Dr. Gustanski testified that because of the limited number of studies that have been conducted of the economic impacts of Endangered Species Act critical habitat designations, a statistically reliable meta-analysis could not be performed.

To the extent that the evaluation committee did not include a person with expertise in a field pertinent to the highly technical and specialized study that was being solicited, such as an economist or a statistician,⁶⁹ the Department accepted the risk that the evaluation committee would fail to adequately identify or fully consider the technical strengths and weaknesses of the proposals presented. The existence of such a risk did not in itself render the evaluation unreasonable.⁷⁰ However, it did leave the door open for a protestor to establish that the evaluation was unreasonable, by showing, as Resource Dimensions has attempted to do, that the evaluation did not reasonably reflect those strengths and weaknesses. Moreover, the Department chose not to call any expert witnesses, such as Dr. Helvoigt or Dr. Plantinga. Dr. Gustanski's testimony was unrebutted. Dr. Gustanski's testimony in substance contradicts the claim made in the McDowell proposal, which is that a meta-analysis is an appropriate approach to this study precisely because there are only a limited number of relevant studies.⁷¹

It may be true that, as Dr. Gustanski testified, it is not feasible to conduct a study of the economic impacts of critical habitat designations in Alaska based solely on a meta-analysis of

⁶⁷ Resource Dimensions Post Hearing Brief at 16.

⁶⁸ Of the possible total of 20 points, Ms. Ingle awarded McDowell 20, Mr. Vincent-Lang awarded McDowell 18, and Mr. Haight awarded McDowell 13. Collectively, the evaluators awarded an average of 17 points to McDowell, as compared with an average of 17.33 points to Resource Dimensions.

⁶⁹ Ms. Ingle testified that she has a substantial background in statistics and that she is "familiar" with meta-analysis; she agreed with Dr. Gustanski that a meta-analysis is not possible when data is limited.

⁷⁰ Resource Dimensions argues that the absence of an economist in itself rendered the evaluation unreasonable. *See* Resource Dimensions Post-Hearing Brief at 16-17. However, a purchasing agency has substantial discretion in the composition of the proposal evaluation committee, and whether the evaluation was unreasonable depends on whether the objective facts support it, not on the degree of expertise the members of the committee have.

⁷¹ *See* R. 85 (McDowell Proposal, p. 6) ("The meta-analysis approach allows us to overcome the problem of low statistical power, which would occur if we attempted to make inferences based on only a small number of CHD studies.").

existing data. But the McDowell proposal was not limited to a meta-analysis. The meta-analysis it proposed was described as a “complement to the qualitative analysis of reviewing each study” and as “an important component of a systematic review of the critical habitat designation studies conducted in Alaska,” and was also to be used to “inform the data collection activities.”⁷² In addition to the meta-analysis, qualitative review,⁷³ and interviews, the McDowell proposal also included use of IMPLAN modeling, which is the same modeling proposed by Resource Dimensions. Notably, the McDowell proposal asserts that the IMPLAN modeling may have its own limitations, which it proposed to identify and discuss with the project manager and other Department staff.

McDowell’s view, as stated in its proposal, that meta-analysis has value when data is limited can reasonably be viewed as reflecting the view of its own experts, Dr. Helvoigt and Dr. Plantinga. If, as Dr. Gustanski asserts, the number of prior studies is insufficient to create statistically reliable data,⁷⁴ meta-analysis may still have value in terms of identifying potential areas of inquiry, or subjects for further study.⁷⁵ In addition, the McDowell approach is not limited to meta-analysis. Furthermore, the evaluation committee recognized that the lack of data could be problematic,⁷⁶ and it considered the possibility that the McDowell approach might need to be modified.⁷⁷ For these reasons, Resource Dimensions did not show that the McDowell

⁷² R. 85 (McDowell Proposal, p. 6).

⁷³ Ms. Ingle, who scored the McDowell proposal higher for its methodology than the Resource Dimensions proposal, specified this as a strength of the McDowell proposal. *See* R. 962 (email, M. Ingle to G. Haight, *et al.*, 9/28/2011 @ 11:35 a.m.).

