



The Department of Natural Resources, through the Division of Mining, Land and Water's survey section, provides technical expertise and survey services to the department. The survey section issues survey instructions and reviews surveys conducted on lands (including tidelands) in which the department has an interest. In addition, the section functions as the platting authority for the unorganized borough.<sup>1</sup> The section consists of about 18 employees, including about a dozen registered land surveyors.<sup>2</sup>

The department oversees surveys performed by private surveyors in connection with a number of programs, including the Remote Recreational Cabin Site (RCCS) program.<sup>3</sup> Among these programs, the RCCS program is unique, in that it involves subdivision based on field staking of individual parcels by lay persons,<sup>4</sup> under staking instructions provided by the department.<sup>5</sup> Typically, those individual parcels do not share a common boundary with another lot, but rather are isolated lots within a larger parcel of state-owned land.<sup>6</sup> For these reasons, RRCS surveys do not require professional judgment in the design of the subdivision: the design (or, rather, absence of a design) is the result of individual stakers' decisions in the field.

The RRCS program was created by legislation enacted in 1997,<sup>7</sup> and was implemented by regulations effective in 2001.<sup>8</sup> The survey section's contracting officer at that time was of the opinion that the RRCS surveys qualified under AS 36.30.270(d) for inclusion of price as an evaluation factor.<sup>9</sup> He recommended to Gerald Jennings, the chief of the survey section, that price be included as an evaluation factor in the RCCS survey solicitations.<sup>10</sup> Mr. Jennings accepted the recommendation and the department obtained authorization from the chief procurement officer to include price as a factor.<sup>11</sup>

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<sup>1</sup> General background information concerning the survey section was obtained from the department's website. *See* [dnr.alaska.gov/mlw/survey](http://dnr.alaska.gov/mlw/survey).

<sup>2</sup> Jennings Testimony. The department's website includes a list of survey section employees. *See* [dnr.alaska.gov/mlw/survey/staff.htm](http://dnr.alaska.gov/mlw/survey/staff.htm).

<sup>3</sup> *See* AS 38.05.600; 11 AAC 67.800-.845.

<sup>4</sup> Jennings Testimony 0:43.

<sup>5</sup> *See* 11 AAC 67.820

<sup>6</sup> Sears Testimony 0:56, 1:17.

<sup>7</sup> §23 ch. 91 SLA 1997.

<sup>8</sup> Register 157 (effective 2/19/2001).

<sup>9</sup> Hagen Testimony 0:16, 0:26.

<sup>10</sup> Jennings Testimony 0:39.

<sup>11</sup> Hagen Testimony 0:15, 0:25; G. Jennings Testimony 0:39.

Accordingly, solicitations for surveying services for the RRCS program were issued as requests for proposals that included price as an evaluation factor. Price was weighed as 20% of the evaluation, which is one-half of the minimum allowable weight of 40% for price in solicitations under the Procurement Code for professional services other than for architects, engineers and land surveyors, and one-third of the recommended weight of 60%.<sup>12</sup> The other evaluation factors were the offeror's understanding of the project, methodology, and proposed work plan (50%), qualifications and experience (20%), and eligibility for the Alaska offeror preference (10%).<sup>13</sup>

B. Change in Department Policy

Beginning in 2006, GPS began to regularly respond to the RRCS solicitations. In 2012, GPS filed a protest concerning such a solicitation, asserting that the price of the winning proposal was excessive, and that one of the evaluators, who was the contracting officer for the solicitation and supervised the other two evaluators, was biased against the firm. The protest was denied, and GPS filed an appeal. A hearing was conducted, and before a final decision was issued the person GPS had claimed was biased retired. Mr. Jennings hired Gwen Gervelis as his replacement.<sup>14</sup> Shortly after she was hired, a final decision was issued denying GPS's appeal.<sup>15</sup>

Ms. Gervelis had extensive experience in a capacity similar to Mr. Jennings, during her employment as a survey manager with the Department of Natural Resources in the state of Washington.<sup>16</sup> As part of her initial review of the survey section's procurement policies and procedures, Ms. Gervelis reviewed the protest decision and related materials and conferred with staff surveyors to consider changes in the department's procurement procedures relating to RRCS surveys.<sup>17</sup> She also reviewed AS 36.30.270, which provides for the award of contracts for architectural, engineering and land surveying services by negotiation with "the most qualified and suitable firm or

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<sup>12</sup> See Global Positioning Services, Inc., v. Department of Natural Resources, at 5 OAH No. 12-0083-PRO (Commissioner of Administration 2013) (hereinafter, GPS I); AAM §81.470(3); Hagen Testimony 0:37.

