

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

BOWERS OFFICE PRODUCTS, INC.)

v.)

DIVISION OF GENERAL SERVICES)

) OAH No. 13-0226-PRO
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DECISION

I. Introduction

The Division of General Services (DGS) decided to standardize office furniture used throughout the state as part of its office-space utilization plan. DGS reviewed furniture offered by four different manufacturers, and determined that three of the manufacturers could provide standardized furniture that would meet DGS’s needs. DGS then requested additional information and price discounts from the Alaska furniture dealers for those three manufactures.

After evaluating the information provided, DGS selected a dealer and manufacturer for each of three regions of the state. This turned out to be the same dealer and manufacturer for all three regions. Bowers Office Products, Inc. (Bowers) had submitted a proposal to supply furniture in the northern region from a different manufacturer. When Bowers was not selected, it filed a protest. DGS denied the protest, and Bowers appealed.

A hearing was held, and a proposed decision was issued. After reviewing the parties’ proposals for action, the Office of Administrative Hearings recommended that this matter be returned for additional proceedings. The Commissioner did return this matter with instructions to make additional findings about what constitutes a material change to an existing contract.

The ALJ identified two factual issues that appeared to be related to material change, and permitted the parties to brief the material change issue.¹ After considering the briefs and reweighing the record as a whole, the decision to purchase only from one Alaska furniture dealer

¹ DGS suggested that Bowers’ brief be rejected because it was emailed after 5:00 p.m. on the date it was due. The parties had previously used email to file and serve pleadings in this case. Unless otherwise ordered, pleadings are timely filed and served if they are sent by first class mail and postmarked before midnight on the date due. ² AAC 64.920(e). Although not sent by first class mail, the brief was received by DGS earlier than it would have been received had it been sent by first class mail on the date due. In addition, Bowers could have hand delivered the brief at 4:59 p.m. on the date due, and DGS has not asserted that it intended to review and begin preparing its response to that brief on the evening of the due date. Thus, there is no prejudice to DGS resulting from service by email after the close of business on the date it was due, and Bowers’ brief has been accepted.

proves not to be material change in the existing contract. Accordingly, Bowers' protest is denied.

II. Facts

DGS issued what it called a Request for Submissions (RFS) on November 23, 2012.² This RFS said that the state was considering adopting state-wide office furniture standards (SOFS), with all future purchases to be from a single manufacturer. DGS proposed purchasing furniture systems (cubicles) as well as chairs, desks, tables, and storage cabinets, which could be easily reconfigured and moved as office needs and staffing changed. The RFS said that this purchase would be made through a prior office furniture contract established by the Western States Contracting Alliance (WSCA), and that three manufacturers had been identified as potential vendors.³

Several furniture dealers raised concerns about the RFS. After considering those concerns, DGS issued a revised RFS on December 19, 2012.⁴ The revised RFS still stated that purchases would be made through the WSCA office furniture contract.⁵ Under the revised RFS, the state was divided into three geographical regions,⁶ and one dealer would be selected for each region.⁷ DGS identified the three manufacturers of product that would meet the state's needs as Allsteel, Herman Miller, and Steelcase.⁸

The RFS stated:

Based on an analysis of various factors; [sic] a dealer will be selected for each region that is qualified and capable of providing the highest level of design, installation, contract administration, and project management services that are the most advantageous to the state.^[9]

Dealers were encouraged to submit product pricing that provided an additional discount from the existing WSCA contract prices.¹⁰ Submissions were to be evaluated on (1) price, (2) contract administration and management plans, (3) asset management and warehousing, and (4) resell/recycle/disposal plans.¹¹

² DGS 000082 (the agency record consists of pages DGS 000001 – 000333).

³ DGS 000083.

⁴ DGS 000133; Testimony of Tom Mayer.

⁵ DGS 000134.

⁶ DGS 000136 – 000137.

⁷ DGS 000134.

⁸ DGS 000134.

⁹ DGS 000135.

¹⁰ DGS 000139.

