

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
BY THE COMMISSIONER OF TRANSPORTATION & PUBLIC FACILITIES**

MILLER CONSTRUCTION CO., LTD )  
 )  
 v. )  
 ) OAH No. 17-0891-PRO  
DOT&PF SOUTHCOAST REGION ) Agency No. Z695390000STP000S738  
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**DECISION ON PARTIES' CROSS-MOTIONS FOR SUMMARY ADJUDICATION**

**I. Introduction**

The Department of Transportation & Public Facilities Southcoast Region issued a notice of intent to award a construction project to Miller Construction Company ("MCC"). Following a protest by the second-lowest bidder, Southcoast Region issued a determination that MCC was not a "responsible bidder" as to the project, and rescinded the notice of intent. MCC protested the rescission, and this administrative appeal followed. The parties have now filed cross-motions for summary adjudication.

MCC contends that the procurement officer's determination of non-responsibility relied on legally impermissible criteria, and must be reversed as a matter of law. Southcoast Region's cross-motion rejoins that the procurement officer's determination was sound and supported by sufficient evidence in the record to warrant summary adjudication in favor of that determination.

This decision concludes that Southcoast Region is entitled to summary adjudication affirming the procurement officer's determination based on MCC's failure to provide Southcoast Region with requested information during the responsibility inquiry. This decision separately concludes that, in the unique procedural and legal posture of an administrative appeal of a procurement officer's discretionary determination of responsibility, sufficient evidence in the record supports the procurement officer's determination such that the Commissioner has the discretion to uphold that determination without a full evidentiary hearing, and that he should exercise that discretion. Hence, on two independent grounds, the procurement officer's decision to rescind the notice of intent to award should stand.

**II. Factual and Procedural History**

Southcoast Region issued an invitation to bid on the Kake/Keku Road Pavement Rehabilitation Project, a road construction project in Kake. Bids were opened on May 23, 2017.<sup>1</sup>

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<sup>1</sup> Ex. B, p. 2.

MCC submitted the lowest bid.<sup>2</sup> On June 1, 2017, Southcoast Region issued a notice of intent to award the Kake project to MCC.<sup>3</sup> The second-lowest bidder, SECON, filed a timely protest on June 9, 2017.<sup>4</sup>

**A. SECON’s June 2017 Protest**

SECON’s protest argued that Southcoast Region should not have accepted MCC’s bid, because, according to SECON, MCC was a “non-responsible” bidder. The basis for SECON’s allegations about non-responsibility largely concerned MCC’s performance on a separate, ongoing contract with Southcoast Region, “the Shelter Cove project.” SECON argued that MCC’s ongoing poor performance and failure to pay its suppliers on that project warranted a finding of non-responsibility.

*1. Protest grounds regarding Shelter Cove*

As to MCC’s alleged poor performance, SECON noted that MCC and Southcoast Region had engaged in numerous disagreements about “MCC’s compliance with contract requirements” in Shelter Cove, necessitating “substantial involvement by the state’s attorneys” as well as DOTPF having had to “take the extraordinary step of hiring an outside consultant to monitor various aspects of MCC’s contract compliance.”<sup>5</sup>

SECON also alleged that MCC had not paid two of its suppliers on the Shelter Cove project, Tyler Rental and Austin Powder, reporting that Tyler alone was owed more than \$300,000.<sup>6</sup> Questioning whether the ongoing problems with the Shelter Cove project, along with MCC’s other commitments, “might hinder or prevent” its timely completion of the Kake project, SECON urged the Department to “take some time to do some due diligence” on these questions.<sup>7</sup>

*2. Protest grounds regarding Kake project/High School Rock Pit*

As a separate basis for finding MCC non-responsible, SECON argued that MCC lacked the “skill, ability, financial resources, or equipment to perform the contract.”<sup>8</sup> SECON advanced various factual claims about MCC’s purported inexperience in highway and mainline paving, and limited asphalt production equipment.<sup>9</sup> SECON also questioned whether MCC’s lower bid on the Kake project had appropriately accounted for a mineral source issue associated with the

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<sup>2</sup> Ex. B, p. 2.

<sup>3</sup> Ex. B, p. 2.

<sup>4</sup> Ex. H.

<sup>5</sup> Ex. H, pp. 1-2, 5.

<sup>6</sup> Ex. H, pp. 2, 5.

<sup>7</sup> Ex. H, pp. 2, 6-7.

<sup>8</sup> Ex. H, p. 3.

project, and argued that MCC’s apparent failure to address this issue appropriately in its bid was evidence that MCC lacked “the skill and ability necessary to perform due diligence” for material sourcing on the Kake road job.<sup>10</sup>

Specifically, prior to bid submission on the Kake project, Southcoast Region had provided bidders with limited testing reports about several local material sources, but had also cautioned that bidders should not rely on the limited data provided to conclude those sources were sufficient to supply the project.<sup>11</sup> The data included analysis of a single sample from a source known as the High School Rock Pit, and which appeared to meet the ITB requirements for “Deg. Values.”<sup>12</sup> However, this Notice to Bidders No. 6 advised bidders that the limited data provided was based on a single sample at each site, may or may not represent the properties of available minerals at the sites, and was provided as informational, without any assurance of the availability of materials nor of the quality or quantity of such materials.<sup>13</sup>

A follow-up Notice to Bidders issued the day bids were to be opened reiterated that bidders should not rely on the testing data provided.<sup>14</sup> This Notice to Bidders No. 7 specifically advised that “the Department has received information from bidders indicating the ‘High School Pit’ source is variable,” and that, while “this source has potential to produce material that meets the contract requirement, the Department does not guarantee this source.”<sup>15</sup> Notice No. 7 also indicated that the Department would test contractor-selected material sources after the project award.<sup>16</sup>

SECON’s protest noted that it had conducted its own pre-bid sampling from the High School Rock Pit, and that testing on that sample yielded markedly different “Deg. Values” than the single sample tested by Southcoast Region. SECON described that its own pre-bid sampling and independent testing from the High School Rock Pit had revealed insufficient rock quality to support the project, a determination which then led it to build its bid around importing the necessary rock for asphalt – as had “the other two bidders and the state, according to the Engineers Estimate.”<sup>17</sup> SECON’s protest argued that MCC’s bid suggested it had likely ignored

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<sup>9</sup> Ex. H, p. 3.