<sup>13</sup> GPS I, at 5.

<sup>14</sup> Jennings Testimony 0:39.

<sup>15</sup> GPS I.

<sup>16</sup> G. Gervelis Testimony 1:31; Gervelis Affidavit, ¶2.

<sup>17</sup> Gervelis Affidavit, ¶2; Gervelis Testimony 1:36.

person of demonstrated competence” and which provides, in subsection (d), that price may be included as a factor in selecting the contractor:

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

In mid-February, 2013 Ms. Gervelis, Mr. Jennings and Ms. Hagen met with Mr. Sears and Tom Moore of GPS.<sup>18</sup> GPS advocated increasing the price factor from 20% to 40%, and that prices not be disclosed to the evaluators. Taking into account GPS’s views, her past experience, her discussions with staff, and her review of existing procedures, Ms. Gervelis concluded that the process used to solicit RRCS survey services should be changed in several respects. She recommended changes in the manner in which post-contract performance evaluations were performed and subsequently utilized in selecting a contractor. In addition, she recommended that members of the proposal evaluation committee not be provided offerors’ evaluated scores for price (if price was to be evaluated), past performance, and other items scored independently of the committee. Lastly, she recommended that price no longer be included as an evaluation factor, based on her opinion that solicitations for surveys of remote recreational cabin sites did not qualify for including price as an evaluation factor under AS 36.30.270(d).

Ms. Gervelis submitted her recommendations to Mr. Jennings, who in turn submitted them to the department’s procurement office, Marlys Hagen. Ms. Hagen, relying on Mr. Jennings’ and Ms. Gervelis’ recommendation, determined that the survey solicitations did not fall within the scope of AS 36.30.270(d).<sup>19</sup> Ms. Hagen also accepted the other changes Ms. Gervelis recommended.<sup>20</sup> Accordingly, beginning in 2013, the department no longer included price as an evaluation factor in RRCS survey solicitations. The evaluated factors were the offeror’s understanding of the project (25%), methodology and work plan (50%), qualifications and experience (25%) and eligibility for the Alaska offeror preference (10%).

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<sup>18</sup> Ex. 2, p. 4.

<sup>19</sup> Hagen Testimony 0:02.

<sup>20</sup> Hagen Testimony 0:09.

In July, 2013 the department issued RFP No. 2013-1000-2047, soliciting proposals to provide land survey services on the Kakhonak Lake Remote Recreational Cabin Site land disposal. Price was not included as an evaluation factor, and GPS filed a protest. The protest was denied, and GPS appeals.

### **III. Discussion**

#### **A. Legislative History of AS 36.30.270**

In 1982, the legislature enacted AS 36.98.010-.080, which permitted the procurement of professional services by competitive requests for proposals, with no requirement that price be a factor in the evaluation.<sup>21</sup> Under that law, the weight given to price in any particular procurement of professional services was determined by the procurement officer, who retained discretion to award contracts based on qualifications alone, without regard to price.<sup>22</sup> In 1985, SB 204 was introduced to amend AS 36.98 to require the procurement of architect, engineering and surveying services by negotiation.<sup>23</sup> As introduced, the bill did not provide for use of price as an evaluation factor, and it was opposed by both the Division of General Services and the Department of Transportation and Public Facilities.<sup>24</sup> Language permitting the use of price as an evaluation factor was added to the legislation in the first committee of referral,<sup>25</sup> based on a proposal submitted

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<sup>21</sup> See AS 36.98.030(e) (“The request for proposals must provide a description of the factors that will be considered by the state agency when it evaluates the proposals received.”); AS 36.98.040(a) (“The evaluation shall consist of assigning point values to factors considered by the agency in evaluating each proposal. Each proposal received must be evaluated using the same factors as those set out in the request for proposals.”).

<sup>22</sup> Testimony of Bob Link, Director of Division of General Services and Supply, Department of Administration before the Senate Committee on Community and Regional Affairs (March 21, 1985) (“Under current law, if there’s a very important task to be done, the people procuring services may determine to make a selection entirely on the basis of qualifications. There’s nothing in the statute which precludes that now.”).

<sup>23</sup> SB 204 (March 1, 1985).

<sup>24</sup> Testimony of Bob Link, Director of Division of General Services and Supply, Department of Administration before the Senate Committee on Community and Regional Affairs (March 21, 1985); Testimony of John Simpson, Division of Standards and Technical Services, Department of Transportation and Public Facilities before the Senate Committee on Community and Regional Affairs (April 16, 1985) (“Position Statement: Testified in opposition to SB 204”).

