Non-Adoption Options

C. In accordance with AS 44.64.060(e)(4), I reject, modify or amend one or more factual findings as follows, based on the specific evidence in the record described below:

See attached document.

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 14th day of July, 2017.

By: *Signed*
Sheldon Fisher
Commissioner, Dep't of Administration

1. BI's Employee, Kaitlyn Smith, Was an Alaska Resident for Purposes of the Alaska Bidder Preference.

I disagree with ALJ Slotnick's conclusion on p. 17 of the Proposed Decision that BI's employee, Kaitlyn Smith, was not an Alaska resident for purposes of the Alaska Bidder Preference.

ALJ Slotnick based this finding on criteria used to determine eligibility for a Permanent Fund Dividend. But this standard is incorrect.

The Alaska Bidder Preference is intended to stimulate Alaska's economy by giving preference to businesses who qualify, in part, by maintaining a physical place of business in the state staffed by at least one Alaska resident. ALJ Slotnick's new, more onerous standard would create insurmountable – and often subjective – hurdles to participating in already-complex competitive procurements, using a standard not legally required in this context.

The evidence showed that Ms. Smith has maintained a home in Alaska for over three years and will remain in Alaska as long as her husband is here (i.e. indefinitely). That demonstrates compliance with the Alaska Bidder Preference regulations sufficient to establish residency for that purpose. Accordingly, I find that DGS correctly concluded that Kaitlyn Smith was an Alaska resident for purposes of the Alaska Bidder Preference.

2. BI's Proposal Met the Minimum Experience Requirements

I disagree with ALJ Slotnick's decision that BI did not meet the minimum experience requirements contained in the Request for Proposal ("RFP").

ALJ Slotnick found on p. 23 of his Proposed Decision that the RFP "clearly required" offerors to have at least three years' experience in supporting multiple types/brands of testing equipment in each of the five testing categories described in the RFP.

I find that DGS correctly found BI's proposal responsive to the minimum experience requirements. This finding is supported by the equal treatment of both offerors in this case, as well as case law upholding procurement officer flexibility in interpreting responsiveness requirements, especially when aligned with the purpose of the RFP and when such flexibility increases competition.[1]

[1] *See, e.g., Chris Berg, Inc. v. Department of Transportation*, 680 P.2d 93 (Alaska 1984); *Gunderson v. University of Alaska, Fairbanks*, 922 P.2d 229 (Alaska 1996); *Laidlaw Transit v. Anchorage School District*, 118 P.3d 1018 (Alaska 2005).

However, I uphold Judge Slotnick's conclusion that had the procurement officer, in the spirit of maximizing competition, amended the RFP to clarify the requirements instead of exercising his discretion to reinterpret them, other software developers might have been able to offer a proposal.

3. Procurement Officers May Consider Business Ethics.

I reject ALJ Slotnick's statement on p. 27 of his Proposed Decision that "the procurement process is not the correct forum to sort out what is right or wrong in the rough-and-tumble world of business ethics."

Procurement officers must be able to consider a potential contractor's business integrity as part of a responsibility determination before awarding a contract.

Conclusion

I uphold ALJ Slotnick's finding that the competitors in this case both engaged in conduct that taints the procurement process and that increased competition may come with clarified prior experience requirements. I further uphold ALJ Slotnick's order that DGS reissue the solicitation.

Finally, I direct DGS that this reissuance occur immediately. Cancelation of BI's current contract must occur upon award of a contract under the new solicitation or when the current one-year contract expires, whichever happens first.

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

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF ADMINISTRATION

In the Matter of	)	
	)	
INTOXIMETERS, INC. v. DOA/ DIVISION OF GENERAL SERVICES	)	OAH No. 16-1202-PRO
	)	Agency No. 2017-0600-3505
	)	
	)	

[PARTIALLY REJECTED PROPOSED] DECISION

I. Introduction

The Division of General Services conducted a procurement for a software program needed by the Division of Behavioral Health in the Department of Health and Social Services. Two firms responded with proposals. The firm that did not receive the contract, Intoximeters, Inc., filed a protest. Intoximeters alleged that the firm that prevailed, BI, Inc., did not qualify for the Alaska Offeror's Preference. It also alleged that BI did not have the experience required under the procurement. General Services denied the protest and issued a contract to BI.

Intoximeters appealed the denial, and a hearing was held. The evidence showed that BI did not qualify for the Alaska Offeror's preference because its employee in Alaska was not an Alaska resident. It also showed that BI did not have experience with operating and providing software that met all of the requirements described in the procurement. Accordingly, BI should not have been awarded the contract.

During the protest period, both BI and Intoximeters engaged in conduct that does not reflect well on the procurement process. Neither this conduct, nor the mistaken evaluation by General Services, necessitates the extreme remedy of vacating the contract award that has already been made. This matter is remanded to General Services to prepare a new solicitation for software services. The new solicitation should occur at a time that is least disruptive to Behavioral Health, no later than the expiration of BI's one-year contract.

II. Facts

1. The purpose of a sobriety monitoring/behavioral modification program

Many states across the country have undertaken programs that use behavioral modification techniques to discontinue drug or alcohol use as an alternative to incarceration. A key element of

these programs is sobriety monitoring—making sure that the participants are keeping their promises to stop using drugs or alcohol.[2]

Starting with a pilot project initiated by Superior Court Judge Douglas Blankenship in Fairbanks several years ago, Alaska has also implemented programs of sobriety monitoring/ behavioral modification for defendants involved in the criminal justice system.[3] Alaska's sobriety monitoring/behavioral modification program is similar to the programs in several other states that are sometimes referred to as "24/7 programs."[4] The current version of the sobriety monitoring/behavioral modification program involves cooperation among the Alaska Court System, the Alaska Department of Corrections, Municipal and State Public Safety Agencies, and the Division of Behavioral Health in the Alaska Department of Health and Social Services.[5]

The Division of Behavioral Health takes the lead in administering Alaska's sobriety monitoring/behavioral modification program. The program provides reports back to the other participating agencies. Those agencies become involved as needed—such as when a participant has completed the program or fails a sobriety test. In administering the program, Behavioral Health must, from time to time, procure contracts with vendors in the field of sobriety monitoring.

2. The 2016 procurement of a sobriety monitoring/behavioral modification program software vendor

In the summer of 2016, Behavioral Health was preparing for a new round of contracts for its most recent iteration of the sobriety monitoring/behavioral modification program. To procure vendors to administer the program, Behavioral Health split the program into two parts. One part required contracting with testing vendors. These vendors would meet with the participants, administer sobriety checks, and provide feedback. The expectation was that many different vendors in different locations across the state, using different types of equipment to measure sobriety, could be awarded testing-provider contracts.[6]

The other part of the program was the software/reporting function. The software/reporting vendor would schedule the tests, receive the raw data from the testing vendors, provide feedback to the testing vendors, store the data in a database, and provide reports to the agencies. For this contract, Behavioral Health wanted only one vendor. That way, all data would be collected and reported uniformly, and confidentiality of the data could be safeguarded. Given the bifurcation of

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2 Forrester testimony.
3 Johnson testimony (Tr. 294).
4 Forrester testimony (Tr. 71-76).
5 DGS 12.
6 DGS 10.

the program, Behavioral Health elected to procure the software vendor first. Then, the costs for the software would be rolled into the subsequent procurements for the testing vendors.[7]

Although the Department of Health and Social Services has procurement authority, and commonly conducts its own procurements, for this procurement, Health and Social Services asked the Division of General Services, located in the Department of Administration, to conduct the procurement. General Services serves as the statewide procurement specialist and provides oversight for procurements for the executive branch of government. When agencies have a difficult or complex procurement, General Services may step in and manage the procurement on behalf of the agency.[8] Here, in the previous iteration of the sobriety monitoring/behavioral modification program, Health and Social Services had been criticized for issuing a sole-source procurement instead of a competitive procurement. Having General Services conduct the procurement was to ensure a more competitive process, so as to avoid any concerns of bias or favoritism. The procurement officer who conducted the procurement for General Services was Jason Grove.

On July 22, 2016, after working with Behavioral Health to define the scope of work needed for the software, General Services issued a Request for Proposals (RFP).[9] The RFP required that an offeror must have operated and provided software that met the requirements of the "scope of work" section of the RFP during three of the past five years.[10] The RFP told offerors how the offers would be evaluated. Cost would account for 65 percent of the evaluation points.[11] The Alaska Offeror Preference—a law that allows additional points to be awarded to offerors who meet a set of requirements for being "Alaskan"—would account for 10 percent.[12] The software features and functions would be 10 percent.[13] Finally, for those offerors that General Services determined were "reasonably susceptible for an award," a mandatory product demonstration would account for 15 percent of the evaluation.[14]

Attachment B to the RFP (the "Proposal Form") required the offeror to answer 19 "true or false" questions. By answering "true" to all questions in Attachment B, the offeror would be certifying that it was a responsive bidder—that it had read the RFP and that it met all of the

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7 DGS 1-14.
8 Grove testimony.
9 Admin. Rec. at 1.
10 Admin. Rec. at 4.
11 Admin. Rec. at 32.
12 Admin. Rec. at 32.
13 Admin. Rec. at 31.
14 Admin. Rec. at 32.

requirements.[15] In Attachment C, which was optional, the offeror was given an opportunity to describe its product's features and functions in a narrative and illustrative form. Attachment C had a 10-page limit.[16] The deadline for proposals was August 12, 2016, at 3:30 p.m.[17]

While the RFP was out, potential offerors were permitted to ask questions about the RFP. For those questions that could not be answered by direct reference to the RFP, General Services posted the answers as "Amendment #1" to the RFP, dated August 4, 2016.[18]

Two companies submitted proposals: BI, Inc., and Intoximeters, Inc. Mr. Grove determined that both proposals were responsive to the RFP—that is, they both met all of the minimal requirements (such as experience) for submitting a bid. Before describing the proposals and their evaluation, this decision will give a short description of the two offerors.

