

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

GLOBAL POSITIONING SERVICES, INC.	)	
	)	
v.	)	
	)	
DEPARTMENT OF NATURAL RESOURCES	)	OAH No. 12-0083-PRO
<hr/>	)	RFP No. 2012-1000-0824

**CORRECTED DECISION<sup>1</sup>**

**I. Introduction**

The Department of Natural Resources issued a solicitation for a contractor to perform surveys of remote recreational cabin sites for disposal by the State of Alaska. The Department received responsive proposals from three respondents and issued notice of intent to award the contract to Mullikin Surveys, Inc. (Mullikin). Global Positioning Services, Inc., (GPS) another respondent, filed a protest, which was denied.

GPS filed an appeal, asserting that the evaluation did not reasonably reflect the merits of its proposal and that one of the evaluators was biased. The administrative law judge conducted a hearing at which both parties were represented by counsel.

Because GPS did not establish that the evaluation was unreasonable or that the evaluator was biased, the appeal is denied.

**II. Facts**

A. Background

The Department of Natural Resources manages large tracts of land on behalf of the State of Alaska, much of it in remote locations. Through the Division of Mining, Land and Water (Division), the Department regularly disposes of parcels of those lands by sale or other offerings to state residents. Under the Remote Recreational Cabin Sites program, the Division identifies an area in which individuals may stake a lot for subsequent purchase. Before the purchase is effected, the Division solicits proposals from licensed land surveyors to survey the staked lots and prepare plats reflecting the surveys. Division staff evaluate the proposals and the procurement officer awards

surveying contracts based on the evaluation. At the conclusion of each contract, Division staff conduct a review and assign a score to the contractor based on its performance on the contract.

Prior to 2006, GPS did not participate in the Remote Recreational Cabin Site solicitations. However, a former long-time GPS employee, Mark Hall, went to work for the Division and encouraged GPS to do so. GPS, which specializes in remote site surveying, began submitting proposals in response to the Division's Remote Recreational Cabin Site solicitations in May, 2006. From May, 2006, through February, 2012, the Department issued at least 26 solicitations for land surveying services in connection with the Remote Recreational Cabin Sites program.<sup>2</sup> GPS responded to 26 solicitations and was awarded ten of the 26 contracts resulting from them.<sup>3</sup>

In two solicitations in early 2007, GPS noticed that the evaluators' score on the evaluation factor for qualifications and experience for the two successful offerors had varied substantially from one solicitation to the next.<sup>4</sup> The firm began tracking evaluation scores and solicitation outcomes closely.<sup>5</sup> In two successive solicitations issued in February and March, 2008, GPS submitted the lowest cost proposal but the contract was awarded to a competitor, Mullikin.<sup>6</sup> After the second solicitation, Stan Sears, GPS's president, and Tom Moore, the firm's vice president, met with Ted Garten and Sam Naramore, who work in the Division's survey section, to discuss the solicitation process. Mr. Sears and Mr. Moore pointed out that on the two recent solicitations GPS had substantially different scores for its qualifications and experience, even though the

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<sup>1</sup> The proposed decision at page 8 erroneously identified one of the members of the proposal evaluation committee as Mark Hall, rather than Sam Naramore. This corrected decision corrects that manifest error. See 2 AAC 64.350(a).

<sup>2</sup> GPS Ex. A. This exhibit reflects Department solicitations on which GPS submitted bids. It appears these constituted most of the solicitations issued during that period of time, at least for the Remote Recreational Cabin Site program: Mr. Garten testified that as head of that program, he had been involved in 56 such solicitations during over the preceding ten years. Mr. Brown testified that he had issued approximately 10 solicitations per year.

<sup>3</sup> GPS Ex. A. During this period of time, GPS was also awarded contracts for four of the eight other types of surveying contracts for which it submitted proposals. Those solicitations involved cadastral surveys, right-of-way surveys, and subdivision surveys. *Id.*

<sup>4</sup> T. Moore testimony [1:24]. The average score for Tanana Chiefs Conference went from 173 points on a January, 2007, solicitation, to 160 points on a March, 2007, solicitation; the average score for Cline and Associates went from 175 points to 190 points. On the same two solicitations, GPS's average score went from 172 points to 167 points. See GPS 15, GPS 18.

<sup>5</sup> T. Moore testimony [1:24].

firm's experience and personnel were unchanged,<sup>7</sup> and that in the most recent solicitation, an evaluator had criticized the GPS proposal for not addressing logistics even though the proposal specifically addressed that issue.<sup>8</sup> Following that meeting, Mr. Sears and Mr. Moore met with Marlys Hagen, the Department's procurement officer. Ms. Hagen agreed that the evaluator had overlooked GPS's mention of logistics.<sup>9</sup> She agreed to review the Division's process; the GPS officials were mollified and the firm stopped tracking the evaluation scoring.<sup>10</sup>

On March 1, 2011, GPS submitted a proposal in response to a solicitation for surveys of the Freshwater Bay subdivision.<sup>11</sup> Because it was a tidewater site, the solicitation required identification of the mean high water line.<sup>12</sup> In addition, wetlands delineation was required.<sup>13</sup> Four responsive proposals were received and evaluated by a proposal evaluation committee consisting of three members of the Division's survey section, Ted Garten, Mark Hall, and George Horton.<sup>14</sup> GPS was ranked tied for first by one, second by another, and third by the last.<sup>15</sup> GPS's combined total score from the three evaluators made it the third highest-ranked proposal overall on the non-cost evaluation factors.<sup>16</sup> GPS, however, was the lowest-priced offeror.<sup>17</sup> Overall, after adding in the points awarded for cost, GPS was the highest-ranked proposal.<sup>18</sup>

The members of the committee submitted their scores to William Brown, the contracting officer for the survey section. Mr. Brown reviewed the scores awarded to GPS by the members of the evaluation committee and concluded that, in his opinion, they were more favorable than the proposal warranted, primarily because he deemed the

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<sup>6</sup> GPS Ex. A (items 9, 10); GPS Ex. C (GPS 29-31; 33-34).

<sup>7</sup> T. Moore testimony [1:27]. GPS was awarded an average of 168 points on the first solicitation, in February, and 180 on the second, in March. *See* GPS 29, GPS 33.

<sup>8</sup> T. Moore testimony [1:27].

<sup>9</sup> S. Sears testimony [3:22]; T. Moore testimony [1:27]. Ms. Hagen recalled the meeting and the general subject, but had no specific recollection of what she had said. M. Hagen testimony [0:46].

<sup>10</sup> T. Moore testimony [1:27].

<sup>11</sup> GPS Ex. L (GPS 322).

<sup>12</sup> *Id.* at GPS 298.

<sup>13</sup> *Id.* at GPS 299.

<sup>14</sup> GPS Ex. A.