<sup>25</sup> CSSB 204 (CRA) (April 19, 1985). Mr. Link, who had testified on opposition to the bill as introduced, stated “the department opposed the original bill but was less opposed to the substitute bill.” Testimony of Bob Link before the Senate Committee on Community and Regional Affairs (April 16, 1985). A representative of the Department of Transportation and Public Facilities, which similarly had opposed the original bill, also testified that his “department could support the substitute bill.” Testimony of John Simpson, Division of Standards and Technical Services, Department of Transportation and Public Facilities before the Senate Committee on Community and Regional Affairs (April 18, 1985).

by the Department of Transportation and Public Facilities.<sup>26</sup> At the same time, the committee limited the price component to a maximum of 20% of the evaluation.<sup>27</sup>

The provision allowing price to be a factor to a maximum of 20% was the subject of extensive and detailed discussion before the next committee to take up the bill, the Senate Finance Committee. Senator Halford questioned the 20% limitation.<sup>28</sup> In extended testimony, John Simpson of the Department of Transportation and Public Facilities noted that the bill as presented “is basically the way the Department currently operates.”<sup>29</sup> In response to a question from Senator Halford, he noted that eliminating the 20% limit “would provide more flexibility.”<sup>30</sup> The committee subsequently passed a substitute bill, prepared by Senator Halford, tightening the language permitting the use of price as a factor, but eliminating the 20% limitation.<sup>31</sup> The effect of these changes was to further restrict the ability to use price as a factor,<sup>32</sup> but if permitted, to allow complete discretion as to the weight afforded price. Mr. Simpson testified that these changes improved the bill.<sup>33</sup> The House further tightened the language permitting the use of price as a factor and reinstated the 20% limitation.<sup>34</sup> In conference, the House language regarding the use of price as a factor was adopted, but the 20% limit was jettisoned.<sup>35</sup>

As SB 204 was winding its way through the committee process during the 1986 legislative session, the Senate was simultaneously considering SB 341, which was introduced at the start of the 1986 legislative session following extensive hearings over

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<sup>26</sup> The same language had earlier been included in a companion bill introduced in the House, HB 278, by the House Labor and Commerce Committee, based on language in the department’s position paper. *See* CSHB 278 (L&C) (April 4, 1985); House Labor and Commerce Committee Minutes (April 2, 1985).

<sup>27</sup> *Id.*, Sec. 2 (proposed AS 36.98.043(e)).

<sup>28</sup> Senate Finance Committee Minutes (January 28, 1986).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> CSSB 204 (FIN) (February 4, 1986). *See* Senate Finance Committee Minutes (February 4, 1986).

<sup>32</sup> As presented to the Finance Committee, the bill permitted the use of price when the services “are sufficiently defined to reasonably enable firms and individuals to compete with a substantially equal understanding and interpretation of the services required.” CSSB 204 (CRA), Sec. 2. As passed out of the Finance Committee, the bill permitted the use of price when the services are “sufficiently defined by measurable and objective standards to reasonably enable firms and individuals compete with a [substantially equal] clear understanding and interpretation of the services required.” CSSB 204 (FIN), Sec. 2.

<sup>33</sup> Senate Finance Committee Minutes (February 4, 1986).

<sup>34</sup> HCSSB 204 (JUD) (April 30, 1986). This bill permitted use of price when the services are “thoroughly defined”, as compared with the Senate version’s “sufficiently defined.”

<sup>35</sup> CCSB 204 (May 9, 1986).

the interim before a special legislative committee.<sup>36</sup> SB 341 comprehensively rewrote state procurement law, and enacted the Procurement Code.<sup>37</sup> As introduced and enacted, SB 341 extended statutory authority to conduct procurement by requests for proposals to supplies, construction and services generally, if use of competitive sealed bidding was deemed not practicable or advantageous to the state, and repealed AS 36.98.<sup>38</sup> Requests for proposals were required to state the relative importance of price and other evaluation factors,<sup>39</sup> and price was made a mandatory consideration in the award of a contract.<sup>40</sup> With the enactment of the Procurement Code and its broad authorization of procurement by requests for proposals, SB 204 as passed out of the Senate-House Conference Committee and enacted into law was incorporated into the Procurement Code as AS 36.30.270.<sup>41</sup>

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<sup>36</sup> See 1986 Senate Journal 1547-1551 (Letter Accompanying SB 341 from Senate Select Interim Committee on Procurement Practices and Procedures) (January 14, 1986). The special committee was created in response to controversy related to a Fairbanks procurement of state office space that had led to impeachment proceedings against the governor in the summer of 1985. See generally, McBirney and Associates v. State, 753 P.2d 1132 (Alaska 1988); 1985 House Journal 1755 (First Special Session, July 15, 1985); 1985 Senate Journal 1489-1490 (First Special Session, August 5, 1985).