<sup>10</sup> Ex. H, pp. 3-4, 7.

<sup>11</sup> *See generally*, Ex AC; Ex. AD; Ex. H, p. 6; Ex. Q.

<sup>12</sup> Ex. AC (Notice to Bidders 6).

<sup>13</sup> Ex. AC.

<sup>14</sup> Ex. AD (Notice to Bidders 7).

<sup>15</sup> Ex. AD.

<sup>16</sup> Ex. AD.

<sup>17</sup> Ex. H, p. 6.

Southcoast Region’s warnings about the variability of material from the High School Rock Pit, and had instead built its (lower) bid around using what may well be unusable rock from that source.<sup>18</sup> SECON’s protest urged that the lack of due diligence such a bid reflected was evidence that MCC lacked the skill and resources to qualify as a responsible bidder for the Kake project.<sup>19</sup>

**B. MCC’s June 15 response to SECON’s protest**

Southcoast Region, through its counsel, invited MCC to respond to SECON’s protest. MCC’s June 15, 2017 response characterized SECON’s protest as part of an ongoing bad-faith attempt to gain a competitive advantage in the construction industry in Southeast Alaska.<sup>20</sup> MCC urged that any disagreements that had arisen in the Shelter Cove project did not rise to the level of “unsatisfactory performance,” which MCC characterized as “a serious allegation . . . typically evidenced by a Default or a Default Notice to Cure.”<sup>21</sup>

While denying that its payment status on a current project could be properly considered as a reliability factor under the Standard Specifications, MCC also indicated that it had agreements “in place” with Austin Powder and Tyler Rental.<sup>22</sup>

On the issue of the rock sourcing, MCC accused SECON of “a never-ending quest to destroy its only competitor,” but did not actually respond to the underlying question of “how MCC bid its rock,” instead insisting that “MCC is under no obligation to divulge such proprietary information to its competitor.”<sup>23</sup>

**C. Burke-Schlemlein post-protest correspondence about SECON’s protest**

As SECON’s protest had referenced, by spring 2017 the parties’ disagreements about Shelter Cove had garnered significant involvement from attorneys on both sides. MCC’s attorney, Garth Schlemlein, and DOTPF’s attorney, Senior Assistant Attorney General Dana Burke, had exchanged multiple emails and letters, as well as meeting in person to discuss numerous concerns that had arisen about the Shelter Cove project.<sup>24</sup> Thus it was DOTPF’s counsel who solicited MCC’s response to SECON’s protest. And MCC’s June 15 response – an emailed letter from Mr. Schlemlein to Southcoast Regional Director Michael Coffey and cc-ed to

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<sup>18</sup> Ex. H, pp. 3-4, 7.

<sup>19</sup> Ex. H, pp. 3-4, 6.

<sup>20</sup> Protest Report Ex. C.

<sup>21</sup> Protest Report Ex. C, p. 3.

<sup>22</sup> Protest Report Ex. C, p. 3.

<sup>23</sup> Protest Report Ex. C, p. 5.

<sup>24</sup> See Ex. B (1<sup>st</sup> COD pp. 6-7 and Exhibits its E-O); Ex. C (2<sup>nd</sup> COD, pp. 8-11 and its Exhibits O-U).

AAG Burke – ended by encouraging Mr. Coffey to “call or write” if he or AAG Burke had any questions.<sup>25</sup>

On Monday, June 19, 2017, AAG Burke emailed Mr. Schlemlein about MCC’s response to SECON’s protest.<sup>26</sup> AAG Burke asked several clarifying questions about the status of MCC’s overdue payments to its Shelter Cove subcontractors.<sup>27</sup> AAG Burke also took issue with Mr. Schlemlein’s characterization of the status of the parties’ disagreements on the Shelter Cove project. Writing that, “DOTPF, both in its own communications with MCC, and its communications with MCC through me and through our expert consultant Michael Foster, has chronicled multiple incidents of unsatisfactory performance,” AAG Burke stated that MCC’s response on this issue “misstates the record.”<sup>28</sup>

Mr. Schlemlein responded with another email late in the day on June 20, 2017.<sup>29</sup> Mr. Schlemlein stated that MCC had fully responded to the issues raised by SECON’s protest and by AAG Burke, and urged that “MCC clearly has the equipment, personnel, financial strength and the bonding capacity to undertake the Kake project.”<sup>30</sup>

On June 21, 2017, AAG Burke wrote to DOTPF Commissioner Luiken requesting a short extension of time for Mr. Coffey’s completion of the COD on SECON’s protest.<sup>31</sup> The letter, cc-ed to Mr. Schlemlein, informed Commissioner Luiken that Southcoast Region was “still gathering information” to evaluate the claims in SECON’s protest.<sup>32</sup>

Late that day, the attorneys exchanged an additional round of emails, this time addressing a concern by MCC that someone from DOTPF had contacted MCC’s unpaid Shelter Cove supplier, Tyler Rental.<sup>33</sup> In an email titled “Miller/ADOTPF/Kake Protest,” Mr. Schlemlein expressed his understanding that Southcoast Region was obligated to investigate the allegations in SECON’s protest, but expressed concern that DOTPF was “hounding” MCC’s supplier to MCC’s detriment.<sup>34</sup>

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<sup>25</sup> Protest Report Ex. C, pp. 1, 6.