3. Intoximeters

Intoximeters is a St. Louis company that has been in the sobriety monitoring business since the 1930s.[19] It has been involved in the development of sobriety monitoring/behavioral modification programs—which it calls "24/7 programs"—since 2010. It provides both software and hardware. The software it provides goes beyond recording, reporting, and data-base management. It also provides features that facilitate the behavioral-modification aspects of the program, including scheduling and reminders of monitoring events, as well as triggers for the person who administers the sobriety test to follow-up with behavioral modification events, such as administration of a reward (for a positive result) or a punishment for failing the test.[20]

In 2014, when Health and Social Services was implementing a statewide sobriety monitoring/behavioral modification program, Health and Social Services determined that no other company manufactured software that would work for the type of program it had in mind. Health and Social Services obtained approval from General Services for a sole-source contract with Intoximeters to procure and use its software.[21] On June 30, 2014, Intoximeters and Health and Social Services entered into an 18-month contract, under which Intoximeters agreed to provide licenses to run its "IntoxiTrack" data management system.[22] The expiration of the sole-source contract in 2016 led to the current procurement for software that is at issue in this appeal.

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15 Admin. Rec. at 35.
16 Admin. Rec. at 36-45.
17 Admin. Rec. at 5.
18 Admin. Rec. at 50.
19 Forrester testimony.
20 *Id.*
21 DGS 323.
22 DGS 326-31.

4. BI

BI is a Colorado company that was founded in 1978.[23] It has extensive experience in monitoring and supervising offenders on "Parole/Probation, pre-trial, electronic monitoring, and curfew within 20 states."[24]

BI has had a contract with the Alaska Department of Corrections for electronic monitoring (ankle bracelets) since the 1990s. BI has electronic-monitoring equipment in Juneau, Ketchikan, Anchorage, the Matanuska-Susitna area, Fairbanks, and Kenai.[25] It has up to three employees in Alaska.[26] Only the Anchorage area, however, has a full-time employee. Her name is Kaitlin Smith. She works out of an office provided by Corrections. The office is located within Corrections's suite in the bus depot building in downtown Anchorage. In that office, Ms. Smith enters the data for offenders into a computer owned and maintained by BI. She meets with offenders, installs the ankle bracelets, and gives the offenders an orientation in how to maintain them.[27] Having the office space within Corrections is very convenient for both Corrections and BI because Corrections officials work closely with BI to schedule and facilitate the electronic monitoring program.

BI pays no rent to Corrections for use of the office. If Corrections were unable to house BI, BI would have to find other rental space to run its operation. That situation would be detrimental to both BI and Corrections, and is not likely to happen.[28]

In addition to the office space at Corrections, BI also rents a storage unit in midtown Anchorage. Several years ago, when BI had a smaller office within Corrections, BI staff needed the storage unit to warehouse equipment and records. Now, however, BI has a larger office at Corrections and is able to inventory equipment in the office and in the hallway immediately outside the office, which is much more convenient. During the year before BI prepared its offer, neither Ms. Smith, nor any other employee of BI, had accessed the storage unit. Ms. Smith did visit the storage unit in late September 2016, as this procurement was coming to an end.[29] In reviewing the materials in storage, she found out-of-date charging units that no longer worked with the equipment used in Alaska.[30] She also found four boxes of files that needed to be

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23 DGS 59, 67.
24 DGS 59.
25 Giles testimony (Tr. 741).
26 Giles testimony; Smith testimony.
27 Smith testimony; Giles testimony.
28 Muise testimony.
29 Smith testimony (Tr. 849). *See also* DGS 177; Johnson testimony (Tr. 314).
30 *Id.*

shredded and put in the landfill, and several empty cardboard boxes.[31] She did not find any equipment or other goods in the storage unit that could be used by BI for its current operation in Alaska.[32]

5. The scoring of the proposals and the award to BI

The evaluators on the proposal evaluation committee scored Intoximeters' proposal more favorably than BI's: 250 points for Intoximeters compared to 167.14 points for BI.[33] Intoximeters also had a lower price.[34] BI, however, qualified for the Alaska Offeror's Preference, which gave it an advantage over Intoximeters. With this advantage, BI's offer received the most points in the evaluation, 917.14 to 893.71.[35] General Services identified BI's offer as the "most advantageous," and on August 31, sent BI a notice of intent to award a contract.[36]

On September 8, 2016, Intoximeters filed a procurement protest with Mr. Grove.[37] The protest alleged that BI did not meet the experience requirement and did not qualify for the Alaska Offeror's Preference.[38] On September 16, 2016, BI filed a response with Mr. Grove, asserting that it met the experience requirement and qualified for the preference.[39] Mr. Grove denied the protest three days later.[40]

On September 26, 2016, Intoximeters appealed the denial to the Commissioner of Administration.[41] In addition to the two issues raised in the protest, Intoximeters also alleged that BI had misrepresented facts about its eligibility for the Alaska Offeror's Preference. The alleged misrepresentation was based on statements by BI that it had a place of business, which it identified as a storage unit, and that for more than six months prior to the RFP its employees had worked out of the storage unit.[42] In fact, however, Intoximeters had learned that no employee of BI had visited the storage unit for two years.[43]

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31 *Id.* at 851-53.
32 *Id.*
33 DGS 120-21.
34 *Compare* DGS 81 (BI's price, $68,723.30) *with* DGS 95 (Intoximeters' price, $65,925.00). BI, however, was awarded more points for price (650) than Intoximeters was awarded (643.71). DGS 120. By my calculation, BI should have received 623.53 points for price ((650 x 65,925.00) ÷ 68,723.30), and Intoximeters should have received 650, which would have meant that Intoximeters would have been awarded the contract on points. This puzzlement was not addressed at the hearing.
35 DGS 120.
36 DGS 127.
37 DGS 128-36.
38 DGS 131, 134.
39 DGS 150-53.
40 DGS 156-58.
41 DGS 159-70.
42 DGS 167.
43 DGS 163.

The commissioner referred the appeal to the Office of Administrative Hearings. General Services filed a motion for summary adjudication on all issues. BI, which was participating in the appeal as an intervenor, filed a partial motion for summary adjudication, requesting a ruling that it qualified for the offeror's preference. Both motions were denied because they raised factual issues that could only be resolved after a hearing. An evidentiary hearing was held, and the hearing process concluded on May 1, 2017.

III. Discussion

Intoximeters' appeal is based on three distinct threads. First, it asserts that BI did not qualify for the Alaska Offeror's Preference. Second, it asserts that BI did not meet the experience requirement. Third, it argues BI misrepresented the facts when it told Mr. Grove that its employees worked out of the storage unit.[44]

A. Did Intoximeters prove that BI did not qualify for the Alaska Offeror's Preference?

The definition of "Alaska Bidder" found in AS 36.30.950 includes a list of five attributes, in subparagraphs (2)(A) – (2)(E). The only attribute in dispute is (2)(C), which requires that the offeror "has maintained a place of business in the state staffed by the bidder or offeror or an employee of the bidder or offeror for a period of six months preceding the date of the bid or proposal."[45] Intoximeters has two arguments regarding subparagraph (2)(C)—first, that BI did not have a place of business, and second, that BI did not "staff" a place of business because BI did not employ an Alaska resident as required under the regulations.

The Department of Administration's regulations define the term "place of business" to mean a "location at which normal business activities are conducted, services are rendered, or goods are made, stored, or processed; a post office box , mail drop, telephone, or answering service does not, by itself, constitute a 'place of business.'"[46] The regulations define the term "staffed" to mean that "the bidder or at least one employee of the bidder is a resident of the state under AS 16.05.451(a)."[47] The statute cited by the definition of "staffed" to define the term "resident," AS 16.05.451(a), is the statute that governs who may obtain a resident fishing or hunting license. This statute requires that a person must have been domiciled in the state for 12

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44 DGS 159-70.
45 AS 36.30.950(2)(C).
46 2 AAC 12.990(b)(3).
47 2 AAC 12.990(b)(7).

consecutive months before applying for a resident license, and have the intent to remain in the state indefinitely.[48]

1. Was BI's storage unit a place of business?

Shortly after the offers were opened, and it appeared that BI's offer would be the winning offer, BI informed Mr. Grove that its place of business was its storage unit in midtown Anchorage.[49] Although BI had an office at Corrections, BI specifically requested that General Services *not* consider that office a place of business.[50] The record indicates that, at that time, General Services would not qualify an office loaned to a business from a state agency as a place of business.[51] BI also informed General Services that it employed at least one Alaska resident, who had been with BI for over a year.

At summary adjudication, both Intoximeters and General Services argued that the only relevant inquiry is whether BI employed an Alaska resident. They arrived at this position by pointing out that 2 AAC 12.990(b)(7) defines the term "staffed" to mean that the business has an Alaska resident employee. The purpose of this narrow definition, General Services explained, was to avoid having a "frequency" requirement regarding how often an employee actually visits the place of business.

