

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

RIGHT! SYSTEMS, INC.,	)	
	)	
v.	)	
	)	
ENTERPRISE TECHNOLOGY SYSTEMS	)	OAH No. 12-0008-PRO
_____	)	ITB No. 2012-0200-0692

**DECISION ON SUMMARY ADJUDICATION**

**I. Introduction**

Enterprise Technology Systems (ETS)<sup>1</sup> issued a solicitation for Cisco communications hardware, software, data center products, video products, and maintenance services. Three bids were received. Right! Systems, Inc.’s (RSI) bid was rejected as non-responsive due to the lack of required certifications at the time of bid submission. RSI filed a protest, objecting to: (1) the inclusion of certain products in the solicitation; (2) the requirement for video certification; and (3) the requirement for data center specialization certification. ETS denied the protest on the ground that it was untimely, and on the ground that the certification requirements did not unduly restrict competition. RSI appeals.

On appeal, ETS filed a motion for summary adjudication on the ground that the protest was untimely and, in the alternative, on the ground that the procurement officer’s decision that the certification requirements are not unduly restrictive had a reasonable basis. Because the protest was untimely, and RSI has not established good cause for accepting the untimely protest, ETS’s motion is granted.

**II. Facts<sup>[2]</sup>**

Enterprise Technology Services issued Invitation to Bid No. 2012-0200-0692 (ITB) on October 10, 2011.<sup>3</sup> The solicitation, entitled “Cisco Unified Communications, Hardware,

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<sup>1</sup> ETS is a division within the Department of Administration.

<sup>2</sup> ETS’s motion may be granted only if there is no genuine dispute as to a material fact. 2 AAC 64.250. Accordingly, the facts as stated are based on undisputed evidence in the record or, where the evidence is disputed, reflect the evidence viewed favorably to RSI. *See, e.g., Samaniego v. City of Kodiak*, 2 P.3d 78-82-83 (Alaska 2000); *Alaska Rent-A-Car, Inc. v. Ford Motor Company*, 526 P.2d 1136, 1138 (Alaska 19974).

Software and Smartnet Maintenance”, called for bids to be submitted no later than October 31, 2011.<sup>4</sup> The solicitation included a provision describing the purchasing agency’s intent:

**CONTRACT INTENT:** This solicitation is intended to result in a mandatory use term contract for purchase of Cisco Unified Communications hardware, software and Smartnet maintenance for the State of Alaska. The State Technology Management Council (TMC) has established Cisco brand as the standard for the many aspects of the State network infrastructure such as routers, switches and VoIP telephony. The Contractor will also be expected to provide technical sales support, such as assisting ETS personnel in determining the correct components needed, as required. Contractor will allow University of Alaska to purchase from any contract established from the ITB at the University’s sole discretion.<sup>[5]</sup>

Elsewhere, the solicitation addressed pricing:

**CONTRACT PRICES:** Contract prices for Cisco VoIP telephony equipment shall be determined by a set discount percentage off the Cisco Global Price List in effect at the time the order is placed. Discount percentages are to remain firm through the duration of the contract(s) and the extension or renewal of the contract(s).<sup>[6]</sup>

The solicitation included this requirement:

**CERTIFICATION OF CISCO PRODUCTS:** Bidder shall certify that they are a Cisco Authorized Partner as of the date of submission of their offer, and that they have the certification/specialization level required by Cisco to support both the product sale and product pricing. ...<sup>[7]</sup>

Bidders were required to bid on all items in order to be responsive.<sup>8</sup> A preface to the bid schedule noted that bidders should provide a discount to be “deducted from Cisco Systems’ most current Global price list for Cisco Unified Communications Hardware, Software and Smartnet maintenance,” which would remain in effect throughout the contract term.<sup>9</sup> The preface estimated annual purchases of \$5-15,000,000 “of Cisco Unified Communications equipment and Smartnet maintenance per year.”<sup>10</sup> The preface repeated that ETS’s intent “is for the State to be able to purchase any Cisco Unified Communications hardware, software firmware or Smartnet maintenance product on the Cisco Global Price List at set discounts throughout the entire term of

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<sup>3</sup> R. 1.  
<sup>4</sup> R. 1.  
<sup>5</sup> R. 6.  
<sup>6</sup> R. 9.  
<sup>7</sup> R. 9.  
<sup>8</sup> R. 11.  
<sup>9</sup> R. 12.  
<sup>10</sup> R. 12.