<sup>26</sup> Protest Report Ex. D.

<sup>27</sup> Protest Report Ex. D, p. 1.

<sup>28</sup> Protest Report Ex. D, pp. 1-2.

<sup>29</sup> Protest Report Ex. E.

<sup>30</sup> Protest Report Ex. E, p. 1.

<sup>31</sup> Protest Report Ex. G, pp. 2-3.

<sup>32</sup> Protest Report Ex. G, p. 2.

<sup>33</sup> Protest Report Ex. F, pp. 2-4.

<sup>34</sup> Protest Report Ex. F, pp. 3-4.

In an emailed letter dated June 23, 2017, and also copied to Mr. Schlemlein, Commissioner Luiken granted an extension until June 30, 2017.<sup>35</sup> The same day, AAG Burke sent Mr. Schlemlein an additional email with the subject heading: “Re: Miller/AKDOTPF/Kake Protest.”<sup>36</sup> The first part of the June 23 email contained a bullet-pointed list of responses to issues raised by Mr. Schlemlein’s June 21 email.<sup>37</sup> Those bulleted responses described Southcoast Region’s contacts with Tyler Rental and with Austin Powder as part of the investigation into SECON’s protest.<sup>38</sup> AAG Burke denied that Southcoast Region’s communications with Tyler had been anything but “appropriate and professional,” and expressed that “DOTPF has and will continue to exercise its due diligence in conducting its investigation[.]”<sup>39</sup>

After the eight-item bullet-point list, the email continues with another lengthy paragraph inquiring about the rock sourcing question. Noting this issue had been raised in SECON’s protest but not addressed on the merits in MCC’s response to the protest, AAG Burke asked Mr. Schlemlein to respond to SECON’s allegation that MCC’s bid on the Kake project suggested “an intent to use locally available rock, presumably from the High School Pit.”<sup>40</sup> AAG Burke queried Mr. Schlemlein:

Based on this allegation, please let me know: a) whether MCC built its bid based on the use of rock from the High School Pit; b) if so, what geotechnical data, if any, MCC relied upon in determining that use of rock from the High School Pit was appropriate for purposes of MCC’s bid submission.<sup>41</sup>

MCC did not respond to this inquiry.

#### **D. MCC supplier issues**

As noted, one of the issues SECON raised in its protest was MCC’s alleged failure to timely pay its suppliers – specifically, Tyler Rental and Austin Powder – on the Shelter Cove project.<sup>42</sup> DOTPF Southcoast Regional Construction Engineer Vic Winters was tasked with investigating the financial responsibility/nonpayment issues raised by SECON’s protest.<sup>43</sup>

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<sup>35</sup> Protest Report Ex. G, p. 1.

<sup>36</sup> Protest Report Ex. F.

<sup>37</sup> Protest Report Ex. F, p. 1.

<sup>38</sup> Protest Report Ex. F, p. 1.

<sup>39</sup> Protest Report Ex. F, p. 1.

<sup>40</sup> Protest Report Ex. F, pp. 1-2.

<sup>41</sup> Protest Report Ex. F, pp. 1-2.

<sup>42</sup> Ex. H, pp. 2, 5.

<sup>43</sup> Ex. G (Winters Affidavit).

In a Declaration submitted with its June 15 response to SECON’s protest, MCC Business Manager Heather Skaife averred that MCC had “reached agreements with respect to both firms for making payments as MCC receives its draw request from ADOT&PF and the vendors are satisfied with the agreements.”<sup>44</sup> At least as to Austin Powder, however, Ms. Skaife was, at best, misinformed.<sup>45</sup>

On June 22, 2017, Austin filed a notice of claim with MCC’s surety for non-payment on the Shelter Cove project, indicating it was owed \$132,604.92 for invoices remaining unpaid.<sup>46</sup> And in a June 27, 2017 email to MCC, Austin’s Andy Marinko wrote that Austin was currently owed \$132,604.84 for the Shelter Cove project; that Austin had supplied the product in October and November 2016; that MCC had made only three payments; and that, contrary to Ms. Skaife’s previously-professed belief, MCC “has not been willing to establish a formal payment arrangement with us.”<sup>47</sup>

In late June 2017, Southcoast Region’s Vic Winters had communications from both Tyler and Austin that contradicted Ms. Skaife’s June 15 claims about payment arrangements being in place and to the suppliers’ satisfaction. On June 21, Mr. Winters learned from a Tyler representative that there was no written agreement in place and that MCC had “recently verbally offered to pay Tyler monthly as funds became available.”<sup>48</sup> On June 27, another Tyler representative informed Mr. Winters of ongoing negotiations between the two companies as recently as June 23 (i.e., after Ms. Skaife’s Declaration). As to Austin, on June 27 Austin’s Andy Marinko forwarded to Mr. Winters her email exchange with MCC about its refusal to establish a formal payment plan.<sup>49</sup>

**E. The Contracting Officer’s June 30, 2017 Decision on SECON’s Kake Road Protest (“the First COD”)**

On June 30, 2017, Mr. Coffey issued his Contracting Officer’s Decision sustaining SECON’s protest and finding MCC to be a non-responsible bidder as to the Kake project.<sup>50</sup> The COD indicated that Southcoast Region had conducted a detailed investigation from multiple sources in evaluating the protest, and stressed the deliberative nature of the decision.<sup>51</sup> Noting

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<sup>44</sup> Ex. G, pp. 5-6.