If the law were as posited by BI and General Services, however, then any business that employed an Alaska resident could qualify for the preference merely by renting an empty shell as a sham place of business. This approach would not be consistent with the statutory requirement that the place of business be staffed. It also would not be consistent with common sense.[52] Although BI and General Services call this a "plain language" approach based on 2 AAC 12.990(b)(7), the definition of "staffed" in 2 AAC 12.990(b)(7) merely tells us who is doing the staffing. It does not tell us what that person must do in order to consummate the act of staffing—that is a fact and circumstances test, to be determined based on the facts of each case.

General Services makes a good point, however, that frequency of use should not be the determinative factor for defining a "place of business." There are at least two reasons to avoid a frequency threshold for the term "staffed." First, as General Services argues, telling a business

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48 AS 16.05.451(a).

49 DGS 123.

50 *Id.*

51 DGS 385.

52 *Cf., e.g., Computer Task Group, Inc. v. Division of Gen'l Servs.,* OAH No. 07-0147-PRO (Dep't of Admin. 2007) at 11 n.42 (holding that "the Alaska bidder's preference must be strictly construed" (quoting 1999 Op. Att'y Gen'l (No. 663-00-0083 1999) and citing 1989 Op. Att'y Gen'l (No. 663-89-0635 1989)). Requiring that the place of business be genuinely used as a place of business is not actually *strict* construction—it is commonsense construction of the statute. An unused storage unit is not a place of business under any reasonable construction of the statute.

how frequently it must access its office and investigating frequency of use of a bona fide place of business are not appropriate exercises for a state agency. Second, and more important, we can imagine Alaskan entrepreneurs who are genuinely engaged in an itinerant business in Alaska who return to their place of business only infrequently.[53] The interpretation of the "place of business" requirement should not prevent deserving (but perhaps unique or quirky) Alaskan businesses from claiming the preference. Therefore, as the parties were advised in the order denying summary adjudication, the focus of the inquiry for determining whether a location meets the requirements of the statute is on "whether the location is genuinely used in the offeror's business."

At the hearing, BI did not refute Intoximeters' evidence that BI's employees had not been to the storage unit for over two years. Testimony at the hearing revealed, however, that BI used to have a valid, bona fide business reason for renting a storage unit.[54] In General Services' and BI's views, the fact that BI once had a genuine need for a storage unit suffices to meet the requirements of a place of business staffed by an Alaska resident.

Although the act of staffing the place of business does not necessarily have to occur frequently for the place to qualify, the act must occur or the place is clearly not a place of business. Here, the facts show that BI no longer uses the storage unit. Its staff does not access the unit, and no genuine goods are stored at the unit. The storage unit is not a place of business.

2. Was BI's office at Corrections a place of business?

Intoximeters argues that because BI does not maintain its office at Corrections, the office does not meet the requirements of AS 36.30.990(2)(C). In Intoximeters' view, the facts that BI does not have a lease or pay for the upkeep or janitorial services at the office means that BI does not maintain the office. Intoximeters also cites to the fact that General Services itself had stated a view at one time that an office within a state government agency would not be sufficient to meet the preference.

General Service's initial concern about whether an office simply on loan by a government agency could meet the requirements of AS 36.30.990(2)(C) is understandable. For example, the

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[53] *Cf., e.g., Irby-Northface v. Com. Elec. Co.*, 664 P.2d 557, 561 (Alaska 1983) (holding that under prior version of Alaska bidder's preference, preference should be awarded to joint-ventures if only one party was an Alaskan business because "we believe the paramount interest is that qualifying corporations be given preference"). Frequency of use, while not a determinative factor, could be evidence that a proffered place of business was not, in fact, a place where business was genuinely conducted. Although General Services is reasonably concerned about having to undertake a searching inquiry, the inquiry that it undertook in this case would have been sufficient to satisfy the minimal "facts and circumstances" test imposed by the preference.

[54] Chapman testimony (Tr. 1047-50). Mr. Chapman, a former employee, accessed the storage unit 10 times in six years. Whether this would meet the statutory requirement of a place of business staffed by the offeror is an open question.

fact that BI could only conduct state business related to an existing contract within its office could mean that it is not "open for business," as that term is traditionally used, at that location. In addition, the tenuousness of its ability to remain at the office could be considered evidence that the office is not actually maintained—it is merely allowed. In a previous case in which the same issue arose, the Department of Administration indicated that whether an office inside a government building could qualify as a place of business was an open question, and that the decision could go either way.[55]

Although these concerns could be issues that a policymaker might want to consider, no regulation requires that the offeror be able to remain in its office, be able to conduct more than one type of business, or have the janitorial contract for the office. In the absence of a regulation, none of these possible limits on the place of business will be imposed. Although the preference should be narrowly construed, we should avoid constructions that could have unforeseen consequences that fence out legitimate Alaskan business. A genuine business carrying out real business in Alaska should not be required to turn down free space, rent more versatile space, or hire a janitor, in order to qualify for the preference. Therefore, the inquiry as to whether the office in Corrections qualifies is the same as the inquiry described above for the storage unit: Is the space genuinely used in the offeror's business?

Here, the evidence proved that BI genuinely uses the office for business needs. Ms. Smith works there every day, meeting with clients, entering data, and working with Corrections officials. Goods are stored and used at the office, as is office equipment.[56] This office is staffed by an employee. In short, the office is a genuine, bona fide place of business. The only question is whether the office is staffed by an Alaska resident. We turn to that question next.[57]

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[55] *Bicknell v. Dep't of Trans. and Pub. Facs.*, at 7 (Dep't of Trans. and Pub. Facs. 2011). In *Bicknell*, the Department of Transportation and Public Facilities indicated that it would allow use of a private office in the federal building to be considered a private party's place of business. *Id.* The decisionmaker did not rule on the issue, but observed that including the office in the preference might be contrary to the proviso that the preference should be narrowly construed. *Id.* at n.27. General Services reviewed its records and stated that it had no record that the Chief Procurement Officer has ever advised on the issue. In this case, General Services has not requested a strict construction. Although the preference could be limited to a person's own business premises, that rule is not suggested by the language of the statute. Strict construction does not require adding requirements onto the statute.

[56] Giles testimony (Tr. 745-46, 771); Smith testimony (Tr. 859-60); Muise testimony (Tr. 784-85).

[57] Intoximeters also asserted that BI cannot qualify on the basis of the office in Corrections because BI originally advised Mr. Grove that it was relying solely on the storage unit as its place of business. Intoximeters Post-Hearing Brief at 29. Intoximeters, however, does not support this assertion with any citation to a case, statute, or regulation. Without authority, the argument is not persuasive. This hearing is a *de novo* hearing. Parties are generally allowed to pursue alternative theories at a hearing.

3. Is BI's employee Kaitlyn Smith an Alaska resident?

Ms. Smith is a military dependent. She arrived in Anchorage in February 2014 to accompany her husband who is in the air force, and who had been assigned to a four-year rotation at the Elmendorf Air Force Base.[58] She left Alaska in June 2015 to visit Virginia, North Carolina, and Tennessee, returning around August 13, 2015.[59] While in Virginia, which is where her mother's home is, she renewed her Virginia driver's license. She gave her mother's address as her home address on her driver's license.[60]

Intoximeters argues that Ms. Smith is not an Alaska resident because:

- She was not physically present in the state for 12 consecutive months before accepting employment.
- She renewed her driver's license in her home state of Virginia on June 29, 2015. Virginia law requires that she be a resident of Virginia in order to renew a Virginia driver's license.
- She has not formed an intent to remain a resident of Alaska.

BI responds, however, that, under the governing regulation, Ms. Smith is automatically a resident for purposes of the Alaska Offeror's Preference, without regard to her intent to remain. Both BI and General Services argue that the standard of review here is deferential—in their view, the procurement officer had discretion in how to apply the standards for the preference. They conclude that, as long as his decision had a reasonable basis, the decision should be affirmed.

a. Is the determination of a person's residency a question committed to the discretion of the procurement officer?

A long line of cases recognize that the procurement officer has discretion to interpret RFPs and proposals, and to make decisions that are committed to the discretion of the procurement officer.[61] The standard of review recognizes that the commissioner will give "due deference" to the procurement officer's decision.[62] This deference to the procurement officer is

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58 Smith testimony (Tr. 841, 855).

59 *Id.* at 839, 843, 872.

60 *Id.* at 843, 887.

61 *Turbo North Aviation, Ltd. v. Dep't of Pub. Safety*, OAH No. 05-0658-PRO (Dep't of Admin. 2006) ("the agency record must show a reasonable basis for the procurement officer's responsiveness decision for that determination to be upheld."); *In re Waste Management, Inc.*, Dep't of Admin. Case No. 01.08 at 7 (Dep't of Admin. 2002), *available at* http://aws.state.ak.us/officeofadminhearings/Documents/PRO/00-11.htm.

62 *See, e.g., Davis Wright Tremaine, LLP v. Dep't of Law,* OAH No. 11-0377-PRO (Dep't of Admin. 2011) at 3 ("[d]ue deference is given to the procurement officer's decision to accept a late protest."); *aff'd, Davis Wright Tremaine LLP v. State, Dep't of Admin.,* 324 P.3d 293, 300-01 (Alaska 2014).

appropriate, and can often keep a protest from escalating into an unnecessary pitched battle among competing vendors.