<sup>15</sup> GPS Ex. C (GPS 76).

<sup>16</sup> GPS was awarded 1715 points, as compared with 1725 for Sentec and 1775 for Alaska Rim. *See* GPS Ex. C (GPS 76).

<sup>17</sup> GPS Ex. C (GPS 76).

<sup>18</sup> GPS Ex. C (GPS 76).

firm's methodology for delineating wetlands to be infeasible.<sup>19</sup> Without consulting or notifying the members of the committee, Mr. Brown independently scored all of the proposals.<sup>20</sup> He ranked GPS as the third-highest proposal.<sup>21</sup> Adding his score to the scores awarded by the committee, together with the points awarded for cost, changed GPS from the highest ranked score overall to the second highest. Mr. Brown included his score in the evaluation memorandum provided to Ms. Hagen, resulting in award of the contract to a competitor rather than to GPS.<sup>22</sup>

B. Preparation and Requirements of North Fork RFP

On January 11, 2012, the Department issued the solicitation that is the subject of this appeal, Request for Proposals No. 2012-100-0824 (North Fork RFP), for the North Fork Big River Remote Recreational Cabin Site land disposal. Ms. Hagen was the procurement officer for the solicitation.<sup>23</sup> Under a delegation from Ms. Hagen, Mr. Brown was responsible for the administration of the solicitation.<sup>24</sup> At his direction, Ted Garten, who manages the Remote Recreational Cabin Site program, drafted the solicitation, using prior solicitations as a template.<sup>25</sup>

Solicitations for the Remote Recreational Cabin Site program surveys are virtually identical from one offering to the next, except for project details as stated in the Scope of Work and the Special Survey Instructions.<sup>26</sup> The Scope of Work consists of

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<sup>19</sup> W. Brown testimony [4:48].

<sup>20</sup> Mr. Brown testified that he had brought his concerns to the attention of the Freshwater Bay evaluators, Mr. Garten, Mr. Hall and Mr. Horton, and asked them to take another look, but they "were happy with what they did.", and that he told them he would be supplementing their scores with his own. W. Brown testimony [4:39-4:42]. However, none of those individuals recalled any such conversation or had any knowledge that Mr. Brown had supplemented their scores with one of his own. T. Garten testimony [0:10]; G. Horton testimony [3:59-4:08]; M. Hall testimony 3:44-3:45]. The preponderance of the evidence is that Mr. Brown did not discuss the matter with the members of the committee.

<sup>21</sup> See GPS Ex. C (GPS 76).

<sup>22</sup> See GPS Ex. A, Ex. C (GPS 76).

<sup>23</sup> DNR 7 (RFP p. 5, §12.01). A procurement officer is "a person authorized to enter into and administer contracts for an agency and make written determinations with respect to them; it also includes an authorized representative of a procurement officer acting within the limits of authority." AS 36.30.990(18). Under various statutes and regulations, the procurement officer has specific duties in connection with the solicitation.

<sup>24</sup> Testimony of W. Brown. The record does not show the extent to which Ms. Hagen delegated her authority as the procurement officer for this solicitation to Mr. Brown.

<sup>25</sup> Testimony of T. Garten.

<sup>26</sup> See generally testimony of W. Brown, T. Garten, *et al.* Review of the requests for proposals included in the record demonstrates that the solicitations are largely identical except with respect to geography, the parcels to be staked, and the platting authority. See GPS Ex. D (Big River South); GPS Ex.

generic language used in all Remote Recreational Cabin Site solicitations regarding the standard surveying practices to be followed with respect to such things as monumentation (setting permanent monuments), identification of public waters and trails, and brushing boundary lines, as well as project specific details regarding the number and size of parcels, the length of meanders and trails, and the number of corners, control monuments, and primary monuments. The Special Survey Instructions provide project specific details regarding variations from the field staking instructions for each parcel, identify any waivers from the general survey rules applicable to particular parcels, and otherwise provide specific directions for each parcel to be surveyed.

The North Fork RFP was for an area about 10 miles north of a 2008 solicitation for the Big River South area on which GPS had been awarded the contract.<sup>27</sup> The North Fork RFP used the standard generic language regarding surveying practices<sup>28</sup> and provided the usual specific project details in the Scope of Work and Special Survey Instructions.<sup>29</sup> The estimated cost of the project was \$45,000-\$55,000.<sup>30</sup>

The North Fork RFP, again using generic language, provided that cost would be 20% of the total points awarded in the evaluation. 50% of the points in the evaluation would be awarded based on the offeror's understanding of the project, methodology, and proposed work plan (Understanding and Methodology), 20% on the qualifications and experience of the firm and its personnel (Qualifications and Experience), and 10% for the Alaska offeror preference (if applicable).<sup>31</sup> The proposals were to be evaluated with respect to two of the factors, Understanding and Methodology (50%) and Qualifications and Experience (20%), by a proposal evaluation committee.<sup>32</sup> For each of the factors evaluated by the proposal evaluation committee, the solicitation included a list of questions that were to guide the evaluators' scores, 14 dealing with Understanding and

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P (Redlands), GPS Ex. S (Ugak Bay). The latter site was tidewater, and therefore the Scope of Work included a requirement to identify the mean high water mark. GPS Ex. S, GPS 605 (RFP p. 20, §5.02).

<sup>27</sup> See GPS Ex. F (GPS 161).

<sup>28</sup> DNR 21.

<sup>29</sup> DNR 21-22 (RFP pp. 19-20, §5.01, Scope of Work; pp. 33-35, Special Survey Instructions).

<sup>30</sup> DNR 8 (RFP p. 6, §1.04).

<sup>31</sup> DNR 26-27 (RFP pp. 24-25, §§7.02-7.05).

<sup>32</sup> DNR 25 (RFP p. 23, §7.01).

Methodology and six with Qualifications and Experience.<sup>33</sup> Offerors were notified of the evaluators' general approach:

[W]hen evaluating proposals, an emphasis is put on detailed discussion of project specific understanding and methodology. Full points are not awarded for a general discussion of surveying methods. If administrative parcels are being surveyed as a part of this project the discussion should also include how the offeror would go about locating those parcels including a list of selection criteria.<sup>[34]</sup>

C. Preparation and Content of GPS Proposal

Lindsay Vaughn, a land surveyor employed by GPS, has been drafting GPS's proposals for a number of years. She, like Mr. Sears and Mr. Moore, was of the view that the firm's methodology from one solicitation to the next was substantially the same, and that it was difficult to substantially differentiate the firm's response with respect to different projects.<sup>35</sup> Over time, accordingly, the firm's responses did not substantially differ from one offering to the next.<sup>36</sup> Moreover, she viewed it as unnecessary to repeat in depth those elements of the firm's methodology that remained the same from one to the next, reasoning that because the firm had performed substantially similar tasks for the Division on multiple occasions the Division was familiar with the firm's methods and it was unnecessary to repeat those details.<sup>37</sup>

The GPS proposal set forth its understanding of the project in a brief one-page section referencing the key components of the project as stated in the solicitation, and mentioning the firm's commitment to professional, economical service and its substantial experience in prior Remote Recreational Cabin Site surveys.<sup>38</sup> With respect to its methodology, apart from referencing various methods required by the solicitation, GPS's proposal provided these particulars:<sup>39</sup>

- Records Research and Pre-computations: Review of existing plats and easements for the area and identification of search coordinates with a field checklist

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<sup>33</sup> DNR 26 (RFP p. 24, §§7.02-7.03).