<sup>45</sup> See Ex. G, pp. 7-8.

<sup>46</sup> Ex. G, pp. 7-8.

<sup>47</sup> Ex. G, p. 7.

<sup>48</sup> Ex. G, p. 2.

<sup>49</sup> Ex. G, pp. 3-4.

<sup>50</sup> Ex. B, p. 2.

<sup>51</sup> Ex. B, p. 3.

that both the Standard Specifications and the applicable regulation describe the responsibility inquiry in terms of non-exhaustive factors, and allow the procurement officer to “consider a wide range of evidence,” Mr. Coffey explained: “this COD follows that approach.”<sup>52</sup>

*1. Decision as to financial responsibility and resources*

On the merits of SECON’s allegations, the COD first discussed concerns raised by SECON about MCC’s “lack of financial responsibility/financial resources” – specifically, MCC’s failure to timely pay Tyler Rental and Austin Powder on the Shelter Cove project.<sup>53</sup> The COD described Southcoast Region’s contacts with both suppliers, and its attempt to obtain a clear explanation from MCC about the overdue payments.

As to Tyler Rental, Southcoast Region was aware before its original Notice of Intent to Award that MCC had not timely paid Tyler for all materials delivered under the Shelter Cove project. On May 25, 2017, two days after bids were opened, Tyler sent Southcoast Region documentation showing more than \$330,000 in unpaid invoices.<sup>54</sup> Investigating further as a result of SECON’s protest, Southcoast Region learned from Tyler that the parties did not have a written agreement authorizing the late payments, and that MCC’s remedial measures had been limited to offering to pay Tyler as funds became available.<sup>55</sup> Southcoast Region also reviewed its own invoices and determined it had paid MCC for supplies provided by Tyler many months earlier.<sup>56</sup> The COD concluded that MCC’s lengthy delays in paying its supplier after Southcoast Region had paid on the invoices “demonstrates a lack of financial responsibility and lack of sufficient financial resources for the Kake project.”<sup>57</sup>

The COD further described information Southcoast Region had obtained from Austin Powder as a result of its investigation into SECON’s protest, information that likewise raised concerns about MCC’s financial resources and responsibility.<sup>58</sup> In the course of that investigation, Austin informed Southcoast Region that MCC owed it more than \$132,000 for supplies provided many months earlier, had refused to establish a formal payment plan despite months of requests by Austin, and had represented to Austin that the cause of the delays was

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<sup>52</sup> Ex. B, p. 3.  
<sup>53</sup> Ex. B, pp. 4-6.  
<sup>54</sup> Ex. B, p. 4.  
<sup>55</sup> Ex. G (Winters Aff.), pp. 2-3.  
<sup>56</sup> Ex. B, p. 4.  
<sup>57</sup> Ex. B, p. 5.  
<sup>58</sup> Ex. B, pp. 5-6.



nonpayment by Southcoast Region, even though Southcoast Region had paid for the supplies in question.<sup>59</sup>

Southcoast Region further learned that, in late June, Austin had filed against MCC's bond.<sup>60</sup> As with the Tyler nonpayment issues, and compounding concerns about those issues, the COD concluded that the circumstances surrounding nonpayment to Austin were indicative of a lack of financial resources and financial responsibility.<sup>61</sup>

### 2. *Decision as to lack of satisfactory performance on Shelter Cove*

The COD next discussed concerns about MCC's "lack of satisfactory performance on the Shelter Cove Project."<sup>62</sup> While disclaiming an intent to chronicle the entire history of disputes regarding Shelter Cove, the COD described a series of ongoing disagreements involving "substantial involvement" by both parties' lawyers. The COD characterized these disagreements as an ongoing refusal of MCC to either satisfactorily perform the contract or follow remedial measures the parties had then agreed to, as chronicled in a series of eleven attached exhibits.<sup>63</sup>

In very general terms, the eleven exhibits document disagreements and dissatisfaction by Southcoast Region as to landslide-related realignment issues, centerline shift concerns, reference point requirements, and MCC's refusal to survey and slope-stake to a degree Southcoast Region believes appropriate.<sup>64</sup> Procedurally, the exhibits chronicle concerns that MCC was inflexible, and had "backpedaled" on agreements to resolve various disagreements. The COD then concluded:

Based on these exhibits the procurement officer has determined in good faith that MCC's performance on the Shelter Cove project is sufficiently unsatisfactory to support a finding of nonresponsibility for purposes of SECON's protest. While I have considered MCC's contrary position (stated in some of the same exhibits, and stated elsewhere), I sustain SECON's protest in view of MCC's unsatisfactory performance relative to Shelter Cove.<sup>65</sup>

### 3. *Decision as to the Kake project rock source issues*

Next, the COD separately addressed MCC's "possible failure to follow DOTPF's instructions to bidders, and failure to provide requested information to DOTPF" on the rock

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<sup>59</sup> Ex. B, p. 5; Ex. G, pp. 3-4, 7-12; 2<sup>nd</sup> COD Exhibit K, p. 2.

<sup>60</sup> Ex. B, p. 5; 2<sup>nd</sup> COD Exhibits D, E.

<sup>61</sup> Ex. B, pp. 5-6.

<sup>62</sup> Ex. B, pp. 6-7.

<sup>63</sup> Ex. B, pp. 6-7; 1<sup>st</sup> COD, Exhibits E – O.

<sup>64</sup> See 1<sup>st</sup> COD, Exhibits E – O.