the contract.”<sup>11</sup> “For evaluation purposes,” the bid schedule provided for each bidder to submit their price discount for specified “categories from the Cisco Global Price List,” namely, (1) Hardware and Software; (2) Data Center Products; (3) Video Products, (4) SmartNet-Single year Renewal; and (5) SmartNet-Multi-year Renewal. The stated discount was to be applied to a stated assumed expenditure in each category, with the total price for all listed categories (after the discounts) constituting the evaluated price.<sup>12</sup>

RSI obtained and reviewed the ITB more than ten days prior to the date bids were due. At that time, it failed to notice that the bid schedule included line items for Video Products and Data Center Products.<sup>13</sup> Relying on the title of the ITB, and on the references in the body of the ITB to Cisco Unified Communications equipment and SmartNet maintenance, RSI understood the ITB to be limited to products in those categories. Within ten days of the date bids were due, while completing the bid schedule, RSI noticed that the bid schedule product categories included Video Products and Data Center Products.<sup>14</sup> Cisco Unified Communications hardware and software is equipment relating to the provision of VoIP solutions and related telephony services<sup>15</sup> and is distinct, in the Cisco marketing and pricing environment, from Cisco Unified Communications System equipment, which includes Data Center Products.<sup>16</sup> Video Products are Cisco Telepresence products, not Cisco Unified Communications equipment.<sup>17</sup> At the time of bid submission, RSI had the certification required by Cisco to support sales and pricing of all Cisco Unified Communications equipment, but it lacked the certifications required by Cisco to support sales and pricing of Cisco Video Products or Data Center Products.

Notwithstanding that it realized prior to the bid due date that it lacked the certifications required by Cisco for two of the product categories, RSI submitted a bid with pricing for all

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<sup>11</sup> R. 12.

<sup>12</sup> R. 12. A copy of the bid schedule is appended to this decision.

<sup>13</sup> See Protest Appeal, p. 2 (“Our initial review of ITB 2012-0200-0692 including the sections ‘Contract Intent’ and ‘Certification of Cisco Products’ did not reveal any mention of ‘Data Center Products’ or ‘Video Products.’”).

<sup>14</sup> Minor Affidavit, ¶2. See Protest Appeal, pp. 1, 2 (“certain ambiguities in the ITB were not discovered until the 10-day period...had expired.”; “RSI became aware of the requirement to submit pricing for both ‘Data Center Products’ and ‘Video Products’ while completing the pricing table contained in the bid schedule.”).

<sup>15</sup> See RSI Memorandum in Opposition to Motion for Summary Adjudication at 2. Viewed favorably to RSI, the terms of the ITB, and Mr. Minor’s affidavit, support RSI’s characterization. Whether RSI’s characterization is correct is in dispute. See Cockroft Affidavit, ¶3.

<sup>16</sup> Minor Affidavit, ¶¶2-4. Mr. Minor’s affidavit does not expressly make this distinction, but, viewed favorably to RSI, the affidavit so implies.

<sup>17</sup> Minor Affidavit, ¶¶3-4.

categories.<sup>18</sup> RSI's bid is dated October 28, 2011.<sup>19</sup> Bids were opened as scheduled, on October 31.<sup>20</sup> On November 1, ETS issued notice of intent to award the contract, to World Wide Technology, the incumbent contractor, at a bid price of \$31,900,000. RSI's bid was 2.3% lower, \$31,180,000, but was deemed non-responsive "due to lack of Cisco certification to sell video and data center products."<sup>21</sup> On November 14, RSI filed its protest.

### III. Discussion

Under Alaska law, a protest regarding the contents of a solicitation must be filed at least ten days in advance of the due date.<sup>22</sup> An untimely protest may be accepted for good cause, however.<sup>23</sup> In this case, RSI acknowledges that its protest was untimely, but it contends there is good cause to consider it on appeal.<sup>24</sup>

Good cause to consider an untimely protest, within the meaning of AS 36.30.565(b), is not limited to good cause for failure to file a timely protest; it means "good cause for accepting the protest under all of the circumstances."<sup>25</sup> Important factors to consider in deciding whether to accept an untimely protest include (1) the timing of the protest, (2) the nature of the objections raised, and (3) the strength of the evidence presented.<sup>26</sup>