<sup>37</sup> Ch. 106, SLA 1986.

<sup>38</sup> SB 341, §2 (AS 36.30.210(b)); §64 (repealing AS 36.98); §2, 67 ch. 106 SLA 1986. By regulation, the RFP process may be applied for the procurement of professional services, concession contracts, office leases, and other specific products. 2 AAC 12.215(a). Other supplies or services may be procured by RFP only after a finding by the procurement officer that the standards for use of that process have been satisfied. 2 AAC 12.215(b). See AS 36.30.200(b).

<sup>39</sup> AS 36.30.210(c). By regulation, price must be included as an evaluation factor except as provided in AS 36.30.270. 2 AAAC 12.260(b).

<sup>40</sup> AS 36.30.250(a).

<sup>41</sup> §3 ch. 54 SLA 1986; §67 ch. 106 SLA 1986. The substance of SB 204 (absent a provision permitting the use of price) first appeared in the Procurement Code legislation in CSSB 341 (JUD) (March 17, 1986). The provision permitting the use of price was added in CSSB 341 (JUD) (May 10, 1986), the day after the conference committee had passed its version of SB 204 (including the provision permitting the use of price as an evaluation factor).

## B. Current Law

In general, under the Procurement Code, price must be a consideration when a state agency procures professional services in a competitive solicitation.<sup>42</sup> The Procurement Code does not apply, however, to contracts for the purchase of a variety of professional services, among them medical doctors and dentists,<sup>43</sup> litigation experts,<sup>44</sup> and curatorial and conservation services,<sup>45</sup> and for those services it is entirely in the discretion of the purchasing agency whether to include price as a factor in selecting a contractor, and if so how much weight should be given to that factor. In Alaska, the procurement of architectural, engineering and land surveying services is unique, as compared with other professional services, in that consideration of price as an evaluation factor is limited to specified circumstances.

Eliminating price as an evaluation factor in the selection of architects, engineers and in some circumstances of land surveyors is common. The federal Brooks Act, enacted in 1972, provided for negotiated contracts for architectural and engineering services, but the statutory definition of those services was interpreted as applicable to land surveying services only when performed incidental to an architectural or engineering project.<sup>46</sup> SB 204, as introduced in 1985, was broadly patterned after the federal Brooks Act,<sup>47</sup> but, unlike the Brooks Act, SB 204 as introduced applied to land surveyor services without limitation. Under current law, there remain substantial differences between the Brooks Act and AS 36.30.270(d) regarding the scope of land surveying services that are subject to contracting by negotiation.<sup>48</sup>

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<sup>42</sup> AS 36.30.250(a). “Professional services” for purposes of the Procurement Code are defined in AS 36.30.990(17).

<sup>43</sup> AS 36.30.850(4).

<sup>44</sup> AS 36.30.850(2).

<sup>45</sup> AS 36.30.850(23).

<sup>46</sup> See Ninneman Engineering, Reconsideration, No. B-184770 (Comptroller General, March 9, 1977).

<sup>47</sup> Testimony of Senator Sturgelewski, Prime Sponsor of SB 204, before the Senate Finance Committee (January 28, 1986).

<sup>48</sup> Amendments to the Brooks Act since its enactment in 1972 have led to the abandonment of the requirement that the land surveying services be incidental to an architectural or land surveying project, and land surveying services are generally subject to contracting by negotiation except for some mapping projects. FAR §36.601(a)(4). See generally, In Re Forest Service Request for Advance Decision, Nos. B-233987, B-233.987.2 (Comptroller General, July 14, 1989); 70 Federal Register 20329 (April 19, 2005).



In addition to differences in the scope of land surveying services subject to contracting by negotiation, there are substantial differences in the contractor selection process under the Brooks Act and the process used for RRCS surveys. Under the Brooks Act, the purchasing agency selects at least three firms for “discussions...to consider anticipated concepts and compare alternative methods for furnishing services.”<sup>49</sup> Based on those discussions, the agency ranks the firms and negotiates a contract with the highest ranked firm, at a price the agency determines is fair and reasonable.<sup>50</sup> The process set out in the Brooks Act, sometimes called Qualifications Based Selection, involves an initial selection of firms based on their qualifications and expertise, capacity, past performance, location, and “other appropriate evaluation criteria”<sup>51</sup> and does not require the initial submission and consideration of proposals setting out a project-specific methodology, although, if authorized, a conceptual design may be considered.<sup>52</sup> Rather, the most qualified firms’ proposed methodology is a matter for exploration during discussions, after initial selection of the most qualified offerors.<sup>53</sup> The starting point for negotiations with the selected contractor is, in fact, the submission of a proposal,<sup>54</sup> rather than using proposals describing a detailed methodology as the starting point for selection.<sup>55</sup>

By contrast, the selection process currently used by the department for RRCS surveys is the standard RFP process, except that price is not an evaluation factor. Unlike under the Brooks Act or in Qualifications Based Selection, there is no requirement for a preliminary submission of a statement of qualifications, no provision for selection of the most qualified firms based on those qualifications (and absent consideration of a proposed methodology), and no provision for discussion of alternative methods with the

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<sup>49</sup> 40 U.S.C. §1103(c).