The cases do not, however, ascribe to the view that *all* aspects of a procurement officer's decision will be affirmed if supported by a reasonable basis. "[O]n questions of law the independent judgment standard applies, and the commissioner determines facts *de novo* following an evidentiary hearing."[63]

Here, Mr. Grove clearly had a reasonable basis for relying on BI's representation that Ms. Smith is an Alaskan resident. That, however, does not relieve the decisionmaker on appeal of the burdens of determining the actual facts regarding Ms. Smith's intent to remain in Alaska, and then using independent judgment to interpret the law that governs the determination of Ms. Smith's residency status.

b. Does 2 AAC 12.990(b)(7) adopt a special rule to allow nonresident military dependents to be considered "residents" for purposes of the Alaska Offeror's Preference?

The regulation that defines "residency" for purposes of the Alaska Offeror's Preference, 2 AAC 12.990(b)(7), does so by adopting the definition of resident that applies to hunting and fishing licenses: the person must be "a resident of this state under AS 16.05.415(a)." This definition of resident, however, gives rise to a question regarding how to treat military personnel and dependents who claim a different state as their state of residence, and who have never formed an intent to remain in Alaska indefinitely.

The ambiguity arises because for fishing and hunting licenses, the legislature has given members of the military and their dependents a special exemption. Once they are in Alaska for a year, they can obtain a resident license, even if they have no intent to remain in Alaska, and even if they still claim a different state as their actual state of official residency.[64] In contrast, an applicant who is not in the military or a military dependent must intend to remain in the state indefinitely, and may not claim or obtain benefits of residency elsewhere.[65]

The Department's regulation expressly adopts only the definition of residency found in subsection (a) of the fish and game residency statute: AS 16.05.415(a).[66] The regulation does not

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63 *Waste Management*, Dep't of Admin. Case No. 01.08 at 7. *Waste Management* also advised, however, that the review by the commissioner may be less deferential than that of a court because the discretion committed to the *agency* (as opposed to the procurement officer) ultimately resides in the commissioner. *Id.*

64 AS 16.05.415(c)-(d).

65 AS 16.05.415(a)(1).

66 2 AAC 12.990(b)(7) ("staffed" means that the bidder or at least one employee of the bidder is a resident of this state under ***AS 16.05.415(a)***" (emphasis added)).

expressly adopt the subsections of the statute that create a special rule for military personnel or military dependents who otherwise would be nonresidents, subsections (c) and (d).[67] Nevertheless, BI's argument appears to assume that the special rules for nonresident military dependents apply to this case.[68] If that were true, this decision would not be required to analyze Ms. Smith's intent to remain indefinitely—even if she had no such intent, she would qualify. If it were true, however, it would also mean that hiring a person who is a resident of another state would qualify a business for the Alaska Offeror's Preference. That result is counterintuitive.

BI argues that the Chief Procurement Officer, Jason Soza, testified that "it has never been DGS's policy to exclude businesses that employ military dependents for the preference."[69] That testimony is no doubt correct, but it is irrelevant. The interpretation advocated by Intoximeters (that "(a)" means "(a) and only (a)") would not exclude businesses that employ military dependents—if a military dependent employee is a resident under 16.05.415(a), then the business is eligible. The correct question to ask is, if a business's only employee is a resident of another state, is the business eligible for the preference because the employee is a military dependent who has been in Alaska for one year? The department could have answered this question yes by adopting subsections (c) and (d), or all of AS 16.05.415, in 2 AAC 12.990(b)(7). That it only adopted subsection (a) is evidence that the answer is no.

The special rule for military personnel and dependents in subsections (c) and (d) makes sense for fishing and hunting. Nonresidents who are stationed in Alaska would not be able to fish or hunt in their home states because they are in Alaska. The cost of a nonresident permit in

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[67] An argument could be made that subsection (a) incorporates the special rule found in subsections (c) and (d). Subsection (a) states as follows:

> (a) In AS 16.05.330 - 16.05.430, a person, except as provided in (c) - (f) of this section, is a resident if the person
>
> (1) is physically present in the state with the intent to remain in the state indefinitely and to make a home in the state;
>
> (2) has maintained the person's domicile in the state for the 12 consecutive months immediately preceding the application for a license;
>
> (3) is not claiming residency in another state, territory, or country; and
>
> (4) is not obtaining benefits under a claim of residency in another state, territory, or country.

It could be argued that, by identifying subsections (c) and (d) as exceptions to the rule that applies in (a), subsection (a) incorporates subsections (c) and (d). On the other hand, it could be argued that the adoption of only (a) means that only the standards in (a) apply to residency for the purpose of the Alaska Offeror's Preference. The rules of statutory construction could allow either result. The rules of statutory construction will not be discussed, however, because BI does not make that argument. BI Post-Hearing Brief at 11-14. Although the statutory construction issue would be a close question, even if BI had made the argument, it would not be persuasive without some evidence that Administration, in adopting 2 AAC 12.990(b)(7), intended to allow residents of other states to be considered residents of Alaska for purposes of the preference.

[68] BI Post-Hearing Brief at 11-14.

[69] *Id.* at 11 (citing Tr. at 1149).

Alaska, however, would mean that they could not hunt or fish here either, without paying a high price. The legislature recognized the involuntary nature of placement in Alaska during military service, and chose to be generous to nonresident military personnel and their dependents. The policy of extending the special rule to the situation of the Alaska Offeror's Preference, however, is not so obvious. The beneficiary would be a business that chooses to employ only nonresident military personnel who have been in Alaska for 12 months. This policy choice could be plausible, but it does not fit with the general concept of the Alaska Offeror's Preference, which anticipates a robust economic presence in Alaska. Generally, we would expect that an Alaska business would not have only one employee in Alaska who is actually a resident of a different state, and who would qualify as an Alaska resident for hunting and fishing purposes only through a special dispensation. Without evidence that the Department of Administration intended such a result, the better interpretation is that it meant what it said when it adopted only subsection (a) in its definition of Alaska resident. Therefore, the special rule for military dependents who have been in Alaska for 12 months, but do not have the intent to remain indefinitely, was not adopted for purposes of the Alaska Offeror's Preference.

a. Did Ms. Smith meet the requirement that she be domiciled in Alaska for 12 months?

The evidence proves that Ms. Smith has been domiciled in Alaska since 2014. Intoximeters' argument that Ms. Smith's trip to the East Coast while on vacation would have derailed her residency status (if she had residency status) is frivolous. It cites no authority for the proposition that a newly-established resident of Alaska may be denied a fishing license under AS 16.05.415(a) for having taken a vacation.

b. Did Ms. Smith claim residency in Virginia?

Intoximeters argues that Ms. Smith's act of renewing her resident driver's license in Virginia in 2015 is evidence that Ms. Smith claimed residency in Virginia. It bases this conclusion on Virginia law, which, it asserts, requires that a person be a Virginia resident in order to renew a Virginia driver's license.[70] If Ms. Smith claimed residency in Virginia, she could not be a resident of Alaska under AS 16.05.415(a).

Ms. Smith, however, explained that she understood Virginia law to allow nonresident military personnel to obtain resident driver's licenses if they claimed Virginia as their home of

[70] Intoximeters' Post-hearing brief at 9 n.2 (citing Va. Code § 46.2-330(B)).

record.[71] Intoximeters disputes Ms. Smith's understanding of Virginia law, explaining that Virginia law allows absent military dependents an extension on their driver's license, but does not waive the residency requirement.[72]

Even if Ms. Smith was wrong about Virginia law, however, the question is whether she *claimed* residency in Virginia.[73] She testified to an understanding of the law under which her act of renewing her license did not require her to claim residency in Virginia. Thus, the problem here is that she did not know whether she was, in fact, a Virginia resident or an Alaska resident. Because I believe her testimony, I cannot find that her act of renewing her Virginia license automatically means that she was not an Alaska resident under AS 16.05.415(a). The question requires further analysis of her intent. If she intended to sever her connection with Virginia, and form an indefinite connection with Alaska, then she is an Alaska resident. If not, then she is not.

c. Did Ms. Smith have the intent to remain indefinitely in Alaska?

Ms. Smith was a scrupulously honest witness. In spite of being closely questioned by a roomful of attorneys at the hearing, she was not willing to claim status as an Alaska resident or disclaim status as an Alaska resident. The questions and hair-splitting that concerned the lawyers were not issues that she had thought or cared about. The exchange with Ms. Smith left me with a great deal of respect for her. It did not, however, make my job of determining her residency status very easy.

The problem is this: Ms. Smith will go where her husband is stationed. When his current four-year rotation in Alaska ends, she expects that he will be transferred to a different location. In this circumstance, she was not willing say that she has the intent to remain indefinitely. She was, however, willing to say that "I reside here. I live here. My home is here."[74]

General Services correctly concludes that Ms. Smith's intent to remain in Alaska until her husband is transferred, and her declaration that she lives here, *could be* evidence that Ms. Smith is an Alaska resident. Her husband's transfer out of Alaska is an indefinite future event. She is not required to foretell the future about what would happen after her husband's military service ends in order to be qualified as a resident.

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71 Smith testimony (Tr. 866).