<sup>34</sup> DNR 23 (RFP p. 23, §6.08).

<sup>35</sup> See, e.g., T. Moore testimony [1:33-1:38]; L. Vaughn testimony [2:10, 2:41-2:45, 2:56]; S. Sears testimony [3:13].

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> DNR 74-75 (GPS Proposal, pp. 4-5).

<sup>39</sup> DNR 75-78 (GPS Proposal, pp. 5-8).

detailing needed data and necessary field investigations, to ensure “that all design concerns and issues can be definitively resolved prior to final determination.”<sup>40</sup>

- Logistics: A helicopter as “the primary mode of transportation to complete the survey;”<sup>41</sup> the same logistical plan GPS had used on the Big River South project, with two-man work crews staying at nearby hunting lodge and using the helicopter to access the work site.<sup>42</sup>

- Survey Standards: Use of “closed GPS loops and other field methods that will ensure redundant checks on all measurements,” and use of “NGS OPS solution as a Basis of Coordinates;”<sup>43</sup> Plats drafted in AutoCAD, with “the NGS conversion utility NADCON to convert between NAD 27 and NAD 83 (1992) coordinates values.”<sup>44</sup>

- Survey Methodology: “[E]mploy fast static observations on all recovered monument locations;” “Set corners will be positioned using real-time kinematics GPS methods...confirmed with redundant fast static observations;”<sup>45</sup> Trimble receivers and two data controllers to “be used as the primary tools of field instrumentation” with GPS data “processed and adjusted using Trimble software.”<sup>46</sup>

- Monumentation: GPS noted it had set over 5,000 primary monuments in Alaska, and that it “understands the procedures needed to establish a solid permanent monument in all types of soil found in Alaska.”<sup>47</sup> Monuments were to be “pre-stamped in Anchorage.”<sup>48</sup> GPS proposed to prepare field sheets recording the location of monuments and noting the species, marking and location of bearing trees.<sup>49</sup>

- Platting Methodology: GPS anticipated use of four or five 24” x 36” sheets at a 1”= 200’ scale,<sup>50</sup> with multiple independent reviews for accuracy.<sup>51</sup>

- Quality Assurance: Procedures listed as described elsewhere in the proposal.<sup>52</sup>

With respect to its work plan, the GPS proposal listed and provided a schedule with four primary tasks:

- Preliminary Fieldwork: project startup and organization (obtain all survey records; examine against lease descriptions for ambiguities and conflicts; draft digital map; create standard pre-printed field note sheets; prepare preliminary fieldwork

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<sup>40</sup> DNR 75 (GPS Proposal, p. 5).  
<sup>41</sup> DNR 75 (GPS Proposal, p. 5).  
<sup>42</sup> DNR 75 (GPS Proposal, p. 5).  
<sup>43</sup> DNR 76 (GPS Proposal, p. 6).  
<sup>44</sup> DNR 76 (GPS Proposal, p. 6).  
<sup>45</sup> DNR 76 (GPS Proposal, p. 6).  
<sup>46</sup> DNR 76 (GPS Proposal, p. 6).  
<sup>47</sup> DNR 76 (GPS Proposal, p. 6).  
<sup>48</sup> DNR 76 (GPS Proposal, p. 6).  
<sup>49</sup> DNR 77 (GPS Proposal, p. 7).  
<sup>50</sup> DNR 77 (GPS Proposal, p. 7).  
<sup>51</sup> DNR 78 (GPS Proposal, p. 8).  
<sup>52</sup> DNR 78 (GPS Proposal, p. 8).

checklist); field work (single team, 2-3 days; recover monuments; tie staked corners, survey riparian lines and existing trails; photograph site)

- Preliminary Platting: parcel design and approval by the Department;
- Final Review and Monumentation: two two-man crews; redundant fast static observations to confirm monumentation; set monuments, complete field notes and parcel descriptions; brush administrative parcels
- Final Plat: Edit plat based on Department review; create Mylar and CD.<sup>53</sup>

GPS did not “foresee any significant problems with the parcel designs[,]” noting that “[i]t is difficult to predict problems without having visited the site” and that the firm’s plan to return to Anchorage after the preliminary field work would provide an opportunity to work through any “potential design problems” with the Department.<sup>54</sup> GPS offered a total price of \$53,411,<sup>55</sup> just within the range of the Division’s estimated cost of \$45,000-\$55,000. GPS had reviewed the likely costs for the project and concluded that because GPS owns a helicopter, only GPS would be able to perform the project, using a helicopter, within the Division’s estimated cost.<sup>56</sup>

#### D. Evaluation

Mr. Brown appointed three employees of the survey section as the proposal evaluation committee: Ted Garten, Sam Naramore, and himself. Each of the three independently reviewed the proposals and scored them on evaluation score sheets. Each evaluator’s score sheet included a total of 1,000 possible points, 580 of which were subject to award by the evaluator. The remaining 420 points were pre-determined based primarily on objective factors (*e.g.* price, Alaskan offeror preference), with the amount awarded for those factors shown on the evaluation score sheets.<sup>57</sup> For the 580 points awarded by each evaluator, the score sheets listed 20 questions corresponding to the 20 questions listed in the solicitation, with space for the evaluator’s score on each question in amounts ranging from 20 to 75 points per question.

The 580 points awarded by each evaluator were in two categories, Understanding and Methodology (470 points) and Qualifications and Experience (110 points). Thus, the

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<sup>53</sup> DNR 78-80 (GPS Proposal, pp. 8-10).

<sup>54</sup> DNR 80 (GPS Proposal, p. 10).

<sup>55</sup> DNR 85 (GPS Proposal, p. 15).

<sup>56</sup> T. Moore testimony [1:34].



combined maximum possible total evaluated score was 1,410 points (3 x 470) for Understanding and Methodology and 330 points (3 x 110) for Qualifications and Experience. The evaluators awarded GPS a combined total of 1,095 points and 330 on these factors, respectively. In addition, GPS received a combined total of 1,185 pre-determined points, including the maximum 600 (3 x 200) for price as the lowest-cost offeror and 105 points (3 x 35) of a possible 150 (3 x 50) for past performance. GPS's combined total score of 2,610 points (1,095 + 330 + 1,185) made it the second highest ranked offeror. The highest ranked offeror was Mullikin, which received a total score of 2,633 points.<sup>58</sup> The third offeror, Sentec, received a total score of 2,515 points. The Division issued notice of intent to award the contract to Mullikin.