<sup>65</sup> Ex. B, p. 7.

source issue.<sup>66</sup> The COD indicated that SECON’s protest had led the procurement officer to reevaluate MCC’s bid “to determine if MCC acted responsibly with respect to material sources.”<sup>67</sup> The procurement officer found that MCC’s failure to respond to inquiries about whether it had relied on DOTPF laboratory data about the High School Rock Pit in building its bid warranted a finding of non-responsibility.<sup>68</sup> The procurement officer relied on AS 36.30.360(a), which provides that “the unreasonable failure of a bidder [to] promptly supply information in connection with an inquiry with respect to responsibility is grounds for a determination of nonresponsibility.”<sup>69</sup>

#### 4. *Concerns about “trustworthiness”*

Finally, in the discussion about Shelter Cove and again on the last page of the COD, the procurement officer stated that MCC’s conduct towards Southcoast Region in response to the protest had raised questions about MCC’s trustworthiness. The Procurement Officer noted two instances in which MCC made and then backed away from written commitments about contract performances. First, although the parties had agreed in writing on May 24 that there were no remaining outstanding payment issues, MCC was now claiming (in response to the supplier nonpayment claims) to have been underpaid by DOTPF. Second, after the parties entered into a written agreement about unfinished contract tasks on June 22, MCC’s Toby Miller emailed a “rescission” of his signature several days later.<sup>70</sup> The COD described both of these developments as implicating concerns about trustworthiness.

The COD also referenced a June 26, 2017 letter from MCC President Terry Miller to Regional Construction Engineer Vic Winters. On June 23, 2017, Mr. Winters wrote to Mr. Miller, expressing concern about MCC not having paid various suppliers on the Shelter Cove contract.<sup>71</sup> Characterizing the lack of prompt payments as “unsatisfactory performance” under the Standard Specifications, Mr. Winters requested a copy of MCC’s bond, as well as documentation regarding payments.

Mr. Miller’s June 26, 2017 response disputed Mr. Winters’ characterization of suppliers as subcontractors for purposes of the Standard Specifications, argued that MCC’s payment arrangements with its suppliers satisfied its obligations, and accused Southcoast Region of

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<sup>66</sup> Ex. B, pp. 4-6.

<sup>67</sup> Ex. B, p. 8.

<sup>68</sup> Ex. B, pp. 8-9.

<sup>69</sup> Ex. B, p. 9, citing AS 36.30.360(a).

<sup>70</sup> Ex. B, p. 7.

underpaying it on the Shelter Cove contract.<sup>72</sup> Mr. Miller also accused DOTPF of longstanding animosity towards MCC, suggested that Southcoast Region had provided information to SECON for its protest, and expressed concern that Mr. Winters' letter was sent to support a determination in SECON's favor.<sup>73</sup> Mr. Miller closed the letter by threatening multiple claims against DOTPF if the SECON protest were upheld.<sup>74</sup> After summarizing this letter, the COD explained that "[i]n light of MCC's incorrect allegations and threats, I conclude MCC is not trustworthy and is not a responsible bidder for purposes of the Kake contract."<sup>75</sup>

#### **F. MCC's July 2017 Protest**

Having deemed MCC non-responsible for purposes of the Kake project, the COD directed the Southcoast Region procurement staff to consider the second lowest bidder.<sup>76</sup> On July 7, 2017, the procurement officer issued a new notice of intent to award the Kake project to SECON. On July 10, 2017, MCC filed the protest that ultimately gave rise to this administrative appeal.<sup>77</sup> MCC's protest accused the procurement officer of ignoring pertinent evidence, and called the non-responsibility determination a "baseless abuse of discretion" based on an "arbitrary, subjective, and results-oriented analysis."<sup>78</sup>

On the finding related to financial responsibility, MCC noted that it was "in good standing with its bonding company," including having sufficient bonding capacity for both the Kake and Shelter Cove projects; touted its "nearly forty-year history performing public projects in Alaska;" and accused the procurement officer of misconstruing and exaggerating its situation with both Tyler Rental and Austin Powder.<sup>79</sup> As to both findings relating to Shelter Cove, MCC also blamed Southcoast Region for the payment issues at Shelter Cove (saying Southcoast Region had underpaid MCC), criticized the procurement officer's failure to consider what MCC saw as Southcoast Region's responsibilities for the Shelter Cove disputes, and argued that unadjudicated disagreements on that ongoing contract should not form the basis for a decision.<sup>80</sup>

As to the finding based on MCC's failure to respond to the rock source inquiry, MCC characterized the inquiry as "requesting nonessential information that is inconsequential to

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<sup>71</sup> 1<sup>st</sup> COD, Ex. C

<sup>72</sup> 1<sup>st</sup> COD, Ex. R, pp. 1-2.

<sup>73</sup> 1<sup>st</sup> COD, Ex. R, pp. 1-2.

<sup>74</sup> 1<sup>st</sup> COD, Ex. R, p. 3.

<sup>75</sup> Ex. B, p. 9.

<sup>76</sup> Ex. B, p. 9.

<sup>77</sup> Appeal Ex. 2.

<sup>78</sup> Appeal Ex. 2, pp. 2, 6.

<sup>79</sup> Appeal Ex. 2, pp. 3-4.