¹¹ DGS 000140 – 000142.

Bowers submitted a response to provide Allsteel furniture in the northern region. Capital Office Supply submitted its response to supply Steelcase furniture in all three regions.¹² Other dealers also submitted responses, but those responses are not directly at issue in this protest appeal.

Capital Office was selected as the dealer for each of the three regions.¹³ Bowers filed its protest of that selection.¹⁴ In responding to that protest, DGS initially took the position that Bowers had no protest rights.¹⁵ DGS did, however, respond to each issue raised in Bowers' protest, and determined there was no basis to revise the selection or conduct a new selection process.¹⁶ Bowers responded with an additional letter,¹⁷ and DGS answered that letter stating, in part, that Bowers could file an appeal with the Commissioner of Administration.¹⁸ Bowers did file an appeal, and that appeal was referred to the Office of Administrative Hearings to conduct a hearing.

III. Discussion

A. Bowers Has Protest Rights Under the Procurement Code

DGS asserts that it was simply choosing a vendor to provide furniture and other services pursuant to an existing competitively bid contract. DGS argued that, since the RFS process was neither an Invitation to Bid pursuant to AS 36.30.100 – 190 nor a Request for Proposals pursuant to AS 36.30.200 – 270, the protest and appeal rights provided in the State Procurement Code do not apply. DGS also argued that the Master Agreement under the WSCA contract anticipated that individual states would enter into separate agreements with manufacturers as part of the WSCA contract, and that these separate agreements could expand on the WSCA requirements without violating the Master Agreement.

DGS has confused the issue of whether protest rights exist with the merits, that is, whether the protest should be upheld. The general protest rights and procedures in AS 36.30 apply quite broadly:

Except for small procurements made under AS 36.30.320, the provisions of AS 36.30.560 – 36.30.615 apply to a solicitation, a proposed contract award, and an

¹² DGS 000266.

¹³ DGS 000300.

¹⁴ DGS 000301.

¹⁵ DGS 000321

¹⁶ DGS 000321 – 000325.

¹⁷ DGS 000326.

¹⁸ DGS 000332.

award of a contract for supplies, services, professional services, or construction.^[19]

Under these provisions, an interested party may protest “the award of a contract, the proposed award of a contract, or a solicitation for supplies, services, professional services, or construction by an agency.”²⁰ In this case, Steelcase had previously agreed to sell furniture, through its dealers, to DGS at the prices listed in the WSCA contract. DGS then solicited a new agreement with furniture dealers in Alaska. It asked those dealers to provide an additional discount from the WSCA prices, and also to provide additional services. Capital Office responded to that solicitation, and DGS accepted Capital Office’s response as the most advantageous to the state. By accepting Capital Office’s offer, DGS created a contractual agreement for the provision of supplies and services.²¹ That obligation is a contractual obligation that came about as a result of a solicitation. As an interested party, Bowers has the right to protest DGS’s solicitation and contract award.

B. Use of the WSCA Office Furniture Contract

The central dispute in this case is whether DGS was required to procure this furniture through a new competitive process, or whether DGS could purchase through the existing WSCA contract. Cooperative purchasing agreements such as the WSCA contract are an alternative procurement method that can save administrative time and money, and also result in more favorable prices.²² Typically, a government agency will enter into a contract through a competitive bid or proposal process. Other participating government agencies are then allowed to take advantage of terms in that contract without further competition.²³

The WSCA office furniture contract was created through a Request for Proposals issued by the State of Utah. The contract was intended to be awarded to multiple furniture manufacturers.²⁴ It was intended to include customer service, installation, and design services.²⁵

¹⁹ AS 36.30.550.

²⁰ AS 36.30.560.

²¹ A contract is created where there is an offer that covers all essential terms, unequivocal acceptance, consideration, and an intent to be bound. *Sea Hawk Seafoods, Inc. v. City of Valdez*, 282 P.3d 359, 364 (Alaska 2012). The consideration included DGS’ agreement to purchase SOFS furniture only from Capital Office and Capital Office’s agreement to provide that furniture at a discounted price.