E. Protest and Appeal

GPS filed a protest on March 14, 2012.<sup>59</sup> The protest raised two issues: first, that the cost of the Mullikin proposal, which was substantially in excess of the Division's estimated cost, was excessive; and second, that the scores awarded to GPS, particularly with respect to its methodology, were unreasonably low. The procurement officer denied the protest, noting that the Division's cost estimate does not represent the maximum available funds and that cost was afforded only 20% of the total evaluation, and that the evaluation of proposals is inherently subjective.<sup>60</sup> GPS filed an appeal. Its appeal raised a third issue, namely, that Mr. Brown, one of the evaluators and the supervisor of the other two, was biased against GPS.<sup>61</sup> Mr. Brown and Mr. Sears, GPS's owner, had some twenty years previously been involved in a joint venture that "did not end well" and had caused some harsh words between the two at the time.<sup>62</sup>

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<sup>57</sup> The pre-determined factors, and the maximum score for each were: price (200 points); Alaska offeror (100 points); complete submission (30 points); past performance (50 points); proximity (40 points).

<sup>58</sup> Ex. 9.

<sup>59</sup> Ex. 11.

<sup>60</sup> Ex. 13.

<sup>61</sup> DNR 164-165.

<sup>62</sup> Testimony of S. Sears, Testimony of W. Brown.

### III. Discussion

#### A. Cost

In its appeal, GPS argues that the contract should not have been awarded to Mullikin, because Mullikin's proposed cost of \$68,307.20 was significantly higher than the Division's estimated cost of \$45,000-\$55,000.<sup>63</sup>

The manner in which the Division determined the estimated cost is unknown and there is no evidence regarding the amount of funding that the Division had available for this project. The solicitation expressly stated that payment for the contract was "subject to funds already appropriated and identified,"<sup>64</sup> and the Division retained authority to negotiate price and to make adjustments that might "reduce overall project costs."<sup>65</sup> The Division also had the authority to terminate negotiations if the intended contractor could not "perform the contract within the budget funds available for the project."<sup>66</sup> That the Division estimated the cost of the project as \$45-55,000 does not mean that it lacks budgetary authority to spend more than that amount, and nothing in the solicitation precluded it from awarding the contract to an offeror submitting a proposal in excess of that amount.

GPS's broader point is that the price differential between its offered price and the winning offeror's price is greater than any added value in the winning proposal. This in substance is an argument that price should be afforded more than 20% of the weight in evaluating the proposals. However, the 20% factor was set forth in the solicitation.<sup>67</sup> GPS did not file a protest objecting to that provision before the due date for submitting proposals, and the Division may not, consistent with the Procurement Code, afford price

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<sup>63</sup> DNR 167-168.

<sup>64</sup> DNR 19 (RFP p. 17, §3.08).

<sup>65</sup> See DNR 25 (RFP p. 23, §6.07).

<sup>66</sup> DNR 16 (RFP p. 14, §2.19).

<sup>67</sup> AS 36.30.270 generally exempts contracts for surveying services from the competitive price aspects of the Procurement Code. However, AS 36.30.270(d) permits consideration of price as an evaluation factor when:

In the judgment of the procurement officer, the services required are repetitious in nature, and the scope, nature, and amount of services are thoroughly defined by measurable and objective standards to reasonably enable firms...making proposals to compete with a clear understanding and interpretation of the services required.

Because the procurement officer has provided for price to be an evaluation factor in the acquisition of survey services for the Remote Recreational Cabin Site program, it is clear that she has determined that

a different weight in the evaluation than was stated in the solicitation. Because GPS failed to file a timely protest objecting to the 20% figure, this argument has been waived.<sup>68</sup>

B. GPS Did Not Establish Bias

On appeal, GPS argues that the evaluation process was unfair because Mr. Brown, who is the contracting officer of the survey section and in that capacity supervises the other evaluators and is responsible for administering the solicitation process, is biased against GPS.<sup>69</sup> Mr. Brown's alleged bias is the result, according to GPS, of residual ill-will stemming from a prior business relationship with Stan Sears, GPS's principal.<sup>70</sup> In support of the allegation, GPS points to Mr. Brown's intervention in the Freshwater Bay solicitation, which resulted in GPS losing a contract that it would otherwise have been awarded,<sup>71</sup> GPS's scores for past performance,<sup>72</sup> and to what it characterizes as disparaging remarks by Mr. Brown in his evaluation of the GPS proposal.<sup>73</sup> At the hearing, GPS witnesses speculated that bias or other improper motives had led the Division to rotate contracts among qualified offerors, rather than to award them on the basis of fair and impartial evaluations.<sup>74</sup>

In the absence of a showing of actual bias or prejudice, procurement officials are presumed to act in good faith and to exercise honest and impartial judgment.<sup>75</sup> To overcome the presumption, a protestor must provide direct evidence of actual bias or prejudice, rather than speculation and inference.<sup>76</sup>

In this case, it is undisputed that about 25 years ago Mr. Brown and Mr. Sears were involved in a joint venture in which they disagreed as to the division of the proceeds, resulting in some harsh words and bad feelings. This is circumstantial

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those services are "repetitious in nature" and that the "scope, nature, and amount of services are thoroughly defined by measurable and objective standards[.]"

<sup>68</sup> See AS 36.30.565(a).

<sup>69</sup> DNR 164-165.

<sup>70</sup> *Id.*

<sup>71</sup> Testimony of T. Moore.

<sup>72</sup> DNR 165, 170.

<sup>73</sup> DNR 165.

<sup>74</sup> T. Moore testimony [1:31]; S. Sears testimony [3:20].

<sup>75</sup> See, e.g., In Re Kyllonen, OAH No. 08-0399-PRO at 6 (Commissioner of Administration 2009); North Pacific Erectors, Inc. v. Division of General Services, OAH No. 11-0061-PRO at 14 (Commissioner of Transportation and Public Facilities 2011).

evidence of bias, no more. Similarly, Mr. Brown's intervention in the Freshwater Bay solicitation might be viewed as circumstantial evidence of bias. That on a couple of occasions contract section staff made comments that GPS perceived as suggesting that contract awards were manipulated<sup>77</sup> might also be seen as circumstantial evidence of bias.<sup>78</sup> Because there is only circumstantial evidence of bias, the presumption of good faith has not been rebutted.