DOTPF’s investigation for responsibility.”<sup>81</sup> MCC described in detail its views of why it would not have been improper for bidders to assume use of the High School Rock Pit, and its conclusion that it was not “necessary” for responsibility purposes to have responded to inquiries about this topic.<sup>82</sup> MCC also criticized the procurement officer’s mention of trustworthiness, calling this an “arbitrary and subjective standard” unsupported by “any citations to evidence or contractual or legal authority.”<sup>83</sup>

Along with its protest, MCC submitted the June 15 Declaration from Business Manager Heather Skaife, as well as Declarations from former DOTPF Commissioner Patrick Kemp, former DOTPF Region Design Chief Tracy Moore, and Project Engineer Edwin Johnson, all of whom were sharply critical of Southcoast Region’s approach to the Shelter Cove project.<sup>84</sup>

Former Commissioner Kemp, now a consultant to MCC on the Shelter Cove project, asserted that “DOTPF has been grossly underpaying MCC under this contract.” Mr. Kemp also took issue with current Southcoast Region staff’s “interpretation of contract requirements” for Shelter Cove as set out in the exhibits to the COD, and described disagreements about those topics (i.e., about who was doing what in Shelter Cove) in some detail.<sup>85</sup> On the “failure to respond” issue, Mr. Kemp described Kake as “well known for having poor quality rock,” but explained his view of why a bidder on a Kake road project could nonetheless reasonably use local materials.<sup>86</sup> Mr. Kemp urged that Southcoast Region’s prebid lowering of “Deg. Value” requirements signaled an intent to allow local materials, and criticized Southcoast Region for suggesting in its Notices that bidders should not rely on the test results.<sup>87</sup> Notably, however, Mr. Kemp did not address the issue of MCC’s failure to respond to DOTPF’s inquiry about the basis for its bid.

Ms. Moore, also now a consultant to MCC on the Shelter Cove Project, opined that Southcoast Region was imposing improper additional work on MCC for the Shelter Cove project, had underpaid MCC, “was causing delay and confusion,” and was acting in a manner tantamount to “blackmail and/or extortion.”<sup>88</sup> Mr. Johnson, the engineer, declared that the

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<sup>80</sup> Appeal Ex. 2, pp. 5-6.

<sup>81</sup> Appeal Ex. 2, p. 8.

<sup>82</sup> Appeal Ex. 2, pp. 8-9.

<sup>83</sup> Appeal Ex. 2, p. 10.

<sup>84</sup> Appeal Ex. 2, pp. 11-12 (Skaife Decl.), 15-26 (Kemp Decl.), 30-33 (Moore Decl.); 43-46 (Johnson Decl.).

<sup>85</sup> Appeal Ex. 2, pp. 15-22

<sup>86</sup> Appeal Ex. 2, p. 22.

<sup>87</sup> Appeal Ex. 2, pp. 23-25.

<sup>88</sup> Appeal Ex. 2, pp. 30-33.

Shelter Cove project was progressing on time and appropriately, notwithstanding “the various changes in the work DOTPF imposed on MCC during the course of the regular work,” and blamed difficulties on the inexperience of Southcoast region staff working on the project.<sup>89</sup>

On July 17, 2017, MCC submitted to the procurement officer an additional 3-page letter from Terrence Miller and further documentation as a “supplement” to its protest. MCC’s letter again argued that MCC was not resisting contract requirements as to Shelter Cove, and that instead DOTPF was unilaterally imposing new requirements.

**G. The parties’ continued disagreements in Shelter Cove while MCC’s Kake Road protest proceeded**

In the meantime, the parties continued to disagree vehemently about the status of Shelter Cove and their respective obligations under the contract. In a letter dated June 29, 2017, MCC General Manager Toby Miller submitted a “Notice of Intent to Claim – Project Underpayment” to Project Engineer Todd Fleming.<sup>90</sup>

Apparently shortly after the First COD, MCC reached a written payment agreement with Tyler Rental.<sup>91</sup> MCC provided Southcoast Region with a redacted copy of that July 5, 2017 agreement, but refused multiple requests for an unredacted copy.<sup>92</sup>

As to Austin Powder, and notwithstanding Ms. Skaife’s affidavit that “MCC has reached agreements with respect to both firms ... and the vendors are satisfied with the agreements,” Austin continued to press its claim against MCC’s bond. MCC’s surety issued an acknowledgement of Austin’s Notice of Claim on July 17, 2017.<sup>93</sup> MCC apparently was not aware of the claim until after this date. In a July 17 letter to Vic Winters denying that any claims had been filed against MCC’s bond, MCC President Terry Miller accused Southcoast Region of encouraging vendors to file claims against MCC’s bond, and stated that Southcoast Region staff’s contact with Austin and Tyler “is inexcusable and, again, shows the great lengths to which the DOTPF will go in order to create a self-fulfilling prophecy.”<sup>94</sup>

In a July 26, 2017 letter to the surety, MCC Business Manager Skaife acknowledged Austin’s claim, indicated MCC had been “issuing regularly bimonthly checks to this vendor,”

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<sup>89</sup> Appeal Ex. 2, pp. 43-46.

<sup>90</sup> Appeal Ex. 8.

<sup>91</sup> 2<sup>nd</sup> COD Ex F.

<sup>92</sup> 2<sup>nd</sup> COD p. 6 and Exs. F, G and H.

<sup>93</sup> 2<sup>nd</sup> COD Ex. E.

<sup>94</sup> MCC Protest Report Response Ex. 3.

accused Southcoast Region of orchestrating the claim, and blamed any shortfall on underpayment by Southcoast Region.<sup>95</sup>

**H. The Contracting Officer’s July 31, 2017 Decision on MCC’s Kake Road Protest (“The Second COD”)**

On July 31, 2017, the procurement officer issued his Contracting Officer’s Decision on MCC’s protest. Construing MCC’s protest as an allegation of “abuse of discretion in finding MCC nonresponsible,” this decision was essentially a review and affirmation of the First COD.<sup>96</sup> The Second COD incorporated by reference the First COD’s discussion of the investigation, and factors considered.<sup>97</sup> It again discussed the broad discretion afforded procurement officers in making responsibility determinations.<sup>98</sup> And it addressed the consideration of “trustworthiness” in the First COD, pointing to a legal treatise and several cases in which “trustworthiness” and “integrity” are considered appropriate “indicia of responsibility.”<sup>99</sup> It then provided further documentation and numbered findings addressing each of the previously enumerated factors.