<sup>50</sup> 40 U.S.C. §1103(d).

<sup>51</sup> FAR §36-602-1(a)(1)-(5).

<sup>52</sup> FAR §36.602-1(b).

<sup>53</sup> See FAR §36.602-1(c) (“discussions...regarding concepts [and] the relative utility of alternative methods...”).

<sup>54</sup> See FAR §3.606(a) (“[T]he final selection authorizes the contracting officer to begin negotiations.”), (b) (“The contracting officer should ordinarily request a proposal from the [selected] firm.”).

<sup>55</sup> A process substantially similar to the Brooks Act has been established by regulation under Alaska law for the procurement of architectural, engineering and land surveying services valued in excess of \$100,000. See 2 AAC 12.350, -.390.

most qualified firms,<sup>56</sup> all prior to selection of the preferred contractor and negotiation of the contract terms (including price). Given these differences, it is a mischaracterization to describe the process that is used to procure RRCS services as substantially equivalent to the process set forth in the Brooks Act, or as a form of Qualifications Based Selection.<sup>57</sup> To the extent that a determination whether price may be a consideration is based on an understanding that the RRCS selection process is substantially equivalent to the process employed in the Brooks Act or in Qualifications Based Selection, it is based on an erroneous view of applicable law.

C. Price May Be Considered

AS 36.30.270(d) states that price may be an evaluation factor in the selection of a contractor for architectural, engineering, or land surveying service when:

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

(1) Repetitious Services

The RRCS surveys are repetitious in two respects: first, the program involves repeated solicitations using virtually identical language. As was stated in GPS I:

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. The Scope of Work consists of 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

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<sup>56</sup> The RFP (at page 11) does permit discussions and best and final offers in accordance with AS 36.30.240 and 2 AAC 12.290. However, the provision is not mandatory, and the scope of discussions under those provisions is limited to clarification.

<sup>57</sup> Survey section staff repeatedly characterized the RRCS contractor selection process as a form of Qualifications Based Selection. Affidavit of Ted Garten at ¶3, ¶8; Hagen Testimony 0:05, 0:14; Jennings Testimony 0:40; Gervelis Testimony 1:38.

particular parcels, and otherwise provide specific directions for each parcel to be surveyed.<sup>[58]</sup>

Second, looking at each individual solicitation, the services required are repetitive, in that each solicitation involves surveying a number of lots, with substantially similar tasks for each lot: locate markers, confirm location, set monuments, etc. While there are differences between lots, the substance of the services required for each lot are substantially the same. Similarly, at the conclusion of the project, there is repetition in the preparation of plats.

It is true, of course, that the individual characteristics of each disposal, and of each lot within a disposal, are not repetitive, and are, indeed, unique (as real property is unique).<sup>59</sup> But the statute calls for a determination as to whether the services required are repetitive, not as to whether the objects to which they are applied are repetitive. In this case, notwithstanding the unique and varying features of the landscapes involved, the services required are highly repetitive. The division's witnesses testified in broad terms that the services did not meet the requirements of AS 36.30.270, largely based on the assertion that professional judgment was involved in providing the services.<sup>60</sup> By contrast, GPS provided testimony specifically identifying the repetitive characteristics of the services required.<sup>61</sup>

(2) Measureable and Objective Standards Define the Scope, Nature and Amount of Services Required

The purpose of considering whether the scope, nature and amount of services are thoroughly defined by measurable and objective standards is to determine whether firms submitting proposals are reasonably able to compete with respect to price. This follows from the fact that the determination being made is whether or not to permit price competition. It is in that context that the procurement officer considers whether firms are reasonably able to compete with a clear understanding and interpretation of the services required.

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<sup>58</sup> GPS I, at 4-5 (footnotes omitted).

<sup>59</sup> *See, e.g.*, Affidavit of Ted Garten, ¶7.

<sup>60</sup> *See, e.g.*, Jennings Testimony 0:53, 0:56; Garten Testimony 2:08-2:12, 2:45.