⁷⁴ Dr. Gustanski testified that there have been about 30 such studies performed across the country, of which Resource Dimensions has performed about a dozen. However, she excluded from that quantity studies performed by federal agencies. Nothing in the McDowell proposal suggests that it is limited to non-federal agency studies.

⁷⁵ Dr. Gustanski testified that even if data is insufficient for statistical purposes, a meta-analysis can be an “informative tool.”

⁷⁶ The evaluators recognized that there is a paucity of “original data”. *See* R. 962 (email, M. Ingle to G. Haight, *et al.*, 9/28/2011 @ 11:35 a.m.). Mr. Haight preferred the Resource Dimensions proposal, in part, because the firm planned, in his view, on a “more strategic” approach to data acquisition. *See* R. 963 (email, G. Haight to M. Ingle, *et al.*, 9/28/2011 @ 11:13 a.m.).

⁷⁷ *See* R. 962-963. Resource Dimensions argues that to permit McDowell to revise its approach if the data proved insufficient for meta-analysis would be “a breach of the procurement process.” Resource Dimensions Post-Hearing Brief at 16. Certainly, if Resource Dimensions had established at the hearing that the McDowell methodology is not feasible, it would be impermissible to award the contract to McDowell in anticipation that the methodology would be substantially revised. However, Resources Dimensions did not make that showing.

To the extent that Resource Dimensions suggests that changes in the methodology proposed are impermissible, it has raised an issue that can only be resolved after the fact, in light of the terms of the contract as issued or amended. *See generally*, 2 AAC 12.315 (permitting contract negotiations after evaluation under 2 AAC 12.290); NANA Management Services v. Department of Transportation and Public Facilities, at 7-11 and 14-16, OAH No. 09-0068-PRO (Department of Transportation and Public Facilities 2010) (contract negotiations after final evaluation not under 2 AAC 12.290 were outside permissible limits of post-final evaluation, pre-award

approach is not feasible, and the evaluation of the McDowell methodology is reasonably supported by the objective facts.

c. Management Plan (10 Points)

Resource Dimensions' appeal objects that McDowell's proposal does not provide a clear management plan.⁷⁸ In particular, Resource Dimensions noted that McDowell's organizational chart did not identify all personnel or explain who has oversight for them.⁷⁹ These objections pertain to the management plan sub-factor addressing project team organization and lines of authority, communication and accountability. All three evaluators awarded the McDowell proposal the maximum three points available for this sub-factor.

The McDowell proposal does not identify the McDowell research staff or the Evergreen Economic analysts who will work on the project, and it does not clearly state the lines of authority, communication and accountability as between those staff, Dr. Plantinga, and Dr. Helvoigt. This sub-factor asks whether lines of authority, communication and accountability are "completely and clearly defined." While it might be assumed that McDowell and Evergreen staff will perform work under the direction of more senior McDowell and Evergreen staff respectively, that is not necessarily the case. Moreover, the lines of authority, communication, and accountability with respect to Dr. Plantinga are unclear, since the nature of his "association" with McDowell and Evergreen (or one of them, if not both) has not been stated. In light of the lack of information as to the lines of authority, communication and accountability as between junior McDowell and Evergreen staff and senior staff, and with respect to Dr. Plantinga, the objective facts do not support an award of all three points on this sub-factor.

3. Resource Dimensions Evaluation

Resource Dimensions' protest asserted that its proposal had been under-rated with respect to the understanding factor, as well as with respect to the methodology it proposed,⁸⁰ its management plan,⁸¹ and its experience and qualifications.⁸²

negotiations); 2 AAC 12.485 (governing contract amendments); McKinnon v. Alpetco Company, 633 P.2d 281, 287 (Alaska 1981) (applying common law, prior to enactment of the Procurement Code: "a government contract that was initially competitively bid cannot be materially amended because that is tantamount to forming a new contract, which should be accomplished by starting all over again with competitive bidding.").

⁷⁸ Appeal, p. 11 (item 16a). This point was given only cursory mention in Resource Dimensions' post-hearing brief. Resource Dimensions Post-Hearing Brief at 12. However, it was identified as an issue in the protest and was the subject of testimony at the hearing. See Protest, p. 10 (item 6). The issue has been sufficiently raised for consideration by the commissioner.