*1. Financial Resources*

On the issue of financial resources and non-responsibility, the decision documented the supplier payment concerns described above, including (1) that MCC had claimed in June to have a payment agreement with Tyler, but then produced a (redacted) agreement not dated until July 5, and (2) that Austin had filed a claim of nonpayment on MCC’s bond 19 days before MCC’s protest, yet MCC continued to deny that either supplier had filed a claim.<sup>100</sup> The decision also documented what the procurement officer viewed as “disingenuous” attempts by MCC to shift the blame for not paying its suppliers onto Southcoast Region.<sup>101</sup>

The decision specifically noted that the financial concerns vis-à-vis the non-responsibility finding went beyond MCC’s “102-1.13 failure to pay its subcontractor/suppliers in accordance with the fair payment act and the Shelter Cove contract.”<sup>102</sup> Rather, it concluded that MCC’s supplier payment arrearages, as well as “billing DOTPF for work not performed,” viewed as a

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<sup>95</sup> Appeal Ex. 5.  
<sup>96</sup> Ex. C, pp. 2-3.  
<sup>97</sup> Ex. C, p. 2.  
<sup>98</sup> Ex. C, pp. 3-4.  
<sup>99</sup> Ex. C, pp. 4-5.  
<sup>100</sup> Ex. C, p. 5-6.  
<sup>101</sup> Ex. C, pp. 6-7.  
<sup>102</sup> Ex. C, p. 8.

whole, implicated concerns that include “lack of financial responsibility and lack of financial resources to fund and sustain the Kake project.”<sup>103</sup>

## 2. *Shelter Cove performance*

On the issue of MCC’s Shelter Cove performance, the Second COD described the parties’ ongoing disputes on the Shelter Cove project, addressing the parties’ disagreements about certain contract requirements (e.g. surveying, slope-staking, and centerline alignment), Southcoast Region’s view that MCC had failed to meet some of those requirements, and Southcoast Region’s general dissatisfaction with the progress of the project and the tone of its interactions with MCC.<sup>104</sup>

The Second COD also included a detailed affidavit from Mike Foster, P.E., about his role and observations as a consultant to Southcoast Region on the Shelter Cove project.<sup>105</sup> Mr. Foster described ongoing communication difficulties with MCC, Southcoast Region’s concerns about road alignment and other contract requirements, MCC failing to pay its suppliers despite Southcoast Region having paid invoices for materials supplied, and Southcoast Region’s disagreement with MCC’s characterization of the work as nearly complete.<sup>106</sup> The Second COD also rejected MCC’s protest claim that it was not notified of unsatisfactory performance, describing numerous meetings, site visits, and written communications based on which the procurement officer was “satisfied [MCC] has received such notice through various means on multiple occasions.”<sup>107</sup>

## 3. *Failure to respond to Rock Pit inquiry*

Lastly, the procurement officer also concluded that MCC’s still ongoing refusal to respond to the inquiry about its reliance on the High School Rock Pit data separately justified a finding of non-responsibility.<sup>108</sup> The procurement officer expressed concern that reliance by MCC on the lab results provided in the Notice to Bidders could create problems for the project down the road (indeed, Mr. Kemp’s declaration about why bidders should have expected to rely on those lab results appears to foreshadow such problems).<sup>109</sup> The procurement officer

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<sup>103</sup> Ex. C, p. 8. The decision also dismissed MCC’s reliance on its being bonded as a defense to a finding of non-responsibility, noting that bonding is a statutory and contractual requirement and does not obviate the concerns raised. Ex. C, p. 8.

<sup>104</sup> Ex. C, pp. 8-11.

<sup>105</sup> 2<sup>nd</sup> COD, Ex. O.

<sup>106</sup> See Ex. C, p. 10; 2<sup>nd</sup> COD Ex. O, pp. 1-8.

<sup>107</sup> Ex. C, p. 11.

<sup>108</sup> Ex. C, pp. 11-12.

<sup>109</sup> Ex. C, p. 11.

concluded that MCC’s “ongoing decision to not answer the question of whether it relied on DOTPF’s lab rest results in formulating its bid for the Kake contract” separately warranted a finding of non-responsibility under AS 36.30.360.<sup>110</sup>

### **I. Procedural history of this appeal**

On the same day that MCC filed its protest of the June 30 COD, it also filed a Superior Court complaint seeking an emergency injunction on essentially the same grounds.<sup>111</sup> On August 9, 2017, the Superior Court dismissed MCC’s appeal due to, *inter alia*, its failure to exhaust administrative remedies.<sup>112</sup> This administrative appeal followed.

In its August 10, 2017 appeal, MCC argued that the procurement officer’s discretion is not as broad as asserted by Southcoast Region; that the findings about Tyler and Austin were factually and legally unsupported; that dissatisfaction about Shelter Cove needed to be addressed through the Shelter Cove contractual procedures; and that the rock sourcing issue could not underlie a non-responsibility determination because Southcoast Region’s inquiries about the rock source were “unreasonable” and the information sought not “necessary” to the responsibility inquiry.