RSI argues that there is both good cause for its failure to file a timely protest, in that RSI did not notice the "almost secretive inclusion" of the objectionable terms prior to the deadline for filing a timely protest,<sup>27</sup> and good cause to consider the issue raised, in that the objectionable terms allegedly unduly restricted competition by limiting the number of potential suppliers and improperly bundling disparate products.<sup>28</sup>

With respect to the timing of the protest, RSI's argues that its failure file a timely protest should be excused, because the ITB title, statement of intent, and price provision did not mention

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<sup>18</sup> See Protest Appeal, p. 1 ("Given the expiration of this important bid requirement, RSI felt compelled to proceed with its bid submission and rely on the possibility that a AS 36.30.565(b) protest for good cause might be accepted after the fact.").

<sup>19</sup> R. 36.

<sup>20</sup> R. 59.

<sup>21</sup> R. 59.

<sup>22</sup> AS 36.30.565(a).

<sup>23</sup> AS 36.30.565(b).

<sup>24</sup> [RSI] Memorandum in Opposition to Motion for Summary Adjudication, at 6-7 (hereinafter, Opposition).

<sup>25</sup> *In Re Electronic Data Systems*, Department of Administration No. 02.23 at 4 (2002) (hereinafter, *Electronic Data Systems*). See generally, *In Re Scientific Fishery Systems, Inc.*, Department of Administration No. 98.08 at 2-7 (1999) (hereinafter, *Scientific Fishery Systems*).

<sup>26</sup> See, e.g., *Austin v. Office of Public Advocacy*, at 3, OAH No. 11-0235-PRO (Commissioner of Administration 2012) (hereinafter, *Austin*).

<sup>27</sup> Opposition at 8.

<sup>28</sup> Opposition at 7, 8-13.

that Video Products or Data Center Products would be purchased under the contract; the only mention of those products was in the bid schedule. This argument is not persuasive, for two reasons. First, the ITB's reference to Video Products and Data Center Products was not hidden in fine print or couched in ambiguous language. It was plainly stated in the bid schedule, which is a key component in any ITB. RSI was obliged to carefully review the entire solicitation for objectionable materials, including the bid schedule.<sup>29</sup> While it may be that the ITB title and other provisions were misleading, or that ETS had not previously used the formal procurement process to purchase Video Products or Data Center products,<sup>30</sup> that would not excuse RSI's failure to identify a plainly stated term in the bid schedule in a timely manner. Second, RSI identified the problematic term at least three days before bids were due, and yet it chose to submit a bid without bringing the matter to the attention of the procurement officer. By electing to submit a bid, rather than filing an untimely protest along with, or prior to, its bid, RSI not only deprived the procurement officer of the opportunity to take corrective action, but also created an opportunity to take two bites at the apple: if it had won the contract, it would not have filed a protest. For these reasons, the timing of RSI's protest weighs against considering it now.

RSI's main argument concerns the nature of the claim raised in the protest. RSI argues that the protest should be considered because including Video Products and Data Center

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<sup>29</sup> The very first provision of the ITB stated: "Bidders shall carefully review this ITB for defects and questionable or objectionable material." R. 2. *See generally*, Tsuru Maritime, Inc. v. Department of Environmental Conservation, at 7-9, OAH No. 10-0620/0622-PRO (Commissioner of Administration 2010).

<sup>30</sup> RSI asserts that "additional equipment, never previously purchased by the Department by formal bid procurement," was included in the ITB. Opposition at 4. RSI's point, presumably, is that the agency has not previously purchased Video Products or Data Center Products by formal solicitation. ETS claims, however, that the ITB was "consistent with how the agency has handled this procurement in previous solicitations." Motion at 2. The solicitations provided as exhibits are titled "Purchase of Cisco Routers, Cisco Switches and related accessories" (ITB 2000-0200-1873; ITB 2003-0200-4132) and "Cisco Voice Over Internet Protocol (VoIP) Telephony Hardware, Software, and Related Accessories" (ITB 2006-0200-5919). One was subsequently amended to include "Cisco Threat Response Solutions and Security Audit and Assessment Solutions." Motion, Ex. A. p. 41 (ITB No. 2003-0200-4132).