⁷⁹ R 177 (Protest, p. 10, item 6).

⁸⁰ Protest, pp. 9, 10 (item 4).

a. Understanding (5 points)

Resource Dimensions asserted that its proposal was under-rated on the understanding factor, in that the firm did not fail to include non-Alaska studies,⁸³ and that it was downgraded for identifying potential problems,⁸⁴ and for recognizing that Department's anticipated timeline was "compact."⁸⁵

Ms. Ingle awarded Resource Dimensions all five points available on this factor. Mr. Haight awarded four points, and Mr. Vincent-Lang awarded 4.5 points.

Mr. Haight deducted one-half point (of one) for the subfactor asking how well the offeror had demonstrated a thorough understanding of the project purpose and scope; his comment was that as to this point the proposal was "pretty strong", and commented, "missed the part about non-Ak, but they got it." Mr. Haight explained this comment reflected his view that that Resource Dimensions had mentioned "exclusively" Alaska studies.⁸⁶ Because the solicitation stated that Alaska studies were preferred,⁸⁷ and because Resource Dimensions' proposal provides for review of non-Alaska studies,⁸⁸ this deduction is not supported by the objective evidence.⁸⁹ Mr. Haight's other deduction of .5 points was, he explained, because he was uncertain if Resource Dimension's professors would be able to have time for the project. He did not similarly deduct points from the McDowell proposal, even though it, too, entailed the use of professors. This deduction, therefore, is also not supported by the objective evidence.

Mr. Vincent-Lang deducted .5 point on the subfactor for recognition of "pertinent issues and potential problems." Mr. Vincent-Lang did not explain that deduction, and the objective facts are that Resource Dimensions recognized one potential problem, namely, a relatively compact timeline, particularly with respect to publication in a peer-reviewed journal. In the

⁸¹ Protest, p. 10 (item 5).

⁸² Protest, pp. 11-13 (items 6-10).

⁸³ Protest, p. 7 (item 1); Appeal pp. 2, 16 (items 7, 32-35).

⁸⁴ Protest, p. 7 (item 2); Appeal p. 9 (item 14).

⁸⁵ Protest p. 8 (item 3); Appeal p. 9 (items 13, 14).

⁸⁶ See Protest Decision at 9.

⁸⁷ R. 145 (RFP p. 23) ("The successful candidate will propose a review of several designations to provide a broad sample of situations and outcomes. Critical habitat designations throughout the United States are acceptable; examples in Alaska are preferred.").

⁸⁸ See R. 7, 10 (Resource Dimensions proposal, pp. 1, 4) ("The study scope will include a review of costs associated with critical habitat designations from similar situations to those in Alaska"; "the Resource Dimensions team will identify and review a broad body of relevant t critical habitat designations").

⁸⁹ Protest, p. 7 (item 1); Appeal, p. 16 (items 32-25).

absence of any explanation for Mr. Vincent-Lang's deduction, his deduction of one-half point is not supported by the objective evidence.

b. Methodology (20 points)

This was the single most important factor, valued at 20 points. The importance of this factor in the overall evaluation was heightened by the facts that it included no subfactors, and that it was highly subjective. The evaluators were to assess the methodology with this question in mind: "How comprehensive and feasible is the methodology and does it depict a logical approach to fulfilling the requirements of the RFP?" Mr. Haight and Mr. Vincent-Lang awarded Resource Dimensions 18 points on this factor; Ms. Ingle awarded it 16 points.

Resource Dimensions objected to Ms. Ingle's comments as to the time allotted and regarding in-person interviews.⁹⁰ It particularly objects that its plan was downgraded for an alleged absence of review of studies from outside of Alaska, despite the fact that it included a review of those studies and, in any event, the solicitation noted that review of Alaska studies was preferred.⁹¹ It also objects that the plan was downgraded for relying on professors who are not employees of Resource Dimensions, even though McDowell was not downgraded on that same basis.⁹²