<sup>61</sup> *See, e.g.*, Sears Testimony 0:18-0:21.

In this regard, it is evident from a review of the RFP that the services required are clearly and thoroughly described, with little if any room for misunderstanding or interpretation.<sup>62</sup> Many of the decisions that in other projects might be made by the surveyor in the field have been made by the department in staking instructions, by stakers, and subsequently by the department in the form of lot-specific survey instructions.<sup>63</sup> To say that there will be some professional judgment involved in delivering those services in the field does not mean that the nature, scope and amount of services required is unclear or subject to interpretation. Mr. Sears testified that to a large degree the firm's cost analysis is based on a production rate for setting monuments, with adjustments for the number of specific factors, such as meander lines, retracements, and the like.<sup>64</sup> He testified that the cost for any particular project may be somewhat greater or lesser than the estimated cost, due to irregularities encountered in the field. This does not mean, however, that the firm's estimates do not form a reasonable basis for price competition, since a contingency factor is built into the firm's cost estimates.<sup>65</sup>

AS 36.30.270(d) is of particular relevance for land surveying services, which are more likely to be susceptible of adequate definition for price competition than are architectural and engineering services.<sup>66</sup> The RRCS solicitations describe the scope and nature of the services required in detail, with specific surveying instructions for each individual parcel. While a degree of professional judgment is required to implement those instructions in the field, firms are provided with sufficient information to have a clear understanding of the services required, with little or no interpretation, for purposes of reasonably enabling them to compete with respect to price.

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<sup>62</sup> See *supra*, note 57.

<sup>63</sup> Sears Testimony 1:01-102.

<sup>64</sup> See also, Affidavit of Stan Sears, ¶9 (“[W]e take umbrage at the idea that...we would be incapable of determining a fair and reasonable cost estimate”); ¶10, ¶11.

<sup>65</sup> Mr. Garten's affidavit states that “Production rates...vary greatly by project.” Affidavit of Ted Garten, ¶7. The basis for this assertion is unknown. Mr. Sears has extensive experience in the commercial arena. His opinion on this topic is afforded substantially more weight than Mr. Garten's.

<sup>66</sup> See Testimony of Richard Ritter, American Institute of Architects, before the Senate Finance Committee (January 28, 1986) (“Mr. Ritter mentioned that the majority of projects are not easily definable and that those that are are primarily in the surveying field”).

D. Price Competition For RRCS Surveys Is Appropriate

That the department had for more than ten years operated with express authorization to consider price under the standards of AS 36.30.270(d) is highly persuasive evidence that, as determined above, the RRCS surveys continue to meet the standards for price to be considered. However, the department's prior practice does not mean that it must continue to do so: having met the standards, the decision to use price as a factor remains discretionary.<sup>67</sup> Given that the standards set forth in AS 36.30.270(d) are met, the primary issue in this case is whether the department's discretionary decision to change its practice should be sustained.

The division argues that the commissioner should defer to a discretionary determination of a procurement officer unless it is shown to lack a reasonable or rational basis.<sup>68</sup> However, it is well established that the commissioner's role "should not be restricted to correcting abuses of discretion that warrant reversal in the courts."<sup>69</sup> Accordingly, while the commissioner will reverse a procurement officer's decision when it is deemed to be an abuse of discretion, the commissioner is not otherwise required to defer to a procurement officer's discretionary decisions.<sup>70</sup> In short, when the

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<sup>67</sup> The use of "shall" rather than "may" was briefly considered in the legislative process. *See* Senate Finance Committee Minutes (January 28, 1986) ("Co-chairman Faiks wondered if changing 'may' to 'shall' on page 2, line 15, would help, and Mr. Simpson indicated he thought this would cause an administrative problem.").

<sup>68</sup> Proposal for Action, at 6 ("GPS did not meet its burden of establishing that DNR's decision lacked a reasonable basis"), 8 ("the appropriate standard of review is a rational basis").

<sup>69</sup> In Re Waste Management of Alaska, Inc., at 12-13, No. 01-08 (Department of Administration 2002):

The Procurement Code authorizes the commissioner to 'audit and monitor the implementation of the [procurement] regulations and the requirements of this chapter with respect to using agencies.' AS 36.30.040(a). The commissioner's decision in a protest appeal, consistently with that authority, fosters the uniform interpretation and application of the Procurement Code, provides for direct administrative supervision by the commissioner over procurement officers acting under delegated procurement authority, and contributes to the development and implementation of sound, consistent procurement policies. For these reasons, the commissioner's decision in a protest appeal should not be limited to correcting abuses of discretion that warrant reversal in the courts.