²² *See Building Materials Corporation of America v. Board of Education of Baltimore County*, 53 A.3d 347, 352 (Md. 2012). Use of a cooperative purchasing agreement is still a “procurement” as that term is defined by AS 36.30.990(17).

²³ *See Alaska Structures, Inc. v. Department of General Services*, 979 A.2d 982, 991 (Pa. Commw. Ct. 2009).

²⁴ DGS 000004, WSCA contract §1.1.

²⁵ *Id.*

The products and services would then be provided to participating government entities by the manufacturer's authorized dealers.²⁶

The WSCA contract also provides:

Each participating entity shall select the authorized dealer(s) they choose to do business with during the participating addendum process. A participating entity may require the authorized dealer(s) to submit additional information regarding their firm as part of the selection process during the execution of a participating addendum. This information could include, but is not limited to; business references, number of years in business, technical capabilities, and the experience of both their sales and installation personnel.^[27]

The price for furniture is stated as a percentage discount from the manufacturer's list price.²⁸ Installation of the furniture appears to be included in the furniture price.²⁹ Design services are an optional item. If offered by a manufacturer as part of this contract, the hourly rate is negotiated with each participating state.³⁰

Alaska law authorizes participation in cooperative purchasing.³¹ Cooperative purchasing is defined as a procurement "conducted by, or on behalf of, more than one public procurement unit, or by a public procurement unit with an external procurement activity[.]"³² DGS, as a division of the Department of Administration, is a public procurement unit.³³ Utah's Division of Purchasing and General Services, which established the WSCA contract,³⁴ is an external procurement activity.³⁵ Thus, DGS can participate in the WSCA contract at issue in this case.³⁶

C. The Selection Process in This Case

DGS did not simply elect to procure through the WSCA contract. In order to achieve a greater benefit for the state, it asked dealers for three of the four WSCA manufacturers if they would supply deeper discounts in exchange for the ability to meet DSG's furniture needs in one

²⁶

Id.

²⁷

Id.

²⁸

DGS 000007, WSCA contract §1.9.

²⁹

DGS 000019, WSCA contract §3.12.

³⁰

DGS 000020, WSCA contract §3.13.

³¹

AS 36.30.700.

³²

AS 36.30.790(1).

³³

AS 36.30.790(4) & (5).

³⁴

See DGS 000001.

³⁵

AS 36.30.790(2) (defining "external procurement activity" as a buying organization that would qualify as a public procurement unit if it were located in Alaska).

³⁶

The procurement code does not define what is meant by "participating" in a cooperative purchase agreement, and there are no implementing regulations defining this term. For purposes of this decision, it is assumed that DGS can participate in the WSCA contract by purchasing furniture at the competitively bid prices in that agreement from any one or more of the WSCA manufacturers without any additional competition.

or more of the three regions. This was done through the RFS, a competitive process similar to what would be used in a Request for Proposals. One WSCA dealer was excluded from this process, as were all non-WSCA-participating dealers. Since those other dealers have not filed a protest, there is no need to decide in this case whether their exclusion was proper.³⁷

It is necessary, however, to determine whether DGS complied with the procurement code in selecting Capital Office as its vendor for future furniture purchases. To the extent AS 36.30.700 authorizes DGS to participate in the competitively bid WSCA contract, DGS cannot materially alter the terms of that contract without following the requirements of the procurement code, which would normally mean a new competitive process.³⁸ A material change is one that tends to subvert the purposes of competitive bidding.³⁹ The purpose of competitive bidding is to ensure that the government gets the most favorable terms possible, and protect the public from the possibility of favoritism, fraud, or corruption.⁴⁰

The Alaska Supreme Court has identified five factors to consider when determining whether a change is material:

- (1) the legitimacy of the reasons for the change;
- (2) whether the reasons for the change were unforeseen at the time the contract was made;
- (3) the timing of the change;
- (4) whether the contract contains clauses authorizing modifications;
- (5) the extent of the change, relative to the original contract.^[41]