Mr. Haight's note on this factor acknowledged that Resource Dimensions would do original research, but that it also had its own prior studies "to pull from", and observed, "I think they can do this." In email correspondence with the other evaluators prior to the protest, Mr. Haight indicated that he valued Resource Dimensions' "more strategic" approach to gathering data. Mr. Vincent-Lang offered no criticisms or positive comments regarding the Resource Dimensions proposal, and he did not identify any particular strengths or weaknesses, either in his pre-protest notes or in his testimony at the hearing. Both Mr. Vincent-Lang and Mr. Haight gave the Resource Dimensions proposal 18 of a possible 20 points, and both testified that they saw no significant shortcomings in the firm's proposed methodology. In light of the highly subjective nature of the evaluation on this factor, Resource Dimensions has not shown that either Mr.

⁹⁰ Protest, pp. 9, 10 (item 4); Appeal at pp. 9, 15 (items 13, 14, 27, 30) ("RD [is] capable of performing within the requisite timeframes"; RD's comments regarding time...should have served as basis for awarding RD points, not taking them away"; "RD could spend 30 hours given limited information available and work already done"; work is "already done").

⁹¹ Protest, p. 7 (item 1); Appeal, pp. 16-17 (items 32-35); Resource Dimensions Post-Hearing Brief at 19-20.

⁹² Post-Hearing Brief at 20-21 (citing testimony of Mr. Haight).

Vincent-Lang's score or Mr. Haight's score was not reasonably supported by the objective evidence.

Ms. Ingle was the only evaluator whose score on this factor (16 points) indicates that she may have found substantial fault with the Resource Dimensions methodology. Ms. Ingle's contemporaneous notes indicate that her somewhat lower score on this factor was due to the length of time allotted for literature review, and the plan for in-person interviews, which she thought were "desirable but difficult, time-consuming." She also commented that, in general, grammatical or typographical errors, and awkward word choices in the Resource Dimensions proposal adversely affected her scoring.

Ms. Ingle's assessment as to the time allotted is wholly subjective. In making such an assessment, it would be unreasonable to disregard Resource Dimensions' extensive prior experience, absent some evidence that the prior experience would not lead to time savings in a literature review. But the objective fact is that the 30 hours Resource Dimensions proposed to spend on this task is a relatively small amount of time, considering the significance of the literature review to the project. Moreover, to the extent that the relatively small amount of time spent on this task reflects reliance on Resource Dimensions' own prior studies, rather a search for studies performed by others, it could be viewed as a weakness. For these reasons, Resource Dimensions has not shown that Ms. Ingle's assessment of the time allotted for this task was unreasonable. The same can be said for Ms. Ingle's observation about interviews. Resource Dimensions was of the view that in-person interviews were preferable; Ms. Ingle had a different view. That type of subjective judgment is well within the discretion of an individual evaluator. As for grammatical errors or word choice, another subjective consideration, those are matters of form that can affect scoring even though not cited as a specific criterion, and Ms. Ingle's subjective judgment as to matters of word choice grammar and formatting was not unreasonable. On balance, while Ms. Ingle had a less favorable view of the Resources Dimensions' methodology than the other evaluators, it was not unreasonable in light of the objective evidence.

c. Management Plan (10 points)

Evaluation of the management plan was based on three sub-factors: (1) support for the project requirements and a logical path to deliverables (4 points), (2) organizational plan (3 points), and (3) work beyond minimums (3 points). Resource Dimensions objects that it was awarded only three of four points on the first subfactor, by Mr. Vincent-Lang, for no apparent

reason,⁹³ and that on the second subfactor it was scored by Ms. Ingle in a manner inconsistent with her score for McDowell on the same factor.⁹⁴ Resource Dimensions also objects to Ms. Ingle's observation, with respect to the third subfactor, that it "seems concerned about short time frame."

Mr. Vincent-Lang did not explain his award of only three points on the first subfactor, either in his contemporaneous notes, or in his testimony. However, this subfactor is wholly subjective. Resource Dimensions has not shown that Mr. Vincent-Lang's score is unreasonable or that it lacks support in the objective evidence.

With respect to Ms. Ingle's score for the organizational plan, the evaluation was based on this question:

Is the organization of the project team clear and are the lines of authority, communication and accountability completely and clearly defined?