Even in the absence of direct evidence of bias, however, there may be a sufficient appearance of impropriety to warrant relief.<sup>79</sup> In this case the circumstantial evidence of bias is attenuated and weak. The business dispute occurred many years ago and Mr. Brown denied that he harbored any ill will. Although Mr. Brown's intervention in the Freshwater Bay evaluation was improper, he provided a reasoned explanation for his action.<sup>80</sup> Mr. Brown did not generate the past performance scores that GPS claims demonstrate his bias. The ambiguous statements of Division employees alluded to by GPS appear to be harmless banter, and the allegedly disparaging tone of Mr. Brown's evaluation comments reflect his evaluation of the proposal, not his opinion about Mr. Sears or his firm.

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<sup>76</sup> *Id.*

<sup>77</sup> According to Mr. Moore, at one point during a discussion of the solicitation process, Mr. Garten or Mr. Hall said to Mr. Moore, "How else am I going to take care of my A teams?" T. Moore testimony [1:41]. Ms. Vaughn testified that at another time, Mr. Garten held told her, "we like you but you can't be greedy." L. Vaughn testimony [2:01]. Ms. Vaughn added that she took this to be a jocular comment. *Id.*

<sup>78</sup> Cf. Kinzel v. Discovery Drilling, Inc., 93 P.3d 427, 435 (Alaska 2004) (ambiguous statement is not direct evidence of bias); Mahan v. Arctic Catering, Inc., 133 P.3d 655, 662 (Alaska 2006) (statement "directly reflecting [a] discriminatory attitude" may be considered direct evidence of bias).

<sup>79</sup> See Empyra, Inc. v. Alaska Permanent Fund Corporation, OAH No. 06-0520-PRO at 9 (Executive Director 2006); In Re Sanders, OAH No. 05-0240 at 16 (Commissioner of Administration 2005).

<sup>80</sup> Section 2.09 of the solicitation states:

All responsive proposals will be reviewed and evaluated by a committee...made up of three representatives from the Division.... Other representatives may be added as appropriate....

Mr. Brown's opinion was that GPS wetlands methodology was not feasible, and he justified his intervention on the basis of the second quoted sentence. His interpretation of that sentence is incorrect. That sentence provides for inclusion of a non-Division "representative" (*i.e.*, someone who is not a Division employee), but it does not permit the addition of a new member, employee or not, after the proposal evaluation committee has completed its final evaluation. In the event of a perceived error in the evaluation, the contracting officer may request that the "Procurement Officer...recommend that proposals be reevaluated." See RFP §7.06. Alternatively, the issue of wetlands delineation could have been addressed through discussions and reevaluation, as provided in 2 AAC 12.370-.380, or in contract negotiations.

Moreover, under Mr. Brown's supervision GPS had been successful in 10 of the 26 Remote Recreational Cabin Site program solicitations in which it has participated, a success rate better than its two most common competitors during that time frame, one of whom was Mullikin.<sup>81</sup> While GPS has been successful with more frequency when Mr. Brown was not an evaluator than when he was,<sup>82</sup> GPS did not show that Mr. Brown's scores for GPS have been inconsistent with those of the other evaluators. As GPS points out, because the pre-determined scores for price, *etc.*, were included on the score sheets, it was possible for individual evaluators to determine the effect of their scores on the offerors' overall rank. For this reason, omitting pre-determined scores from the evaluation score sheets is sound procurement practice, and which the Division has shown no reason to disregard. However, to rotate contracts, as GPS speculates occurred, more than individual manipulation of scores would be needed: it would require tracking contract awards and coordinating scoring by all the evaluators. The evidence is that contract awards were not tracked and evaluators scored proposals independently. Finally, omitting Mr. Brown's score on this particular proposal would not have changed the outcome.<sup>83</sup> Under these circumstances, there is not a sufficient appearance of impropriety to warrant intervening in the outcome of this solicitation.

C. The Evaluation Was Reasonable

GPS argues that the evaluation was unreasonable for a variety of reasons. The central point it made in its protest, and a common theme running through a number of its arguments on appeal, is that the differences from one project to the next are insufficient to warrant a highly subjective evaluation process.<sup>84</sup> GPS argues, with respect to its scores for methodology, that because GPS has proposed substantially the same methodology on many different solicitations, it should have received substantially the

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<sup>81</sup> GPS's two most frequent competitors have been Mullikin and Sentec. Mullikin was the successful offeror on four of 14 Remote Recreational Cabin Site solicitations it has sought, a success rate of 28.6%. Sentec has submitted proposals on 15 Remote Recreational Solicitations and has not won any. Two other firms (who rarely compete against GPS) Manley and Cline, have a higher success rate than GPS: Manley has been awarded the contract on two of the three Remote Recreational Cabin Site solicitations it has responded to, and Cline four of eight.

<sup>82</sup> GPS was successful of 10 of 18 Remote Recreational Cabin Site solicitations when Mr. Brown was not an evaluator, and on only 2 of 8 when he was. See Exhibit C.

<sup>83</sup> Mullikin's combined score, including price, was higher than GPS's on all three evaluators' scoresheets. See DNR 152.

<sup>84</sup> See DNR 158.

same scores on that factor, and that its somewhat lower score on the North Fork solicitation is unreasonable for that reason alone. But that scores vary from one solicitation to the next reflects the reality that different evaluators may have different opinions as to the value of a particular approach, as well as that the same evaluator might score differently when viewing the identical proposal on different occasions. Scoring proposals is an inherently subjective and variable exercise.

To the extent that GPS objects that the evaluators' scores are unreasonable, the question to be determined 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]."<sup>85</sup> An evaluation is reasonable if "the objective facts...reasonably support [the] evaluations."<sup>86</sup> In this case, the record includes the score sheets of each evaluator, and each of them testified at the hearing as to the basis for his scores. There is ample evidence of the basis for their scores and that each of them considered all of the important evaluation factors. The only question on appeal is whether the objective facts reasonably support the evaluations.

GPS's specific objections, as set forth in its appeal, are as follows: (1) GPS's past performance scores were too low, considering GPS had "received a lot of positive feedback from our field inspectors and plat reviewers;"<sup>87</sup> (2) Mr. Naramore's notes state that quality control was "not specifically addressed", although the GPS proposal mentions quality control on multiple occasions;<sup>88</sup> (3) Mr. Naramore's score for adequate support in personnel and a realistic and complete schedule were unduly low;<sup>89</sup> (4) all evaluators' scores for logistics were unduly low;<sup>90</sup> (5) Mr. Naramore's<sup>91</sup> and Mr. Brown's<sup>92</sup> scores for work plan and methodology were unduly low; (6) all evaluators' scores for GPS's understanding were unduly low;<sup>93</sup> (7) Mr. Garten deducted points for a

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<sup>85</sup> In Re World Wide Movers, Inc., at 10, *citing* King v. Alaska Housing Authority, 633 P.2d 256, 263 (Alaska 1981); State, Department of Education v. Nickerson, 711 P.2d 1165, 1169 (Alaska 1985); Lower Kuskokwim School District v. Foundation Services, Inc., 909 P.2d 1283, 1388-89 (Alaska 1996).