1. Reasons for the change

DGS asserts that it issued the RFS, and selected Capital Office as its dealer, to obtain a lower price, hourly labor rates for reconfiguring existing cubicles, and asset management and inventory reports.⁴² When purchasing office furniture under an existing competitively bid contract, the state may legitimately want to negotiate a lower price or request reports related to that furniture. Reconfiguring existing cubicles will not always be related to purchasing new

³⁷ The RFS specifically stated that protests would not be allowed. DGS 000139. As stated above, interested parties do have protest rights. Whether the statement in the RFS that there are no protest rights would justify acceptance of a late protest is also beyond the scope of this decision.

³⁸ See *McKinnon v. Alpetco Co.*, 633 P.2d 281, 287 (Alaska 1981) (material changes to a competitively bid contract is tantamount to forming a new contract).

³⁹ *Kenai Lumber Company, Inc. v. LeResche*, 646 P.2d 215, 221 (Alaska 1982).

⁴⁰ *Kenai Lumber*, 646 P.2d at 220.

⁴¹ *Kenai Lumber*, 646 P.2d at 221 (internal footnotes omitted).

⁴² DGS' Proposal for Action, page 9.

furniture, but it could be more efficient to use the same company for this task as the company that is delivering and configuring the new cubicles. The evidence in the record does not support a finding that the changes were made for any illegitimate purpose. The fact that DGS used a competitive RFS, a process similar to a Request for Proposals, instead of informal negotiations with each of the dealers, helped protect the public from favoritism, fraud, or corruption.⁴³

2. *Whether the change was unforeseen*

If a particular need is foreseen, that need should be included in the solicitation so that the need can be incorporated in the proposals or bids. The decision by this state to move to one furniture manufacturer for all of its needs in each region was probably not foreseen by the State of Utah when it created the WSCA contract. At a minimum, Bowers has not proven that it was foreseen by either Utah or Alaska officials.

3. *Timing*

There is nothing about the timing that weighs in favor of or against finding the changes to be material.

4. *Whether the original contract authorizes the changes*

The WSCA contract anticipated the possibility of additional price discounts by stating that such discounts were at the discretion of the manufacturer or dealer.⁴⁴ Authorization for those discounts is implicit in the contract.

Inventory and asset management are not included in the scope of work of the WSCA contract.⁴⁵ However, the WSCA RFP did ask manufacturers to describe their websites. Steelcase stated that its website provides

Asset Management – Improve and simplify the management of furniture assets. Electronic tools created to track inventory, encourage reuse of existing products, manage churn and dispose of unused furniture are also available to our customers.^[46]

The capabilities of the website were a factor considered in the WSCA RFP evaluation process.⁴⁷ While not specifically part of the work contracted for, it would not be unexpected that decisions

⁴³ The RFP process will not always protect the public, and Bowers claimed that the process used in this procurement was manipulated to steer this contract to Capital Office. However, this process provides more protection than simply conducting an informal negotiation without any notice to other potential dealers.

⁴⁴ DGS 000045, WSCA contract.

⁴⁵ DGS 000045, WSCA contract.

⁴⁶ Exhibit 4, page 14 to DGS' Motion to Dismiss.

⁴⁷ DGS 000021.

about which furniture to purchase would be made, in part, based on whether the website included online asset management.

Other changes not specifically provided for in the contract would not have been anticipated when the WSCA RFP was issued. Reconfiguration of existing cubicles is not mentioned in the WSCA contract. The RFS in this case asked dealers to submit a price for the cost of disassembling and reassembling existing furniture in a new configuration, including associated design work.⁴⁸ This is different than the design services for new purchases which was included in the WSCA contract. There would have been no reason for any of the manufacturers submitting proposals for the WSCA contract to anticipate their dealers being asked to reconfigure existing furniture sold and installed by a different manufacturer.