Ms. Ingle awarded Resource Dimensions two of the three available points on this subfactor, noting, "Not clearly defined; confusing org chart."⁹⁵ When asked at the hearing what was undefined, or how the chart was confusing, she was unable to identify any issues. Moreover, as Resource Dimensions points out, her score on this subfactor is inconsistent with her score for McDowell on the same subfactor.⁹⁶ The objective evidence does not support Ms. Ingle's deduction of one point on this subfactor.

On the third subfactor, Ms. Ingle awarded only two of three points, citing Resource Dimensions' reference to the project's time constraints. To the extent this deduction represents Ms. Ingle's judgment that Resource Dimension's view that the project had a significant time constraint meant that it would be unable to provide more than the minimum amount required by the solicitation, such an assessment is not unreasonable. Moreover, while it is true that that the solicitation expressed a preference for review of studies from Alaska, the failure to clearly

⁹³ Protest, p. 10 (item 5).

⁹⁴ Resource Dimensions' Post-Hearing Brief at 21-22 (citing testimony of Ms. Ingle). Resource Dimensions mistakenly asserts that another evaluator, Mr. Haight, had awarded Resource Dimensions less than the maximum number of points on this subfactor. *Id.* In fact, Mr. Haight awarded Resource Dimensions three points on that subfactor.

⁹⁵ R. 990.

⁹⁶ Both the McDowell organizational chart and the Resource Dimensions organizational chart lack connecting lines for some of the personnel shown. Ms. Ingle awarded McDowell full points, but not Resource Dimensions, notwithstanding the similar deficiencies in their organizational charts, and the lack of any detail as to Dr. Plantinga's role in the McDowell proposal, a deficiency that is absent in the Resource Dimensions proposal.

provide for review of studies from across the country could be seen as offering the minimum rather than more than the minimum.⁹⁷

d. Experience and Qualifications (15 points)

Resource Dimensions claimed that its proposal was under-rated on the experience and qualifications factor for a variety of minor reasons,⁹⁸ even though it is undisputed that Resource Dimensions has substantial experience in Endangered Species Act research, including having conducted a number of studies of the economic impacts of listings in Alaska and elsewhere, which is exactly what this study entails.⁹⁹

Mr. Haight awarded Resource Dimensions all 15 points available on this factor. Mr. Vincent-Lang awarded 14.5 points, and Ms. Ingle 14. Mr. Vincent-Lang's deduction of .5 points was on the subfactor assessing the subcontractor's experience and qualifications; because Resource Dimensions did not propose to use a subcontractor, that deduction is not supported by the objective evidence.

Ms. Ingle deducted one point on the subfactor asking:

How well has the firm demonstrated experience in completing similar projects?
Has the firm provided letters of reference from previous clients that indicate exemplary, on time and within budget performance?

Ms. Ingle's note on this subfactor states:

No letters of reference, but contact info. Emphasis on detail oriented approach, but multiple typos, awkward word choices. See p. 12

If, as this note suggests, Ms. Ingle's deduction of one point was due to perceived deficiencies in the proposal's word choices and grammar,¹⁰⁰ that is not an unreasonable deduction for flaws of that nature for this factor: it is not unreasonable to include the appearance, readability, grammar and error rate of a proposal as a proxy for assessing an offeror's past performance, in the absence of any other means of assessing that performance, and the amount deducted is not disproportionately large.

⁹⁷ Ms. Ingle testified that she viewed the failure to refer to review of such studies as a detriment.

⁹⁸ Protest, pp. 11-13 (items 6-10); *See* Resource Dimensions' Appeal, at 9 (item 12); Resource Dimensions' Post-Hearing Brief at 12-13.

⁹⁹ Appeal at p. 9 (item 12) ("superior and extensive, directly relevant experience"); p. 11 (item 17a) ("RD had substantially more direct experience"), (item 17c ("RD's background gave it a 'step ahead' on the work").

¹⁰⁰ At the hearing, Ms. Ingle was unable to identify any specific shortcoming in the Resource Dimensions proposal with respect to this evaluation factor.