72 Intoximeters' Post-hearing brief at 9 n.2.

73 My limited research of Virginia law suggests that Intoximeters is likely correct that military personnel living outside Virginia still must be Virginia residents in order to obtain a resident driver's license. BI has not argued otherwise. *See* Va. Code § 46.2-330 *available at* http://law.lis.virginia.gov/vacode/title46.2/chapter3/section46.2-330/.

74 Smith testimony (Tr. 874).

The problem, however, is that Ms. Smith was unable to express her intent or identify her state of legal residence. A nonresident could just as easily make the same statements that Ms. Smith made. A military spouse who fully intends to leave Alaska permanently at the first available opportunity, and who claims residency in a different state, could also testify that she would remain in Alaska until her spouse is transferred. That nonresident, too, could truthfully say, "I live here and my home is here." That would not mean, however, that the nonresident is a resident, because the nonresident would have no intent to remain indefinitely. Residing in a state is not the same as being a legal resident of the state. Therefore, Ms. Smith's statement that she lives here, standing alone, is not *sufficient* evidence to establish residency.

Testimony regarding intent is inherently problematic. People forget, change their minds, or are unsure about their intent. In many cases, objective evidence is a better indication of intent than testimony.[75] In the context of determining eligibility for a Permanent Fund Dividend, the legislature has identified the following as some of the objective indicia relevant to determining intent to remain in the state indefinitely:

> (4) the ties the individual has established with the state or another jurisdiction, as demonstrated by
>
> (A) maintenance of a home;
>
> (B) payment of resident taxes;
>
> (C) registration of a vehicle;
>
> (D) registration to vote and voting history;
>
> (E) acquisition of a driver's license, business license, or professional license; and
>
> (F) receipt of benefits under a claim of residency in the state or another jurisdiction.[76]

Applying these objective criteria here, Ms. Smith does not maintain a home or pay resident taxes in either Alaska or Virginia. That is not, however, an indication that Alaska is not her legal residence—in her situation, it would not make economic sense to buy a home in Alaska. She has registered her vehicle in Alaska, but this was merely a matter of complying with the law: nonresidents who accept employment in Alaska must register their vehicles within ten days.[77]

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[75] *See, e.g., In re LMQ*, OAH No. 12-0766-PFD (Dep't of Rev. 2014) (holding that evidence of answers on form was more conclusive evidence of intent than later move back to Alaska).

[76] AS 43.23.008(e)(4). This statute is not binding on this proceeding. Even in the PFD context, none of these factors is considered dispositive—the decisionmaker is to weigh them as bearing on the question of intent. Given the congruity of the inquiry (intent to remain indefinitely), however, the objective factors in AS 43.23.008(e)(4), as well as other objective factors, can be considered in determining Ms. Smith's intent.

[77] AS 28.10.121(a).

Ms. Smith registered to vote in Virginia before she left, and she has not changed her registration. She did not vote in the last election. She has not considered voting in Alaska.[78] In general, her voting history may show more of an apathy toward politics than it does a lack of intent to make Alaska her legal residence. Nevertheless, the fact that she has apparently not engaged in Alaska issues, and did not consider Alaska enough of a home base to register to vote in Alaska, is some objective evidence that she has not formed the intent to be an Alaska resident.

Ms. Smith's decision to renew her driver's license in Virginia, rather than obtain an Alaska driver's license, is significant objective evidence of intent. Obtaining an Alaska driver's license would have been a step toward establishing a tie to Alaska. Renewing her Virginia license, on the other hand, is evidence of her unwillingness to sever her tie to Virginia.

A conclusion that Ms. Smith is unwilling to sever her tie to Virginia is consistent with her testimony. She mentioned in her testimony the importance of Virginia as her husband's "home of record."[79] Ms. Smith indicated that she knew that "home of record" was "where we're from."[80] Although a home of record for the military is different from a state of legal residence, she was not sure of the difference.[81] Given that the State of Alaska provides a very large financial incentive for Ms. Smith and her husband to sever their tie to Virginia, their decision not to do so is an indication that they have not adopted Alaska as their state of legal residence.[82]

Nothing in this analysis is critical of Ms. Smith. She did not advocate that she was an Alaska resident. The issue being discussed here—her state of legal residence—is an issue that she has never thought about and would prefer to never think about. Because she did not know whether she was an Alaska resident, I accepted that she might be, and have now analyzed the available objective evidence for signs of whether she has severed her ties with Virginia and adopted Alaska as her state of residence. Based on the available evidence, Intoximeters has met its burden of proving that Ms. Smith is not an Alaska resident. Therefore, BI was not eligible for the Alaska Offeror's Preference.

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78 Smith testimony (Tr. 868).

79 *Id.* at 866.

80 *Id.*

81 *Id.*

82 Ms. Smith's husband might have been able to qualify for a dividend while still calling Virginia his home of record if he had changed his state of legal residence to Alaska. Because the parties did not explore the issue, however, I put relatively little weight on Ms. Smith's decision to not apply for a Permanent Fund Dividend. I merely note that she had a financial incentive to sever her tie with Virginia and adopt Alaska as her state of legal residence.

B. Did Intoximeters prove that BI did not meet the experience requirement?

Section 1.04 of the RFP required at least three years of experience within the last five years in "operating and providing software that meets all of the requirements listed [in] Section 3.01 – Scope of Work."[83] The RFP advised that "[a]n offeror's failure to meet these minimum prior experience requirements will cause their proposal to be considered non-responsive and rejected."[84]

In its protest and appeal, Intoximeters argues that BI did not have a history of

- supporting a "24/7 program."[85]
- supporting testing products other than those manufactured by BI.[86]
- supporting third-party testers.[87]

Contending that each of these requirements was an element of the required experience under the scope of work, Intoximeters concludes that the BI's proposal was not responsive to the RFP.

1. Does the RFP require experience with a 24/7 program?

The decision on summary adjudication agreed with General Services' argument that the RFP never specifically required a 24/7 program. The RFP used the term "24/7" only in reference to the requirement that the software have sufficient permission groups and assignment capability to "meet requirements for administration of the 24/7 program."[88] The only issue regarding 24/7 to be considered at the hearing was whether BI had sufficient experience with providing software that met the requirement for unlimited permission groups and assignment capability.

At the hearing, Intoximeters did not prove that BI had insufficient experience with permission groups and assignment capabilities. Citing the evidence that the members of the proposal evaluation committee used the term "24/7" in their notes on their scoresheets, Intoximeters continued to argue that the RFP "implicitly" required that the software must meet 24/7 criteria. No such requirement is explicit, however, and the experience requirement can fairly be applied only to explicit criteria. Merely noting "24/7" on a scoresheet does not turn the

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83 DGS 4.

84 *Id.* In Amendment #1 to the RFP, posted online before the proposals were due, General Services reaffirmed that experience with *all* requirements was necessary. The amendment posted a question General Services had received about whether "with regard to the previous experience, are we to assume that the vendor has had experience in operating in a program where all of the attributes that are required have been exercised?" DGS 50. General Services answered the question, "correct." DGS 51. It then readopted the same language for §1.04, leaving in the requirement of experience with *all* requirements listed in §3.01.

85 DGS 128-31.

86 DGS 131-32

87 DGS 132-33.

88 DGS 12.

acknowledgement of the relevance of experience with 24/7 programs into a requirement that lack of experience would make a proposal nonresponsive. Furthermore, Mr. Grove persuasively testified that he deliberately refrained from requiring a 24/7 program in the RFP because of concern that the term was jargon that would be seen as proprietary and potentially limiting the number of proposals.[89] In sum, General Services' interpretation that the RFP did not require experience with a 24/7 program was reasonable. Intoximeters' continued argument relating to experience with 24/7 programs is rejected.

2. Does the experience requirement apply to all requirements in the scope of work?

In its motion for summary adjudication, General Services explained that Mr. Grove had denied the protest because the experience requirement did not apply to an item in the scope of work that was stated as a "current requirement of the software."[90] In its view, no experience was required for specifications of performance that the software had to be able to do currently or in the future. Experience was only required for technical requirements of the software.

If General Services' argument were accepted, however, it would swallow the rule. All requirements stated in the scope of work are obligations to be performed in the future. Nothing in the RFP or Amendment #1 alerted potential offerors that some (or perhaps all) of the requirements in the scope of work were exempt from the experience requirement. The language of §1.04 made clear that experience was required for *all* requirements of the scope of work. This language is not reasonably susceptible to General Services' interpretation that "all requirements" implicitly excepts "current requirements." [91] To the extent that the contract officer has discretion to interpret the RFP, this proposed interpretation is an abuse of discretion. It would be unfair to other potential offerors who may have had the ability to tailor their software for the future, but did not offer proposals here because they could not meet the experience requirements.

Nevertheless, a close reading of the RFP reveals that the procurement officer's interpretation was reasonable with regard to those requirements that first laid out a general requirement, and then listed specific performance requirements for the future. For example, the scope of work required that the software "[m]ust allow entry of participants by a variety of

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89 Grove testimony.