<sup>86</sup> King v. Alaska State Housing Authority, 512 P.2d 887, 894 (Alaska 1973).

<sup>87</sup> DNR 170.

<sup>88</sup> DNR 170-171.

<sup>89</sup> DNR 171-172.

<sup>90</sup> DNR 172.

<sup>91</sup> DNR 172.

<sup>92</sup> DNR 173.

<sup>93</sup> DNR 172.

low number of platting sheets;<sup>94</sup> and (8) all evaluators deducted points for GPS's failure to identify potential problems.<sup>95</sup>

(1) Past Performance

50 points on each evaluation score sheet were awarded for the offeror's performance on past contracts. GPS was awarded 35 points on each, for a combined total of 105 points. GPS's appeal asserted that past performance scores were too low, considering that GPS had "received a lot of positive feedback from our field inspectors and plat reviewers."<sup>96</sup>

Testimony at the hearing established that points for past performance were determined based on the scores awarded to each contractor in a post-contract review. Typically, Mr. Naramore conducted the post-contract review<sup>97</sup> and Mr. Garten awarded points for past performance based on the average score received on the post-contract review. Seven of the post-contract reviews for GPS were submitted into evidence. The contracts covered by the reviews were the result of solicitations conducted from September, 2007, through January, 2011, and the reviews were issued following completion of the contracts, from November, 2008, through April, 2012. Five of the post-contract performance reviews were issued before the evaluation of the North Fork Big River proposals was conducted. The average score on those reviews was 35.4 points. GPS was awarded 35 points on the past performance factor.

The basis for the GPS protest was that it had received favorable comments from field inspectors and plat reviewers. This may be so, but it is the formal in-house post-contract reviews, not informal feedback or comments to the contractor, that determines the points awarded in the evaluation of proposals. The evidence supports the less-than-exemplary scores awarded for some of the contract reviews.<sup>98</sup> Because GPS has not

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<sup>94</sup> DNR 173.

<sup>95</sup> DNR 173.

<sup>96</sup> DNR 170.

<sup>97</sup> SN Testimony, 5:28-5:29. *See* Ex. 17 (initials SN on six of seven evaluation forms; TG on one).

<sup>98</sup> *See* Ex. 17, p. 16 (Kogruklu River; April 19, 2009; 35 points) (plats "Not to the level that we have seen in the past, but average."; late start on job "ultimately made field inspection impossible due to weather"), Ex. 17, p. 10-12 (Donkey Terraces, April 25, 2011, 30 points) ("constantly changing the field completion dates"; performance not as efficient as claimed in proposal; "contract extended due to their work conflict"; "numerous plat corrections on both the preliminary and final plats requiring considerable correspondence"; plats lacking "the detail that we would have preferred"; quality control in field "fair to good", in office "poor"); Ex. 17, pp. 8-9, Robertson River, January 5, 2011, 25 points) ("Some of the

shown that the contract review scores were unreasonable, and the evaluated score for past performance reflects those reviews, its protest regarding this aspect of the proposal evaluation is without merit.

## (2) Quality Control

The RFP stated that proposals would be evaluated against this question:

Does the Offeror address how quality control will be maintained in the field as well as the office?<sup>99]</sup>

The evaluation sheets provided a maximum of 60 points on this question.<sup>100</sup> Mr. Naramore awarded GPS 45 points for its discussion of quality control.<sup>101</sup> GPS objects that Mr. Naramore's notes state that quality control was "not specifically addressed[,]” although the GPS proposal mentions quality control on multiple occasions.<sup>102</sup> In particular, at page 8, the GPS proposal includes a list of specific quality control measures to be taken.<sup>103</sup>

Mr. Naramore testified, but was not asked to provide any insight into his score on this factor. Review of the GPS proposal supports GPS's assertion that the topic of quality control was specifically addressed in a separate section of the proposal, as well as in multiple separate provisions of the proposal. Absent any explanation from Mr. Naramore, the objective facts do not support Mr. Naramore's score for GPS on this item.

## (3) Project Support and Project Schedule

The RFP stated that proposals would be evaluated against these questions:

Does the Offeror provide for adequate support and flexibility in terms of personnel and time?

Has the Offeror proposed a work plan that is in accordance with the project schedule and tasks? If not, are alternatives offered that are a reasonable solution for accomplishing the work?<sup>104]</sup>

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requirements relaxed in order to get the job done”; “mylars received 1 year after the scheduled date”; “contract was extended due to contractor errors and incomplete submittals”; quality control in field “inconsistent”, in office “fair”; “end product was acceptable but required excessive monitoring”). *See also*, Exhibits 21-22 (comments of Kantishna lessee with photographs), Exhibit 23 (Kantishna field inspection).

<sup>99</sup> DNR 26 (RFP p. 24, §7.02, question N).

<sup>100</sup> As stated in the evaluation score sheets, the question was substantially identical: “Does the proposal address how quality control will be maintained in the field (30 points) and in the office (30 points)?” DNR 128.

<sup>101</sup> DNR 128.

<sup>102</sup> DNR 170-171.

<sup>103</sup> DNR 78.

<sup>104</sup> DNR 26 (RFP p. 26, §7.02, questions F, K).



The evaluation sheets provided maximum of 25 points for “adequate support in terms of personnel and time”<sup>105</sup> and 30 points for a “complete and realistic” schedule, with an “allocation of...time commensurate with scope of work and complexity of the project”.<sup>106</sup> Mr. Naramore awarded 20 and 25 points on these questions, respectively, and GPS contends his scores were unduly low as compared with the 60 (total) points he awarded to Mullikin on the same questions.<sup>107</sup>

Because evaluators do not compare proposals, the fact that one proposal is scored higher than another notwithstanding substantially similar responses does not necessarily mean that either score is unreasonable, and an after-the-fact comparison of proposals is of limited value in assessing the reasonableness of an evaluator’s score. However, in this particular instance, comparison of the personnel and time allocated to the project establishes that, as GPS points out, it had allocated more personnel and time in both the field and in the office than Mullikin. Mr. Garten awarded GPS the full 55 points available on these questions, and Mr. Brown awarded 50 (deducting five points on the project schedule question). Mr. Naramore’s notes offer no explanation for his score on these two questions (45 points), and he did not provide any testimony regarding it. In light of Mr. Naramore’s score on the same questions for the Mullikin proposal, the higher scores for GPS from both other evaluators on the same questions, the fact that GPS provided more personnel and time than Mullikin, and the absence of any explanation by Mr. Naramore, the objective facts do not support his score for GPS on these questions.