<sup>70</sup> *See* Davis Wright Tremaine LLP v. Department of Law, at 2, OAH No. 11-0377-PRO (Commissioner of Administration 2011), *affirmed*, Davis Wright Tremaine LLP v. State, Department of Administration, 324 P.3d 293 (Alaska 2014); *quoting* Quality Food Service v. Department of Corrections, at 11-12, OAH No. 06-0400-PRO (Commissioner of Administration 2006); Flagship Development, LLC v. Division of General Services, at 11, OAH No. 06-0249-PRO (Commissioner of Administration 2006).

commissioner has the definite and firm conviction that a procurement officer's decision was mistaken, the commissioner may set aside that decision.<sup>71</sup>

In considering whether the procurement officer's decision not to include price as a factor in the evaluation was mistaken, the commissioner has the benefit of the testimony and cross examination of both the division's staff and GPS's representatives, which the procurement officer did not have. In addition, the commissioner is mindful that AS 36.30.270(a) is an exception to the general rule that price is a factor in the award of contracts for professional services. As such, it is in derogation of some of the underlying purposes and policies of the Procurement Code, which include to "provide increased economy in state procurement activities and maximize to the fullest extent practicable the purchasing value of state funds" and to "foster effective broad-based competition within the free enterprise system."<sup>72</sup> Cost competition is routinely used for procurements requiring a relatively high degree of professional expertise that impact mission-critical services, including for programs with large costs.<sup>73</sup> For these reasons, subsection (d) should be construed and applied liberally in favor of permitting price competition, and in the absence of persuasive reasons to the contrary discretion should be exercised in favor of price competition when the statutory standards are met.

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<sup>71</sup> This is the test for abuse of discretion applied by the Alaska Supreme Court to fact-based decisions within the equitable jurisdiction or judicial discretion of the superior court. *See, e.g., Kollander v. Kollander*, 322 P.3d 897, 903 (Alaska 2014) (laches); *Vezev v. Green*, 171 P.3d 1125, 1128 (Alaska 2007) (motion for relief under Civil Rule 60(b)); *Olmstead v. Ziegler*, 42 P.3d 1102, 1104 (Alaska 2002) (modification of child support).

<sup>72</sup> §1 ch. 106 SLA 1986.

<sup>73</sup> *See, e.g., In Re Sanders*, at 2, and at 3, note 13, OAH No. 05-0240-PRO (Commissioner of Administration 2005) (20% cost factor for professional forester to develop a comprehensive Timber Asset Management Plan, including "timber inventory, market analysis, and timber sale planning, design, and layout."); *Alaska Communications Systems v. Department of Education and Early Development*, at 1, 5, 8, OAH No. 11-0120-PRO (Commissioner of Administration 2011) (50% cost factor for contractor to "design, build and maintain a [statewide] broadband communications network"; proposed costs in excess of \$20,000,000); *Johns v. Department of Revenue*, at 4, OAH No. 09-0572-PRO (Commissioner of Administration 2010) (40% cost factor for auditing managers of \$15 billion investment portfolio); *Aetna Life Insurance v. Division of General Services*, at 3, 31, OAH No. 06-0230-PRO (Commissioner of Administration 2006) (40% cost factor for claims administration of health care plans covering 68,000 individuals; contract value of \$30 million); *Flagship Development v. Division of General Services*, at 3, OAH No. 06-0249-PRO (Commissioner of Administration 2009) (60% cost factor, 15% for "function, planning and design" of leased office space); *Empyra.com, Inc. v. Alaska Permanent Fund Corporation*, at 2-3 (Office of Administrative Hearings 2007) (60% cost factor for contract to host, maintain and operate website with 300,000 hits annually); *Mikunda, Cottrell & Co., Inc. v. Department of Health and Social Services*, at 3, OAH No. 07-0618-PRO (Commissioner of Administration 2008) (40% cost factor for auditing Medicaid services providers).

Given that those standards are met, the most important factor to consider in determining whether to permit consideration of price is the nature of the project. Projects in which creative design is paramount may be particularly appropriate for contracting by negotiation.<sup>74</sup> Architectural, engineering and land surveying services sought in connection with a construction project typically include significant design considerations<sup>75</sup> and, in addition, may significantly affect public safety; for such projects, even if the standards set out in AS 36.30.270(d) are met, in most cases price is likely not an appropriate consideration in the selection of a contractor. But in other contexts, and for other projects, and in particular for land surveying services outside of the construction arena, if the standards set forth in AS 36.30.270(d) are met, in most cases price is likely to be an appropriate consideration.<sup>76</sup>

The department argues that to include price as a factor in the award of RRCS survey contracts would risk contract award to contractors who will cut corners in order to meet their low price.<sup>77</sup> But that risk is inherent in any contract for services, whether professional or not, and yet price must be included as a factor in the procurement of services, including contracts in which “cutting corners” could prove particularly harmful to the state’s best interests.<sup>78</sup> Moreover, the division has a mechanism in place to guard against such occurrences, in the form of contract performance evaluation, which is then a factor in future contract awards. Finally, a relatively low price for RRCS surveys has on occasion yielded excellent performance,<sup>79</sup> and thus, as Mr. Jennings testified, one cannot equate a low price with low quality.<sup>80</sup> The department has not provided a persuasive rationale to disregard price as an evaluation factor.