90 DGS Motion for Summary Adjudication at 13.

91 *Cf., e.g., State, Dep't of Commerce, Commuity, and Econ. Dev., Div. of Ins. v. Alyeska Pipeline Serv. Co.*, 262 P.3d 593, 597 (Alaska 2011) (rejecting interpretation of statute to mean the opposite of what it actually said because even taking into account aids to statutory construction and legislative history, statute "remains unsusceptible to the Division's interpretation").

agencies."[92] This general requirement was followed by a list of specific Alaska agencies—the "Courts, Department of Corrections, Parole, [Division] of Motor Vehicles, and Department of Health and Social Services/ASAP" that would be required after implementation.[93] The RFP clearly did not intend that an offeror would have experience with entry by each of the Alaska agencies. The experience required was for having three years of experience with allowing "entry of participants by a variety of agencies." The specific Alaska agencies were, as the procurement officer reasonably determined, described for purposes of future implementation, not past experience.

A second example of a requirement in the scope of work where the experience requirement would apply generally, but not with regard to the specific list of items to be required in the future, relates to a matter that was vigorously disputed in this hearing. The RFP required that "the software must support multiple products from numerous vendors, in all of the above testing categories."[94] This general requirement was followed by a specific requirement that "[t]he software must be able to record all testing data from BI, AMS, Soberlink, Intoxitrack and all other brands/types of testing equipment currently available."[95] Here, the experience requirement went with the general requirement: the software provider had to have three years' experience in supporting products from numerous vendors in all testing categories. It did not, however, have to have had three years' experience in recording testing data from the four brands of testing equipment listed, or in all other brands/types currently available.[96] Given the "must be able to" language for the specific list of vendors, the procurement officer could reasonably read that level of specificity as a future requirement. As long as the general requirement, which was merely an obligation of "must support," was included in the experience requirement, the interpretation would still be faithful to §1.04's requirement of experience with *all* aspects of the scope of work.

3. Did BI have experience with supporting more than one type/brand of testing equipment for each testing category?

BI certified that it met all experience requirements. At the hearing, its witnesses described the ease with which BI is able to meet the current requirement of supporting all brands and types

92 DGS 12.
93 *Id.*
94 DGS 10.
95 *Id.*
96 The decision on summary adjudication clarified what had to be shown at the hearing with regard to the general requirement of experience supporting "numerous" brands/types of testing equipment. Because the term "numerous" was ambiguous, the experience requirement at issue in the hearing was whether BI had experience with supporting more than one brand/type of testing equipment in each of the testing categories. Decision denying summary adjudication at 7.

of testing equipment.[97] In addition, BI described the vast experience it has with supporting multiple types and brands of electronic-monitoring equipment (ankle bracelets). It also has experience with its software supporting more than one type of drug-testing equipment. BI explained how that experience crossed over to making BI software developers experts in providing precisely the type of support called for in this RFP.

BI admitted, however, that for alcohol testing equipment, the only brand/type of equipment that it has experience supporting is its own. BI asserts that this limitation in experience is not relevant. In BI's view, if the RFP called for this experience, the RFP was being irrational: a software developer would not have experience in supporting a competitor's brand of testing equipment unless it was contractually required to do so.

Irrational or not, however, the RFP clearly required three years' experience in supporting multiple types/brands of testing equipment in "all of the above testing categories."[98] The testing categories listed were

> breath alcohol
> facial recognition alcohol
> other remote testing device
> drug urinalysis test
> laboratory confirmation test[99]

BI did not have three years' experience in supporting alcohol testing devices other than the ones that it manufactures itself.[100] Therefore, it did not meet the experience requirement. Its offer was not responsive to the requirements in the RFP, and it should not have been awarded a contract.

General Services makes a strong argument that enforcing the experience requirement as written would be bad policy. It points out that if Mr. Grove had enforced the experience requirement, it would have the effect of making this a sole-source procurement—the only vendor capable of meeting the experience requirement would be Intoximeters. This would result in an anticompetitive procurement process. Because that was exactly the result that General Services

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97 Murnock trestimony (Tr. 981-82); Conforti testimony (Tr. 923-24; 926-27).

98 DGS 10.

99 *Id.*

100 Conforti testimony (Tr. 956-57 ("we do not have a history specifically with alcohol testing equipment because we haven't had the opportunity in the past to integrate that with our system"), 960-61 ("we have not interfaced in alcohol monitoring system that is not ours with our system because we haven't needed to do so in the past"), 945-46); *see also* Murnock testimony (Tr. 996-99; 1000-04). Mr. Murnock seemed to imply that BI had experience with supporting alcohol testing devices other than its own via manual entry of data, rather than electronic interface. (Tr. 997) Although the term "support" used in the RFP is not clearly defined, BI's admissions that it did not interface with alcohol testing devices other than its own and did not have experience with any of the devices listed in the RFP other than its own, is evidence that it did not have the requisite experience.

was trying to avoid, General Services argues that Mr. Grove was justified in reinterpreting the RFP to keep the process competitive.

This reasoning is not persuasive. As explained above, Mr. Grove's attempt to correct for one type of unfairness in the RFP results in a different type of unfairness. Reinterpreting the clear requirements of the RFP is unfair to other software developers who might have been able to offer a proposal if they had known that the experience requirement would not be enforced. Moreover, although I am convinced that Mr. Grove was acting in good faith and that his concern was to keep the process competitive, failing to enforce the RFP as written will always open up the agency to a charge of bias—a charge that Intoximeters has made here. Because the policy behind the public procurement process is to avoid any appearance of impropriety, the remedy for unforeseen consequences of a requirement in an RFP is not to ignore the requirement. Once the agency realized that the experience requirement in the RFP was too limiting, its choices were to enforce it, and award the contract to Intoximeters, or cancel the solicitation, redraft the RFP, and reissue.

4. Did BI have experience with providing its software to third-party testers?

The scope of work required that "[t]he contractor will provide a software program/database to testing providers."[101] Intoximeters interprets this requirement as stating a requirement that the contractor must have three years' experience in providing the software to multiple testing providers. It argues that BI cannot meet this requirement.

As explained above, however, the experience requirement of the RFP (§1.04) required at least three years of experience within the last five years in "operating and providing software that meets all of the requirements" of the scope of work.[102] The requirement of meeting the specifications in the scope of work went to the elements of the *software*. The contractor's only obligation under this experience requirement was to have operated and provided the software that met the requirements. To whom the contractor provided the software was not a matter for inquiry under the experience requirement.

Here, BI proved that it has provided and operated its own software. It provided its software to government agencies. It has interfaced and operated its software in conjunction with testing laboratories.[103] Even if none of these entities meets the definition of a "testing provider," BI still has provided its software to others. Whether the software that it provided and operated

101 DGS 10.
102 DGS 4.
103 DGS 151.

met the requirements is a different question (as explained above, it did not).[104] But the RFP language of "[t]he contractor will provide a software program/database to testing providers," in §3.01 does not impose an additional experience requirement regarding to whom the software must be provided. Therefore, Intoximeters' interpretation of the RFP is in error.[105]

In sum, Intoximeters has met its burden of proof on two of the issues it raised. First, it has proved that BI did not qualify for the Alaska Offeror's Preference. Second, it has proved that BI's proposal was not responsive because BI did not meet the experience requirement for experience with supporting more than one brand/type of testing equipment for the required category of alcohol testing products. For both reasons, the award to BI was improper.

C. What is the appropriate remedy for the procurement violation found here?

Under AS 36.30.585(a), if a protest is sustained in whole or part, the agency has discretion to implement an "appropriate" remedy. The factors to be considered in deciding what remedy is appropriate include

> the circumstances surrounding the solicitation or procurement including the seriousness of the procurement deficiencies, the degree of prejudice to other interested parties or to the integrity of the procurement system, the good faith of the parties, the extent the procurement has been accomplished, costs to the agency and other impacts on the agency of a proposed remedy, and the urgency of the procurement to the welfare of the state.[106]

In this case, the procurement deficiencies are serious because the errors resulted in an improper award.[107] The procurement has been accomplished, so the urgency of completing the procurement is no longer a concern. The costs to the agency and other impacts of a proposed

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104 Intoximeters did not prove that BI's statement that its software "has been exchanging data with a third party monitoring provider since 2009" was untrue or that this activity did not meet the requirements of §1.04 in "operating and providing software."

105 To the extent that Intoximeters is arguing that BI is prohibited under *Turbo North Aviation, Ltd. v. Dep't of Pub. Safety* from presenting at the hearing evidence of its degree of compliance with the experience requirement, Intoximeters is in error. *See* Intoximeters' Post Hearing Brief at 42 (citing OAH No. 05-0658-PRO (Dep't of Admin. 2006)). *Turbo North* did not hold that a vendor defending its award is prohibited from bringing in additional evidence of its compliance at a hearing *de novo* involving disputes of fact. In *Turbo North*, the proposer attempted to modify its proposal after the RFP had closed in order to make the proposal responsive. *Id.* at 13. The procurement officer's determination that the proposer could not make material amendments to its proposal was affirmed. Here, BI is not attempting to amend its proposal. It is simply providing additional evidence that explains and supports the factual contentions regarding experience that it made in its proposal.

106 AS 36.30.585(a).

107 *See Computer Task Group v. Division of Gen'l Servs.,* OAH No. 07-0147-PRO at 14 (Dep't of Admin. 2007).

remedy were not explored in this hearing, but in general any remedy that involves changing a contract midstream will likely disrupt the agency's program and ability to serve the public.

With regard to the factors of the parties' good faith and the degree of prejudice to the integrity of the procurement system, much of BI's and Intoximeters' time in this hearing has been spent in making the case that the other is a bad actor. As explained below, both firms have acted in a manner that is detrimental to the procurement process. The allegations, the implications for the process, and the appropriate remedy, are discussed below.