#### (4) Logistics

The RFP stated that proposals would be evaluated against this question:

Have the logistics for this project been discussed?<sup>[108]</sup>

The evaluation score sheets amplified on this question somewhat, providing a maximum of 25 points for the discussion of “logistics such as: mobilization, demobilization, lodging, transportation, communications, and field office setup.”<sup>109</sup> All

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<sup>105</sup> DNR 127 (question 6).

<sup>106</sup> DNR 128 (question 11).

<sup>107</sup> DNR 171-172.

<sup>108</sup> DNR 26 (RFP p. 24, §7.02, question G).

<sup>109</sup> DNR 127 (question 7).

three evaluators awarded GPS less than the full 25 points available, two awarding 20 and one 15. All three cited a lack of detail as the reason.<sup>110</sup>

GPS asserts that the evaluators' scores were unduly low, pointing out that the simplicity of its plan made a more detailed discussion unnecessary: GPS proposed staying at a hunting lodge and helicoptering in to the work site each day.<sup>111</sup>

The GPS proposal's discussion of logistics offers no information on field communications.<sup>112</sup> In addition, there is no specific discussion of a field office; it is impossible to tell if the "field office" will be the lodge or some sort of camp at the work area. In view of the limited information provided by GPS, it has not shown that the scores on these questions were unreasonable.

#### (5) Work Plan and Methodology

The RFP stated that proposals would be evaluated against these questions:

Is the methodology to be used sound and defensible? Does the methodology discussion include project specific detail?<sup>[113]</sup>

The evaluation score sheets provided a maximum of 75 points for a discussion of "methodology and work plan" that was "complete, practical and feasible", addressing "this project specifically."<sup>114</sup> Mr. Naramore awarded GPS 65 points on these questions,<sup>115</sup> and Mr. Brown 50. In its appeal, GPS asserted that Mr. Naramore's score was unreasonably low for two reasons: first, GPS had proposed "the exact same work plan and methodology...that we used successfully for the 2009 Big River South project, just a few miles away"; and second, the GPS score was lower than Mr. Naramore's score for Mullikin, notwithstanding that "Mullikin...has admitted in their proposal that they do not know if their plan will work", because the braided river conditions would make upstream boat transport "quite difficult."<sup>116</sup> GPS asserted that Mr. Brown inappropriately deducted points on these questions, citing Mr. Brown's reference to the lack of a discussion of setting monuments.<sup>117</sup>

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<sup>110</sup> R. 127 ("not much detail"); R. 131 ("ok but not complete"); ("vague").

<sup>111</sup> DNR 172.

<sup>112</sup> DNR 76.

<sup>113</sup> DNR 26 (RFP p. 24, §7.02, question J).

<sup>114</sup> DNR 128 (question 10).

<sup>115</sup> DNR 128 (question 10).

<sup>116</sup> DNR 172.

<sup>117</sup> DNR 173. *See* DNR 136 ("no discussion on setting mons").

GPS's point that it ought to have received a higher score than it did because the methodology it proposed in this case was essentially the same as that which had been successfully utilized in a prior contract overlooks the specific points made by the evaluators in assessing the proposal.

Mr. Naramore deducted 10 points, resulting in a score relatively close to the maximum. Mr. Naramore testified that he considered his score of 65 points a "fairly decent score." GPS agreed that its proposed methodology did not include any substantial project specific detail. Mr. Naramore's relatively small deduction is not unreasonable, in light of the relative absence of project specific detail.

Mr. Brown made a substantially larger deduction, 25 points, than Mr. Naramore, awarding GPS only 50 points. GPS's specific objection to his score was that Mr. Brown's notes reference the lack of a discussion of monumentation. GPS argues that setting monuments is a basic survey technique that needs no discussion in a proposal. But Mr. Brown's notes also point out that GPS proposed an "Opus solution for basis of coord[inates]", while the "RFP clearly stated BOC [basis of coordinates] would be a tie to a cadastral control monument." This would warrant a significant deduction.<sup>118</sup> Moreover, while it may be that setting monuments is a basic survey technique, in light of the requested project specific detail it would not be unreasonable to deduct points for failure to address how monumentation will be affected by project specific conditions, such as the presence (or absence) in this particular project of muskeg, peat moss, permafrost, or suitable bearing trees, the anticipated source of fill material, or other factors.<sup>119</sup> GPS has not shown that Mr. Brown's score was unreasonable.

GPS's appeal did not specifically object to Mr. Garten's score on these questions, although Mr. Garten's score of 40 points was the lowest of the three

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<sup>118</sup> Mr. Brown deducted 15 points for the Mullikin proposal on this question, which also proposed an Opus solution. However, Mr. Brown also noted "very good discussion on parcel adjustments, monument accessories" and "good on monuments set." See DNR 124. In light of these comments, Mr. Brown's score on the Mullikin proposal is wholly consistent with his score on the GPS proposal.

<sup>119</sup> See W. Brown testimony [5:04].

evaluators.<sup>120</sup> Mr. Garten explained his relatively low score, testifying that GPS's description of its technical methods was good, but it did not include a discussion of project specific information, which is important to him.<sup>121</sup>

The RFP specifically notifies offerors that "an emphasis is put on detailed discussion of project specific understanding and methodology." Projects vary in respect to a wide variety of features, including the geography (*e.g.*, project location and terrain; existence and prevalence of trails, water bodies, meanders), topography, staking characteristics (*e.g.*, number, size and distribution of parcels), platting authority, and the specific staking instructions for parcels to be staked. Absent a discussion of an offeror's proposed methodology in the context of those types of project specific characteristics, it is reasonable to deduct points. GPS acknowledged the lack of such a discussion, and the evaluations on this item reflect that.

#### (6) Understanding

The RFP stated that proposals would be evaluated against this question:

Does the Offeror demonstrate a clear understanding of the project goals and deliverables?<sup>122</sup>

The evaluation sheets provided a maximum of 50 points for this question, with the addition of reference to understanding of the "final product" and the question, "Did the offeror's response address this project specifically?"<sup>123</sup> Mr. Naramore awarded GPS 45 points on these questions,<sup>124</sup> and Mr. Garten and Mr. Brown awarded 25 points.<sup>125</sup> In its appeal, GPS asserted that it is unreasonable to suggest that GPS's understanding of the project goals and deliverables is deficient, because GPS has successfully performed multiple similar contracts in recent years.<sup>126</sup>

Mr. Naramore's score sheet includes no notes on this question.<sup>127</sup> Mr. Garten noted the use of an Opus reference for the basis of coordinates, as well as that "many

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<sup>120</sup> See DNR 132.

<sup>121</sup> T. Garten testimony [0:51].