To the extent that Video Products or Data Center Products consist of switches, routers, or other items purchased in the prior solicitations, those solicitations would support ETS's claim that this solicitation is "consistent with how the agency has handled this procurement in previous solicitations," in the sense that those products were obtained through the formal procurement process. However, ETS has not provided any evidence that Video Products or Data Center Products are switches, routers, or other items purchased in the prior solicitations. Quite obviously, the prior solicitations are all inconsistent with this solicitation in their terminology, in that none of the prior solicitations identifies Unified Communications products, Video Products or Data Center Products, either in the title or elsewhere, as the subject of the solicitation. They are all also inconsistent with this solicitation in that the bid schedule in each of the prior solicitations identifies specific products for pricing purposes, rather than generic product categories. Moreover, one of the prior solicitations is inconsistent in that it did not require bids for all lots, and provided for the award of multiple contracts in the event the same bidder was not the lowest for all lots. Motion, Ex. A, p. 35 (ITB No. 2003-0200-4132).

Products in the solicitation had the effect of unduly restricting competition. RSI asserts that only about 17 vendors nationwide meet the requirements for certification for those products in addition to being certified for Unified Communications products. RSI asserts that a solicitation for Unified Communications equipment, alone, would have opened the solicitation up to hundreds of potential suppliers. By combining Video Products and Data Center Products in the solicitation, RSI argues, ETS effectively limited competition to a relatively small group of potential vendors. Absent any reason for including those products in this solicitation, the approach taken by ETS constitutes improper bundling, RSI asserts.

In arguing that the nature of its claim warrants consideration of the protest, RSI points to a prior case in which the commissioner entertained an untimely protest asserting that the terms of the solicitation were unduly restrictive.<sup>31</sup> But in considering whether to accept an untimely protest, no single factor is dispositive: all of the relevant circumstances should be considered. In the prior case referenced by RSI, the solicitation was for development of a unique product that was of significant importance to one of the state's basic industries;<sup>32</sup> this procurement, by contrast, is "a straightforward procurement of off the shelf commercial products."<sup>33</sup> Nor is this a case in which the integrity of the procurement process is at issue;<sup>34</sup> there is no evidence, or even an allegation, that the solicitation was deliberately structured to limit completion.<sup>35</sup> Moreover, RSI admits that multiple vendors met the solicitation's certification requirements, and more than one responsive bid was received. Under these circumstances, the nature of RSI's claim does not mean that there is good cause to accept its untimely protest.

In terms of the strength of the evidence presented, RSI presented substantial evidence to support its claim that the solicitation unduly restricted competition by unnecessarily bundling disparate products in a single procurement. However, ETS presented evidence to the contrary.

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<sup>31</sup> Opposition at 7, citing Scientific Fishery Systems.

<sup>32</sup> See Scientific Fishery Systems, at 3.

<sup>33</sup> Opposition at 7.

<sup>34</sup> See Electronic Data Systems at 6 ("In prior cases, one factor that has been identified as supporting acceptance of an untimely protest is the existence of questions concerning the integrity of the procurement, such as bias, prejudice, or conflict of interest.") (citations omitted).

<sup>35</sup> Compare Austin, at 4 (untimely protest considered on appeal where "protest alleged that the RFP was specifically designed to avoid competition and direct the contract to one favored individual."); Geary v. Department of Transportation and Public Facilities, OAH No. 11-0367-PRO (Commissioner of Administration 2012) (untimely protest accepted by procurement officer; allegations of bad faith and unduly restrictive terms); In Re Sanders, OAH No. 05-0240-PRO, at 12-13 (Commissioner of Administration 2005) ("To the extent that Sanders asserts that an unduly restrictive minimum requirement was included in the request for proposals in bad faith, this factor weighs in favor of considering the propriety of the...experience requirement as evidence of bad faith.").

Moreover, RSI relies on federal procurement cases, rather than Alaska decisions, as the basis for its legal argument with respect to bundling. Whether RSI would prevail on its claim following a hearing is speculative. Under these circumstances, this factor does not indicate that the commissioner should reverse the procurement officer's decision to reject RSI's untimely protest.

**IV. Conclusion**

RSI's appeal was untimely, and the procurement officer found that there was not good cause to accept it. None of the important factors generally considered in connection with AS 36.30.565(b) warrants disturbing the procurement officer's decision. RSI's appeal is therefore denied.

DATED June 18, 2012.

*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 3<sup>rd</sup> day of August, 2012.

By: *Signed* \_\_\_\_\_  
Signature  
Becky Hultberg \_\_\_\_\_  
Name  
Commissioner \_\_\_\_\_  
Title

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