Under the RFS, Capital Office must provide a resell/recycle/disposal program for old office furniture being replaced by new furniture.⁴⁹ This is not required under the WSCA contract. The RFS requires that the selected dealer have a physical place of business in the region that dealer is selected for.⁵⁰ That is not a requirement in the WSCA contract.

Bowers argues that there was another material change: the volume of furniture to be purchased. The WSCA RFP estimated that there might be a total of \$4.2 million in annual sales to Alaska. This was only an estimate. The total volume could have been as low as zero, or much higher.

Bowers notes that the state now anticipates spending nearly \$13 million to purchase new office cubicle systems. This is also an estimate. Even if it is likely that the state will purchase \$13 million worth of furniture as part of the SOFS program, that purchase may not occur within one year.⁵¹ Bowers has not met its burden of proving any increase in purchasing from DGS is a change in the WSCA contract beyond what was anticipated and authorized in that contract.

5. *The extent of the change relative to the original contract.*

The changes or additions to the WSCA contract that are contained in DGS' agreement with Capital Office are individually small relative to the original contract. Taken together, they become more significant, but are still small.

⁴⁸ DGS 000141, Exhibit 19.

⁴⁹ DGS 000142.

⁵⁰ DGS 000134; DGS 000138; DGS 000140.

⁵¹ If it takes three years to purchase this much furniture, the annual volume will be nearly identical to the estimated volume listed in the WSCA RFP.

One difference appears larger even standing alone. Under the WSCA contract, DGS was free to purchase office furniture from any dealer of any WSCA manufacturer. Where a manufacturer had more than one dealer in Alaska, DGS could purchase from any or all of those dealers. If desired, DGS could have also issued an invitation to bid or an RFP to competitively procure furniture totally outside of the WSCA contract. Now, however, purchases that are part of the State Office Furniture Standards program must be purchased through Capital Office.

Upon closer analysis, this is not actually a change at all. The WSCA contract is similar to a bazaar. Manufacturers participated in a competitive process to be allowed to market their furniture in that bazaar. Participating entities, such as DGS, are then permitted to shop among the manufacturers to obtain the furniture they wish to buy on the most advantageous terms they can arrange.

The WSCA contract does not require purchasers to use more than one dealer. It would not be surprising for a participating entity to decide to select all of its furniture from one dealer. The buyer would not want to repeatedly go through the process of deciding which furniture best met its needs at an appropriate price. In addition, using one type of furniture allows for greater flexibility to move furniture between offices as needs change, would present a more uniform appearance to the public, and would reduce employee concerns of differing treatment based on the furniture they each use. Using one dealer would also be more efficient as the dealer would become familiar with the buyer's needs. And once the furniture and dealer are selected, it would be normal—indeed expected—that the buyer would attempt to negotiate a good price based on being selected as the single provider of the buyer's furniture. DGS could have done this without entering into a binding contract with Capital Office. The fact that it has put that commitment in writing is not a change from what was already allowed.

Because the decision to use only one dealer for all purchases is not a change to the WSCA contract, that decision is not a factor in evaluating the extent of the changes relative to the overall contract. The changes that are considered in this evaluation are the inclusion of an inventory/asset management program, the labor rate for reconfiguring existing cubicles, and the resell/recycle/disposal program.

The ability to provide an asset management program was evaluated when manufacturers were selected for inclusion in the WSCA contract. The addition of this service here is a small change from the original contract. Reconfiguring existing cubicles is something DGS expects to

use “occasionally.”⁵² The WSCA contracted estimated annual spending of \$4.2 million. Bowers has not proven that the occasional use of Capital Office employees to reconfigure existing cubicles is a significant change relative to the existing contract.

Finally, it is not possible to determine from the existing record how much furniture might be resold, recycled, or disposed of as part of this contract. It was Bowers’ burden to prove that there has been a material change, and to the extent this factor is part of that proof, it was Bowers’ burden to prove that this program was a large change relative to the existing contract. Bowers has not met that burden.

Even when all the small changes are looked at together, Bowers has not shown that these changes are large relative to the existing contract. When all five of the *Kenai Lumber* factors are considered, there has been no material change to the WSCA contract.