<sup>122</sup> DNR 26 (RFP p. 24, §7.02, question I).

<sup>123</sup> DNR 128 (question 9).

<sup>124</sup> DNR 128 (question 9).

<sup>125</sup> DNR 132, 136 (question 9).

<sup>126</sup> DNR 172.

<sup>127</sup> DNR 128.

elements not discussed” and “many items missing,” and in reference to this question described the proposal as “boiler plate.”<sup>128</sup> Mr. Brown noted only a “very brief” project specific discussion, and noted that the proposal contained “a lot of fluff” and referenced conforming to standards and specifications.<sup>129</sup>

The scores on this question reflect the same defect that the evaluators found with respect to methodology: the absence of a discussion of project specific details. Ms. Vaughn, who drafted the GPS proposal, admitted that the proposal was, except insofar as it reiterated language in the solicitation, largely repetitive of prior proposals, rather than addressing the specific characteristics of this particular project. Identifying those characteristics and addressing them in the proposal demonstrates an understanding of the project goals and deliverables in the context of those project specific characteristics. Because the GPS proposal, by its own admission, does not provide that type of context and discussion, the evaluations on this question are not unreasonable.

#### (7) Platting Requirements

The RFP stated that proposals would be evaluated against this question:

Does the proposal adequately address platting requirements?<sup>[130]</sup>

The evaluation sheets provided a maximum of 25 points for this question, with the addition of reference to “required attendance at borough meetings, number of plat sheets, proposed plat scale and the submittal items required for DNR review.”<sup>131</sup> Mr. Garten and Mr. Brown awarded GPS 20 points on this question.<sup>132</sup>

GPS’s proposal states, “The plat for this survey will likely require 4-5 sheets (including an index sheet).”<sup>133</sup> In its appeal, GPS objects to Mr. Garten’s concern that the proposed number of platting sheets is too low.<sup>134</sup> It makes two points: first, that the number of sheets is an estimate, and GPS adjusts the number of sheets as necessary; and

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<sup>128</sup> DNR 132.

<sup>129</sup> DNR 136.

<sup>130</sup> DNR 26 (RFP p. 24, §7.02, question H).

<sup>131</sup> DNR 128 (question 8).

<sup>132</sup> DNR 132, 136 (question 8). Mr. Naramore awarded the full 25 points. DNR 128 (question 8).

<sup>133</sup> DNR 77 (Proposal p. 7).

<sup>134</sup> DNR 173.

second, that the GPS estimate is appropriate, given that there will be an average of 3.25 tracts per sheet.<sup>135</sup>

GPS's points are matters that could have been mentioned in the proposal. Because GPS omitted a specific reference to flexibility in determining the number of sheets used, or any calculation to support the specific number of sheets deemed "likely" to be needed, evaluators were at liberty to make their own subjective assessments as to whether the number GPS proposed was adequate or appropriate. A deduction of 5 points is relatively small, and well within the subjective discretion of the evaluators.

#### (8) Potential Problems

The RFP stated that proposals would be evaluated against this question:

Has the offeror identified pertinent issues, potential problems and possible alternatives?<sup>[136]</sup>

The evaluation sheets provided a maximum of 30 points for this question.<sup>137</sup> All three evaluators gave GPS low scores on this question: 20 (Mr. Naramore), 15 (Mr. Garten), and 10 (Mr. Brown).<sup>138</sup>

The GPS proposal states:

GPS Inc. does not foresee any significant problems with the parcel designs. It is difficult to predict problems without having visited the site. However, by returning to Anchorage between the preliminary field work and final monumentation, any potential design problems can be dealt with and resolved cooperatively between GPS Inc. and DNR.

In its appeal, GPS objected that in view of its substantial experience, it is able to address problems as they arise, and that "[s]peculating as to what may occur is pointless."<sup>139</sup>

The RFP does not ask for speculation. It asks for offerors to identify issues and potential problems to the extent they can be identified in advance. The reviewers' notes and testimony suggest that, as with methodology and understanding, issues and problems are those project specific features that warrant advance consideration or planning. GPS did not identify any, which is essentially what Mr. Naramore's and Mr. Brown's

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<sup>135</sup> DNR 173.

<sup>136</sup> DNR 26 (RFP p. 24, §7.02, question M).

<sup>137</sup> DNR 128 (question 13).

<sup>138</sup> DNR 128, 132, 136 (question 13).

<sup>139</sup> DNR 173.

comments point out.<sup>140</sup> Mr. Garten noted, “there is plenty of opportunity [to identify in advance issues and potential problems] with this one.”<sup>141</sup> He testified that GPS proposed to study the special survey instructions and existing survey records for ambiguities and conflicts and then determine “pertinent issues, potential problems and possible pre-solutions” as part of the contract performance, rather than incorporating such an analysis into the proposal, and that contracting staff wants that sort of information to be in a proposal.<sup>142</sup>

As the GPS proposal indicates, advance review of the special survey instructions in light of existing information could lead to the identification of issues and problems in a proposal. Talking with stakers or other persons familiar with the project terrain and review of existing surveys are additional ways in which issues and problems might be identified in advance. GPS’s proposal neither identifies issues and problems nor states what steps, if any, were taken do so. Under these circumstances, GPS has not shown that the scores on this question were unreasonable.

#### *Summary*

GPS has identified two instances in which the objective evidence does not support particular scores for GPS. However, by its own admission, GPS has consistently failed to address project specific details in its proposals. That failure is the primary reason why this particular proposal was not scored higher. In short, notwithstanding that there are minor instances in which an evaluator’s score for GPS may be questioned, GPS has not shown that the overall evaluations are unreasonable in light of the objective evidence as a whole.<sup>143</sup>

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<sup>140</sup> DNR 128 (question 13); DNR 136 (question 13).

<sup>141</sup> DNR 132 (question 13).

<sup>142</sup> T. Garten testimony [1:04].

<sup>143</sup> See Johns v. Department of Revenue, OAH No. 09-0572-PRO, at 14 (Commissioner of Administration 2010 (“[T]he issue to be decided is whether the record as a whole adequately discloses the basis for the evaluators’ ratings and supports their scores, not whether each and every note and comment that they made was precisely accurate.”)).

**IV. Conclusion**

GPS did not provide any direct evidence of bias, and it did not show a significant appearance of impropriety in this solicitation. The clear preponderance of the evidence is that what GPS attributes to impropriety is nothing more than the natural result of a highly subjective evaluation process. The solicitation in this case expressly notified offerors that price would be only 20% of the evaluation, and that evaluators would place emphasis on the presence of project specific detail. In light of those provisions, the evaluations were reasonable. Accordingly, GPS’s protest appeal is denied.

DATED January 7, 2013.

*Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

**Adoption**

The undersigned adopts this corrected 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 18<sup>th</sup> day of January, 2013.

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

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