IV. Conclusion

The evaluation of the technical proposals in this case was largely subjective. Nonetheless, based on the evidence presented, it appears that in some areas Resource Dimensions was under-rated and McDowell over-rated. Adjusting the evaluators' combined scores¹⁰¹ to reflect the merits of the technical proposals in light of the objective evidence might yield a gain for Resource Dimensions of a point or two¹⁰² and a reduction for McDowell of perhaps four or five points.¹⁰³ Even then, viewed as a whole, the objective evidence largely reflects what all three evaluators determined: both McDowell and Resource Dimensions are well-regarded firms, both are capable of providing the services requested, and neither technical proposal was substantially superior to the other overall.

Adjusting the scores to more reasonably reflect the merits of the technical proposals in light of the objective evidence would not change the outcome of the solicitation. Even if the Resource Dimensions proposal had been awarded a perfect score in all categories, absent a showing of significant deficiencies in the McDowell technical proposal Resource Dimensions would not have prevailed,¹⁰⁴ because McDowell is the beneficiary of a ten-point Alaska Offeror's Preference. In that light, Resource Dimensions' appeal stands or falls on the strength of its two central claims: first, that McDowell does not meet the minimum requirement for Endangered Species Act research experience, and second, that the methodology McDowell proposed is not feasible.

¹⁰¹ The evaluators' combined scores must be divided by three in order to obtain the evaluated score for the technical proposals. As originally scored, the points awarded by each evaluator were summed, rather than averaged. That calculation had the effect of increasing the value of the technical evaluation to 75% of the total, rather than only 50% as required by the solicitation. Following the hearing, the Department submitted a revised scoresheet correcting that error.

¹⁰² Resource Dimensions' proposal was deemed scored too low with respect to its understanding of the project; only .5 points would have been gained had all the evaluators scored that factor at the maximum of five points.

¹⁰³ McDowell's proposal was deemed scored too high with respect to the Experience and Qualifications subfactor addressing subcontractors. *Supra*, at 16. Given minimally-acceptable experience in one area (Endangered Species Act research), a reduction of as much as two points on that subfactor would be reasonable. McDowell's proposal was also deemed scored too high with respect to its management plan, largely due to the failure to describe Dr. Plantinga's role adequately. *Supra*, at 19. A reduction of as much as two points on that subfactor would be reasonable.

¹⁰⁴ Using the correct scoring methodology, if Ms. Ingle had awarded Resource Dimensions a perfect score across the board, for a total of 50 points, the effect would be to increase Resource Dimensions' evaluated score by only 2.33 points. If all three evaluators had awarded Resource Dimensions the full 50 points, the effect would have been to increase its evaluated score by 5.5 points, from 83.73 points to 89.23 points, still well behind McDowell's score of 94.65 points.

On those two central claims, Resource Dimensions has not shown that award of the contract to McDowell would be improper. It is undeniable that Resource Dimensions has substantial experience in performing substantially similar studies, and that McDowell has no experience at all in performing substantially similar studies. However, McDowell has, through its associate, just barely met the minimum requirement for experience in Endangered Species Act research. Having met the minimum requirement, McDowell's deep experience in Alaska economic and industry research may reasonably be deemed sufficient to compensate for the relative lack of experience of its associate, Dr. Plantinga, in Endangered Species Act research. With respect to the methodology proposed, McDowell's proposal to review studies from across the country and to apply a meta-analysis of the data acquired is, it appears, unlikely to yield statistically reliable information regarding the economic impacts of critical habitat designations, but it can reasonably be expected to have informative value. Indeed, because the McDowell proposal is not limited to meta-analysis, it would not unreasonable to characterize McDowell's approach (which includes IMPLAN modeling and specifically calls for review of studies from outside of Alaska as well as from within Alaska) as providing added value rather than, as Resource Dimensions asserts, not feasible at all.

Because Resource Dimensions has not shown that the McDowell proposal was not responsive, or that the evaluation as a whole is not reasonably supported by the objective facts, apart from matters that would not have affected the outcome of the solicitation, this appeal is denied.

DATED April 9, 2012.

By: *Signed* _____
Andrew M. Hemenway
Administrative Law Judge

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 19th day of June, 2012.

By: By Direction
Signature
Becky Hultberg
Name
Commissioner
Title

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