D. The Purposes of the Competitive Process Were Not Subverted

The competitive process in procurement is designed to ensure that the government gets the most favorable terms possible, and protect the public from the possibility of favoritism, fraud, or corruption.⁵³ The WSCA RFP was a competitive process used to select manufacturers and their dealers. That process by itself provided DGS with favorable terms, and protected the public against favoritism, fraud, or corruption. DGS could have gone directly to Capital Office, Bowers, or any other WSCA dealer, without any further competition, and purchased 2000 cubicles for its SOFS implementation. DGS did not do that, nor did it negotiate directly with individual dealers to obtain a better price. Instead, DGS provided a modified competitive process, conducted openly among the three dealers it was willing to buy from. Because those dealers, and the manufacturers they represented, had already been selected through the WSCA competitive process, this was not a violation of the procurement code. This process could present a problem if in doing so the parties made a material change in the existing contract. Based on an analysis of the *Kenai Lumber* factors, however, any changes in the WSCA contract were not material.

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⁵² DGS 000141.
⁵³ *Kenai Lumber*, 646 P.2d at 220.

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E. Other Issues Raised By Bowers⁵⁴

1. Preferences

Bowers raised a concern that The RFS did not include a preference for Alaska bidders as required by AS 36.30.170(b). Whether an Alaska bidder's preference was required as part of this solicitation is not a material issue. All of the dealers who participated in the RFS would have qualified for the Alaska bidder preference. Thus, the inclusion of that preference would not have changed the selection.

Bowers also asserted that it would have received a preference for employing disabled individuals. Bowers did not support this assertion with sufficient evidence to show that it would have changed the selection of Capital Office.

In addition, while preferences are provided for in the procurement code, those preferences appear to apply only to invitations to bid and requests for proposals. They do not appear to apply to participation in previously competed cooperative purchasing agreements. The State of Utah followed its procurement code in selecting manufacturers for participation in the WSCA contract. If Utah has preferences, they would have been applied at that time. Alaska law does not clearly provide that it must then apply its own preferences when making purchases under that contract.⁵⁵

2. Evaluation of Cost

The RFS divided cost elements into categories, and gave different weights to each element in determining which dealer offered the lowest price. Bowers argued that low cost items were given a disproportionate amount of weight, resulting in the lowest cost proposal getting fewer points than a proposal with the highest overall cost.

A total of 60 points were available for the cost component. Of these, 30 points were for product purchases, 20 points for project management, and 10 points for hourly labor.⁵⁶ Thus, the

⁵⁴ It was difficult to determine what issues Bowers was actually pursuing, and DGS objected several times to the inclusion of issues not listed in the original protest or in the appeal of the protest decision. At the beginning of the hearing, the parties went through a list of issues presented by Bowers, and rulings were made as to which issues would be considered.

⁵⁵ The limited excerpt of testimony before a Senate Finance Committee hearing quoted by Bowers does not demonstrate otherwise. That one person testified that preferences should apply when purchasing through a cooperative purchasing agreement does not establish that the legislature intended preferences to apply when AS 36.30.700 was adopted.

⁵⁶ DGS 000140 – 000141.

combined weight given to the hourly labor and project management items was equal to the weight given to product cost.⁵⁷

To estimate product cost, the RFS contained a typical office layout consisting of cubicles and associated furniture,⁵⁸ and asked each proposer to list the price of the different parts necessary to create the typical layout.⁵⁹ The project management fee was set as a percentage of the product cost, with each proposer free to select the percentage it wished to add for this item.⁶⁰ The hourly labor component was evaluated based on submitted labor rates for various types of work multiplied by an estimated number of hours needed for that work.⁶¹ In the northern region, the product cost ranged from a low of \$86,673.01 to a high of \$125,129.18.⁶² The total of the management fee and labor cost ranged from \$25,870.02 to \$39,327.47.⁶³ While the management fee and labor costs were a much smaller part of the total project cost, those costs were given equal weight to the cost of actually purchasing furniture.