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<sup>74</sup> It appears that this was the primary purpose for the legislation. Senator Sturgelewski, the prime sponsor of SB 204, indicated that “[t]he issue... is that many of the things these professionals deal with in the area of design are difficult to put into a specific proposal.” Senate Finance Committee Minutes (January 28, 1986). As Senator Faiks put it, the professionals involved “believe that reasonable compensation is necessary but that it is difficult to put a dollar amount on creativity.” *Id.*

<sup>75</sup> Mr. Sears testified that for construction-related subdivision layout, road construction, and other projects, land surveyors work in tandem with engineers to design the project. Sears Testimony 0:54, 0:58.

<sup>76</sup> This is consistent with the manner in which the Brooks Act was originally interpreted. *See supra*, note 46.

<sup>77</sup> *See, e.g.*, Garten Testimony 2:13-2:19.

<sup>78</sup> *See supra*, note 70.

<sup>79</sup> Garten Testimony 2:40.

<sup>80</sup> Jennings Testimony 1:05.

The preponderance of the evidence is that the level of professional expertise and judgment required for RRCS surveys is relatively limited as compared with other types of land surveying projects.<sup>81</sup> The project does not involve public safety issues or creative design. The department routinely included price as a factor prior to 2013, and it has not provided a persuasive rationale for disregarding price in soliciting for RRCS surveys. In light of the record as a whole, the procurement officer's decision to disregard price was mistaken.

E. There Is No Evidence of Bad Faith

In the absence of a showing of actual bias or prejudgment, procurement officials are presumed to act in good faith and to exercise honest and impartial judgment.<sup>82</sup> To overcome the presumption, a protestor must provide direct evidence of actual bias or prejudgment, rather than speculation and inference.<sup>83</sup>

In this case, GPS provided no evidence to suggest that the decision to eliminate price was retaliatory. GPS simply speculates that the division's decision to eliminate price was in retaliation for GPS's prior protest. GPS's claim that the determination was made in bad faith is completely without merit.

**IV. Conclusion**

The preponderance of the evidence in this case is that the standards set out in AS 36.30.270(d) have been met. In light of the nature of the project, the degree of professional expertise and judgment involved, and the division's long standing past practice, price should continue to be a factor in the evaluation of proposals for RRCS surveys to at least the same extent as previously.<sup>84</sup> The protest appeal is therefore

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<sup>81</sup> See Affidavit of Stan Sears, ¶5 (“[A]ll boundary surveys are very similar. They are all based on the same principles of surveying and the same survey methodology. The particulars of the location or history of a boundary survey may vary but in the end it's just a boundary survey.”); ¶6, ¶7.

<sup>82</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).

<sup>83</sup> *Id.*

<sup>84</sup> The legislative history, described above, makes it clear that in cases where price is an appropriate consideration, the weight afforded that factor is not subject to any particular limit. Nothing in this decision precludes the procurement officer from affording price a weight of more than a 20%, consistent with standard practice in the award of contracts for other professional services, including contracts involving far greater degrees of professional expertise and judgment, and programs of far greater impact on the public fisc and welfare. See *supra*, notes 12, 58.



sustained. Because the contract has been awarded and the exclusion of price was a factor was not in bad faith, an award of the cost of proposal preparation is not in order. The appropriate remedy is to include price as a factor in selecting a contractor in future RRCS solicitations.<sup>85</sup>

DATED October 20, 2014.

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

### **Adoption**

Under the authority of AS 44.64.060(e)(1) and (2), I adopt the revised proposed decision dated October 20, 2014 as the final agency decision in this matter. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date this decision is distributed.

DATED October 22, 2014.

*Signed* \_\_\_\_\_  
Curtis B. Thayer  
Commissioner

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

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<sup>85</sup> The division may, in the event of programmatic changes or for other reasons, request a change in this policy from the commissioner through the Chief Procurement Officer. The commissioner will consider the Chief Procurement Officer's recommendation and provide such policy guidance as is appropriate. See AS 36.30.005(a), -.015(b), -.040(a).