1. Has Intoximeters engaged in conduct that prejudices the integrity of the procurement system?

Both BI and General Services have focused considerable energy on Intoximeters' investigation of BI's storage unit after the offers were opened and its protest had been denied. The facts are complex, but in condensed form, the important facts are as follows:

- After the Chief Executive Officer of Intoximeters, Rankine Forrester, learned the address of BI's storage unit, Mr. Forrester informed Dennis Johnson, owner of a firm called "Alaska Pretrial Services," of that address.[108] Mr. Forrester agreed that Mr. Johnson should go to the storage unit to investigate.[109]
- Alaska Pretrial Services is a testing provider. It is a competitor of BI. Alaska Pretrial Services had a business relationship with Intoximeters, using Intoximeters' software and paying Intoximeters for that use.[110]
- When Mr. Johnson went to BI's storage unit, the operators of the facility were very cooperative with Mr. Johnson. They accessed the records of BI's use of the storage unit, and showed them to Mr. Johnson. He photographed the records.[111] They showed him the unit, and apparently allowed him to place a camera under the door and take a picture.[112]
- When Mr. Johnson reported the results of his investigation to Mr. Forrester, Mr. Forrester typed up statements for the operators of the facility to sign. The statements affirmed that no employee of BI had been to the storage unit for two

108 Forrester testimony (Tr. 118).
109 *Id.*
110 Forrester testimony (Tr. 95).
111 Johnson testimony (Tr. 315).
112 Int. 04; Johnson testimony (Tr. 318); Forrester testimony (Tr. 159-60).

years. Mr. Johnson made some minor edits to the statements, brought them to the facility, and obtained signatures.[113]

- The operators of the storage facility had earlier offered to open the door to the unit to allow Mr. Johnson to look in. Neither Mr. Johnson nor Mr. Forrester initially felt comfortable in doing so.[114] Upon reflection, however, Mr. Forrester told Mr. Johnson that it was important to document the status of the storage unit, so that if BI made changes, there would be evidence.[115] During Mr. Johnson's return visit, the operators of the facility opened the door of BI's storage unit and allowed him to take pictures.[116]
- When BI learned of Mr. Johnson's investigation, it alleged that Mr. Johnson had misled the operators of the storage facility. BI obtained an affidavit from the general manager of the storage facility in which he alleged that Mr. Johnson had led them to believe that he was a state investigator.[117] But for Mr. Johnson's impersonation of a state official, the manager affied, he would not have cooperated with Mr. Johnson's investigation.[118]

Mr. Johnson asserts that he did nothing wrong. In his view, he only took advantage of what was offered him by the storage facility operators.[119] Intoximeters agrees that Mr. Johnson did nothing wrong, but even if he did, Mr. Forrester denies that Mr. Johnson was his agent. In his view, his frequent communication with Mr. Johnson is not unusual for two business people who knew each other and had a common concern. Intoximeters argues that if General Services had merely done its job in investigating the facts, Mr. Johnson would not have had to undertake his inquiry. In its view, an aggrieved proposer must have some leeway to discover the facts.

Both BI and General Services, however, assert that Intoximeters' role in this investigation was reprehensible. According to BI, "these two companies, who were competing in active separate procurements with BI, colluded to obtain BI's proprietary and nonpublic information and enter into its private place of business to undermine and influence the appellate process in this procurement."[120] General Services characterizes Intoximeters' conduct as "a case of a protestor

113 *Id.* at 332; 391-92; DS 176-77.
114 Johnson testimony (Tr. 316).
115 *Id.* at 329.
116 *Id.* at 334.
117 Watson testimony (Tr. 650).
118 DGS 247-48.
119 Johnson testimony (Tr. 410).
120 BI Post-Hearing Brief at 28.

running amok."[121] It cautions that an award in Intoximeters' favor would "set a dangerous precedent for future procurements that could undermine the integrity and administrative efficiency of the procurement system."[122]

The question of whether Mr. Johnson posed as a state investigator is an important question. If so, Mr. Johnson's actions, in concert with Mr. Forrester's complicity in his actions, would create a strong reason to avoid rewarding Intoximeters for bad behavior. BI, however, has not proved that Mr. Johnson defrauded the operators of the storage facility. Mr. Johnson testified under oath. He denied that he overtly or covertly represented himself as a state investigator. The storage facility operator, on the other hand, did not testify in support of the affidavits he gave to BI. This affidavit is clearly self-serving, in that he places the blame on someone else for his questionable conduct of allowing unauthorized personnel access to a private business's property. Moreover, his affidavit testimony misreported facts with regard to the job title on Mr. Johnson's jacket, and mischaracterized Mr. Johnson's Ford Explorers as "unmarked police cars."[123] Therefore, BI has not proven that Mr. Johnson represented himself to be a state investigator.

BI and General Services have, however, established that Mr. Johnson's conduct was, to some degree, wrongful.[124] He knew or should have known that he should not have examined BI's business records or photographed the inside of BI's business premises without BI's permission. That the operators of the storage facility allowed this conduct gives Mr. Johnson cover, but it does not make the conduct acceptable. Indeed, their willingness to show him business records should have been a red flag to him that either their judgment was clouded or they were operating under a misapprehension that he had official authority to investigate.[125]

As for Intoximeters' view that it should not be tarred with guilt by association, Mr. Forrester was aware of, encouraged, and assisted Mr. Johnson's investigation. He used the information obtained by Mr. Johnson. He was not merely the innocent beneficiary of Mr. Johnson's inquiry. The conduct of Intoximeters and Alaska Pretrial Services gives the public the impression that the procurement process allows two businesses to obtain unfettered access to

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121 General Services' Closing Brief at 13.

122 *Id.*

123 DGS 247-48, (Affidavit of Harold Smith); Johnson testimony (Tr. 1162-63).

124 Nothing in this conclusion implies that this decision has considered whether his conduct was or was not illegal or tortious. The only standard employed by this decision is the standard that a procurement must be conducted with integrity. Mr. Johnson's conduct falls below that standard. AS 36.30.585(a).

125 Although BI has not proven that Mr. Johnson posed as a state investigator, it has established that the operators of the facility may have formed a mistaken impression that he was a state investigator.

another business's records and facilities. The concern raised about the integrity of the procurement process also applies to Intoximeters, not just Mr. Johnson's firm.

BI and General Services have not, however, proven that the two firms "colluded." Two firms with a common interest communicating with each other is not necessarily wrongful if it does not involve deceit or an attempt to deprive a third party of a right or privilege.[126] An agreement to suppress the truth, or to obtain information illicitly, on the other hand, would be collusion. Here, although Mr. Johnson did take some action that is not consistent with integrity, BI and General Services did not prove that Mr. Forrester and Mr. Johnson colluded to obtain information illicitly.

The procurement process is not the correct forum to sort out what is right or wrong in the rough-and-tumble world of business ethics. In this procurement protest appeal, the only concern is for the integrity of the procurement process. Evaluating how Intoximeters' transgression affects the integrity of the process, and what effect that should have on the remedy for the errors in the procurement, will be discussed after discussing the allegation that BI's conduct also prejudiced the integrity of the procurement process.

2. Did BI engage in fraud or conduct that prejudices the integrity of the procurement system?

Shortly after opening the offers on August 15, 2016, Mr. Grove began a series of email inquiries to Taggart Giles, BI's Business Development Director.[127] Mr. Grove was asking for confirmation that BI met the requirements for the Alaska Offeror's Preference. He asked Mr. Giles to provide him with the address of BI's place of business and to certify that BI's place of business met the requirements of 2 AAC 12.900(b)(3). Mr. Giles responded that "[o]ur employees are housed at the state DOC offices in Anchorage as per the contract."[128] He further explained that "[t]hey also have a physical address where they work out of and where our equipment is housed, and goods and supplies are stored."[129] He provided the address and number of the "Best Storage Unit."[130] He asked that General Services rely on the storage unit, not the office at the Department of Corrections, to meet the requirements of "place of business."[131]

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126 *See, e.g., Black's Law Dictionary* at 264 (6th ed. 1990) (defining collusion to mean "[a] secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purposes.").

127 DGS 122-25.

128 DGS 123.

129 *Id.*

130 *Id.*

131 *Id.*

a. Was Intoximeters' allegation that BI made material misrepresentations a matter that could be raised in this procurement appeal?

Intoximeters' appeal alleged that BI had committed fraud or misrepresentation in its representations to Mr. Grove regarding BI's use of its storage unit. General Services argued that Intoximeters' failure to raise this issue in its protest meant that it could not raise the issue on appeal. It also argued that an offeror claiming a preference for which it was not qualified is a simple issue of fact, not an issue of misrepresentation. Finally, General Services argued that under the Alaska Supreme Court decision in *Azimi-Tabriz v. State,* an allegation of misrepresentation could not be alleged in a procurement protest.[132]

As to the timeliness of the issue, given that Intoximeters did not know the facts about the location of the storage area until after the protest decision, it had good cause for waiting until the appeal to raise the issue. With regard to whether the issue of misrepresentation is appropriate for a protest appeal, even if not an independent ground for a protest, the facts regarding the alleged misrepresentation would be relevant to a remedy if imposing a remedy proved to be necessary. Moreover, although General Services was correct that merely being mistaken in a claim for a preference would not establish misrepresentation under AS 36.30.687 or 2 AAC 12.690, here, the question is whether Mr. Giles misled Mr. Grove with regard to the facts. Intoximeters may pursue that issue in a protest appeal. Finally, *Amizi-Tabriz* did not hold that misrepresentation was not a proper subject for a procurement appeal. It merely upheld the commissioner's decision that, under the circumstances of that case, no misrepresentation had occurred. Therefore, the misrepresentation issue alleged by Intoximeters is an appropriate subject for a protest appeal.

b. Did BI commit fraud or misrepresentation?