When evaluating responses to an RFP, the contracting agency must include price as an evaluation factor, and must give the maximum number of price points to the lowest cost proposal.⁶⁴ DGS argues that it complied with this requirement because the highest points were given to the lowest cost within each cost item. Bowers argues that the estimated costs need to be combined so that DGS awards the highest points to the proposal with the lowest overall cost. Otherwise, according to Bowers, the highest number of price points could be awarded to the proposal that is the most expensive for the state.⁶⁵

Bowers might be correct if this solicitation had been an RFP issued pursuant to AS 36.30.200 – 265. Instead, the purchase was made pursuant to AS 36.30.700. The State of Utah had already conducted a selection process that weighed price against other factors. DGS also considered price as part of its additional selection process, but did so in a way that did not necessarily give the most points to the offer with the lowest total cost. However, DGS was not

⁵⁷ The costs submitted in each proposal was based on the cost of design, purchase, and installation of a typical office set up.

⁵⁸ DGS 000150 – 000155.

⁵⁹ DGS 000156.

⁶⁰ DGS 000140 – 000141.

⁶¹ DGS 000141.

⁶² Exhibit 25-8. Bowers proposed the lowest cost and Capital Office the highest.

⁶³ Exhibit 25-8. Bowers had the highest costs and Capital Office the lowest.

⁶⁴ 2 AAC 12.260(c) (highest points to lowest cost except for architectural, engineering, and land surveying contracts).

⁶⁵ See Exhibit 25-8.

required to strictly apply 2 AAC 12.260 to that process since that regulation has not been made applicable to cooperative purchasing agreements.⁶⁶

3. *Steelcase's List Prices*

Bowers asserted that several of the list prices included in Capital Office's proposal were lower than the true manufacturer's list price and that the inclusion of the lower list price made Capital Office's proposal look less expensive than it actually is. According to Bowers, when DGS orders one of those products, it will be charged based on a discount from the true list price, and not the lower list price in the proposal. Bowers did not prove this assertion to be accurate, and DGS's witness, Tom Mayer, testified that Capital Office would be required to honor the discounted price listed in its proposal, even if that price is based on an erroneous list price.

4. *Consideration of Herman Miller's Proposal*

Bowers asserted that the proposal from Herman Miller should not have been considered in the northern region because they did not have a place of business there—as required by the RFS. Herman Miller was not the selected dealer for that region, however, and assuming DGS should have declared its offer non-responsive, Bowers has not shown how it was prejudiced by the failure to reject Herman Miller's proposal.

5. *Procedural Improprieties*

Bowers alleged that DGS and the proposal evaluation committee acted improperly. Many of the alleged improprieties were based on the assumption that DGS was required to establish this contract through an invitation to bid or a request for proposals, and, therefore, that DGS had to follow all the rules applicable to those procurement methods. As discussed above, DGS could use the WSCA contract and select Capital Office as its dealer as long as it did not materially change the WSCA contract.

Bowers also made several generalized allegations that various individuals acted improperly in an effort to ensure that Capital Office would be selected as the dealer to sell SOFS office furniture. Bowers did not present sufficient evidence to prove any misconduct by any state official or by the architect hired by DGS to assist it in the selection process.

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⁶⁶ It is important to note that that if DGS had simply procured furniture under the WSCA contract, it could have done so without purchasing the least expensive option offered by the four different manufacturers. Because a competitive price had already been obtained, DGS could participate in the WSCA contract by simply selecting the desired items and ordering them without any consideration of price.

IV. Conclusion

The Division of General Services is permitted to participate in the WSCA cooperative purchasing agreement. In selecting which dealer to purchase from, DGS was permitted to conduct the limited competition that occurred in the RFS, and was permitted to select Capital Office as its dealer of choice for the SOFS implementation. Bowers Office Products' protest appeal is DENIED.

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

DATED this 5th day of September, 2013.

Signed _____
Becky Hultberg
Commissioner
Department of Administration

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