Intoximeters alleges that Mr. Giles committed fraud when he told Mr. Grove that BI's employees "also have a physical address where they work out of and where our equipment is housed, and goods and supplies are stored."[133] That statement was not true—no BI employee had been to the storage unit for two years. Intoximeters notes that Mr. Giles made this representation two days after Mr. Grove's initial inquiry. Intoximeters alleges that Mr. Giles had time to discover the truth, and either knew that this statement was not true, or was recklessly indifferent towards the truth. Further, Mr. Giles knew that whether the storage unit qualified as a place of business was a crucial inquiry, and that if it did not, BI would not be awarded the contract.

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132 2003 WL 23002625 (Alaska).

133 *Id.*

Intoximeters concludes that BI has committed fraud, which would be grounds for requiring BI to forfeit its claim to the contract under AS 36.30.687(a).

BI argues that Mr. Giles merely made an innocent mistake. He had informed Mr. Grove that BI's workers were housed at the Department of Corrections. No one could reasonably believe that BI's workers really had a desk and an office in a storage unit, so, in BI's view, no one could be fooled by Mr. Giles's inaccurate statement. Moreover, BI points out that Mr. Grove did not regard Mr. Giles's misrepresentation as material, because Mr. Grove did not care whether BI worked out of the storage unit. General Services defends Mr. Grove's decision to ignore Mr. Giles's misrepresentation because, in its view, BI did not act in bad faith in claiming the preference.[134]

BI's argument that Mr. Giles's misrepresentation was merely a harmless mistake is not persuasive. Its argument that no one could be fooled by the statement into imaging a desk and chair in the storage unit is beside the point. A reasonable interpretation of Mr. Giles's claim that BI employees "work out of" the storage unit is that the employees come and go to the storage unit to place and retrieve goods used and needed in the conduct of BI's business. This inference (the only reasonable inference from Mr. Giles's statement) is important—if true, it likely would establish that the storage unit was a genuine place of business. Even if Mr. Grove was not focused on the frequency of use, if Mr. Giles had been truthful, and told Mr. Grove that the storage unit was no longer accessed by its employees or used to store goods needed for BI's business, it would have created a much different record. Moreover, Mr. Giles did not know how Mr. Grove would analyze a true statement of facts, and a reasonable person in Mr. Giles's position would be concerned that a procurement officer would not accept a claim that an unused storage unit qualified as a place of business. Certainly, it was to BI's advantage to have Mr. Grove wrongly believe that the storage unit was in active use.

In addition, Mr. Giles was not a credible witness. Although he was the person who had certified that the statements in BI's proposal were true and correct, he denied any personal knowledge or responsibility regarding the accuracy of the proposal.[135] He evaded questions about who would have knowledge of the proposal, BI's employees, the arrangement regarding BI's office space at the Department of Corrections, or use of the storage unit.[136] He gave only vague

134 General Services Closing Brief at 13.
135 Giles testimony (Tr. 692, 697-98).
136 *Id*. at 697-98; 706; 727; 729-30.

answers to questions regarding his due diligence in preparing his responses to Mr. Grove, and the information he gave regarding BI's other employee in Anchorage was incorrect.[137]

Yet, although the question is very close, Intoximeters did not prove that Mr. Giles committed fraud. The facts showed that in years past, BI's storage unit was, in fact, used by BI's employees in the regular course of business. Apparently, in previous procurements, the storage unit was qualified as a place of business for purposes of the Alaska Offeror's Preference.[138] Intoximeters did not prove that Mr. Giles was not relying on past practice when he answered Mr. Grove's questions. Therefore, although Mr. Giles misrepresented the facts, and should have inquired before answering, Intoximeters has not proved that his statement has the elements of intent and bad faith that are required to establish fraud.[139]

In sum, Mr. Giles's misrepresentation was not fraud, but it was close. Here, Mr. Giles's statement goes beyond normal business exaggeration or "puffing." He misled a procurement officer about a matter that Mr. Giles believed was material. His misstatements, although not fraudulent, could easily have been avoided with minimal inquiry and a commitment to be truthful and honest in the process. Mr. Giles's statement is a violation of the duty of an offeror to be truthful during the procurement process.[140] In evaluating a proposal, a procurement officer must be able to rely on the statements and representations made by a firm with regard to the firm's eligibility for a preference.[141] Mr. Giles's conduct undercuts the integrity of the procurement. How the conduct of BI and Intoximeters affects the remedy in this case is discussed next.

3. What is the appropriate remedy for BI's procurement violation, taking into account Intoximeters' and BI's conduct?

Intoximeters has requested that the contract be canceled and awarded to Intoximeters as the only remaining responsive offeror after BI has been eliminated. BI and General Services, on

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137 *Id.* at 710; 729-32; 742; 775. *See also* Smith testimony (Tr. 854, 862); Muise testimony (TR. 833-34) (explaining facts regarding BI's other Anchorage employee).

138 Giles testimony (Tr. 713; 780).

139 *See Select Med. Prods, Inc., v. Dep't of Military and Veterans' Affairs,* OAH No. 14-0570-PRO (Dep't of Admin. 2014) at 5 (defining fraud to mean "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment" (quoting Black's Law Dictionary (9th Ed.))).

140 *See, e.g.*, 2 AAC 12.690 ("[i]n accordance with AS 36.30.687, upon a finding that the recipient of a state contract made misrepresentation or fraudulent claims at any stage of proceedings relating to a procurement or contract controversy the procurement officer or the head of a purchasing agency may, after consulting with the attorney general, declare the contract void."). 2 AAC 12.690 has been interpreted to require an intentional misrepresentation. *Select Med. Prods.*, OAH No. 14-0570-PRO at 5.

141 *See, e.g., World-Wide Movers v. DOE/Div. of Libraries, Archives and Museums,* Dep't of Admin. Case No. 97-004 (Dep't of Admin. 1997) at 7 *available at*: http://aws.state.ak.us/officeofadminhearings/Documents/PRO/97-004.htm?_ga=2.65784557.2107267785.1494875470-1741211287.1424461288#p7 (holding that where proposal represented that offer complied "in all respects with the RFP[, t]he procurement officer did not abuse his discretion in accepting that certification at face value").

the other hand, both imply that the contract should remain with BI even if BI is determined to not qualify for the contract.

BI does not qualify for the contract. The award of the contract to BI was in error. The contract has already been let, and is being implemented. In this situation, an accepted remedy would be to allow the contract to run to the end of its one-year term, and then require a new solicitation without allowing for any renewal.[142]

Although both parties have engaged in conduct that does not reflect well on the procurement process, the Division of Behavioral Health has a program to run. Given the time that has elapsed, the lack of a request for a stay of the award of the contract, and the emphasis in the Procurement Code that precipitous action need occur only in the case of fraud, no procurement emergency exists here that would necessitate immediate contract cancellation.

In these circumstances, the object of imposing a remedy is not to be considerate of the needs of either BI or Intoximeters. The object is to consider the needs of the agency and the public, and to assure the public that the procurement process is fair.

Therefore, General Services is authorized, but not required, to cancel the contract before the expiration of the one-year period if General Services determines that cancellation is in the public interest and will not disrupt Behavioral Health's ability to meet the needs of the public. Otherwise, General Services shall conduct a new solicitation when BI's one-year contract expires. The contract may not be renewed without a competitive solicitation.

IV. Conclusion and Order

Intoximeters has proved that BI did not qualify for the Alaska Offeror's Preference. Intoximeters has also proved that BI did not meet the experience requirement because it did not have three years of experience in supporting alcohol testing equipment other than its own. Therefore, General Services erred in determining that BI's offer was responsive to the Request for Proposals, determining that BI's offer was the offer most advantageous to the state, and awarding the contract to BI.

Both competitors have engaged in conduct that taints the procurement process. To correct the error, and to cure the taint, the solicitation must be redone. General Services shall conduct a new solicitation. The new solicitation shall be timed to be completed no later than the date BI's

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142 *See, e.g., Computer Task Group,* OAH No. 07-0147-PRO at 14; *Aetna Life Ins. v. Division of Gen'l Servs.,* OAH No. 06-0230-PRO (Dep't of Admin 2006) at 44 ("the seriousness of the deficiency . . . argues in favor of reopening competition at the earliest convenient time"). Another standard remedy is award of bid preparation costs. Intoximeters, however, did not request an award of bid preparation costs. DGS 169; Intoximeters Post-Hearing Brief at 54-57. Given its conduct, no bid preparation costs are awarded.

current one-year contract expires. If General Services determines that cancellation is in the public interest and will not disrupt Behavioral Health's ability to meet the needs of the public, General Services may cancel BI's current contract and conduct the new solicitation before the expiration of the current contract.

DATED this 25th of May, 2017.

By: *Signed*
Stephen C. Slotnick
Administrative Law Judge

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