At a case planning conference in August 2017, the parties scheduled a two-week hearing on the merits but, at MCC’s request, also set a briefing schedule for cross-motions on summary adjudication. Pursuant to that schedule, MCC filed a motion for summary adjudication on September 15, 2017. Southcoast Region filed its Opposition and Cross-Motion on October 2, 2017. MCC filed its Opposition to that cross-motion on October 10, 2017. Oral argument was held on October 13, 2017.

### **III. Discussion**

#### **A. Applicable law**

##### *1. Responsibility overview*

The Procurement Code directs the procurement officer to award a contract “to the lowest responsible and responsive bidder whose bid conforms in all material respects to the

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<sup>110</sup> Ex. C, p. 12.

<sup>111</sup> 2<sup>nd</sup> COD, Ex. C.

<sup>112</sup> Protest Report, Ex. U, pp. 2-12 (“[T]he matters at issue here, including a determination of whether MCC is a responsible bidder, are best determined by those with expertise in the area, leaving it to the court only when administrative remedies are exhausted. We are not at that point.”).



requirements and criteria set out in the invitation to bid.”<sup>113</sup> Standards of responsibility are then addressed in both the procurement regulations, and in DOTPF’s Standards Specifications.

2 AAC 12.500(a) provides a non-exhaustive list of three factors that may inform the Department’s responsibility analysis:

Factors that may be considered in determining whether a prospective contractor is responsible include whether the prospective contractor

- (1) has a satisfactory record of performance;
- (2) is qualified legally to contract with the state; and
- (3) has supplied all necessary information in connection with the inquiry concerning responsibility.<sup>114</sup>

2 AAC 12.500(b) then provides:

The procurement officer may require the prospective contractor to demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel, by submitting

- (1) evidence that the contractor possesses the necessary items;
- (2) acceptable plans to subcontract for the necessary items;
- (3) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items; or
- (4) other information required by the procurement officer.<sup>115</sup>

Relatedly, AS 36.30.360(a) provides that “[t]he unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility is grounds for a determination of nonresponsibility with respect to the bidder or offeror.”<sup>116</sup>

Section 102-1.13 of the Standard Specifications provides a non-exhaustive list of the bases on which the Department may find a bidder to be non-responsible.<sup>117</sup> That section begins: “The Department may find a bidder is non-responsible for any one of the following reasons, but is not limited in its responsibility analysis to the following factors.” Of particular relevance here are the following:

102-1.13(4): “Unsatisfactory performance on previous or current contracts;”

102-1.13(5): “Failure to pay, or satisfactorily settle, all bills due for labor and materials on previous contracts;” [and]

102-1.13(13): “Lack of skill, ability, financial resources, or equipment required to perform the contract.”

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<sup>113</sup> AS 36.30.170.

<sup>114</sup> 2 AAC 12.500(a).

<sup>115</sup> 2 AAC 12.500(b).

<sup>116</sup> AS 36.30.360(a).

<sup>117</sup> Ex. A, p. 2.

After listing fourteen possible bases for a non-responsibility finding, the section concludes: “[n]othing contained in this section deprives the Department of its discretion in determining the lowest responsible bidder.”<sup>118</sup>

## 2. *Standard of Commissioner’s review*

The Commissioner of Transportation and Public Facilities serves as chief procurement officer for the procurement of construction.<sup>119</sup> For this reason, “the commissioner’s decision in a protest appeal should not be restricted to correcting abuses of discretion that warrant reversal on the courts.”<sup>120</sup> At the same time, the commissioner gives “due deference” to the procurement officer’s “discretionary decisions.”<sup>121</sup> In *Flagship Development LLC*, the issue of responsibility was identified as a finding entitled to deference, as follows: “[t]he commissioner gives due deference to the decision of a contracting officer regarding matters within the officer’s discretion, and may affirm the contracting officer’s decision regarding responsibility if it is supported by substantial evidence in the record.”<sup>122</sup>

## 3. *Summary Adjudication*

Presently pending are cross motions for summary adjudication. Summary adjudication in an administrative proceeding is equivalent to summary judgment under the civil rules. As such, it is appropriate where the moving party has shown that no genuine issue of material fact exists. But the procedural context of this case complicates the analysis of whether summary adjudication is or could be appropriate here, where the parties vigorously dispute the facts underlying their conflicts about Shelter Cove.

As an administrative appeal, this case was referred to OAH and to this Administrative Law Judge to conduct an evidentiary hearing if necessary and issue a proposed decision on behalf of, and for review by, the Commissioner. Both parties now ask the ALJ to recommend summary adjudication to the Commissioner.

MCC urges that, as a matter of law, the procurement officer did not apply an appropriate standard in reaching his non-responsibility determination, so that determination must be

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<sup>118</sup> Ex. A, p. 3.

<sup>119</sup> AS 36.30.005(b) (“Except as otherwise provided, all rights, powers, duties, and authority relating to the procurement of construction ... and the control over construction of state facilities ... are transferred to the commissioner of transportation and public facilities, subject to regulations adopted by the commissioner of administration.”).

<sup>120</sup> *In re: Waste Management of Alaska*, No. 01-08 at 11-14 (Department of Administration, April 24, 2002).

<sup>121</sup> *In re: Waste Management of Alaska*, No. 01-08 at 11-14 (Department of Administration, April 24, 2002).

<sup>122</sup> *Flagship Development, LLC v. Division of General Services*, OAH No. 06-0249-PRO, citing *In Re Waste Management of Alaska, Inc.*, No. 01-08 at 11-14 (Department of Administration, April 24, 2002).

reversed. Southcoast Region responds that the procurement officer used appropriate factors in his analysis, and that, further, because his evaluation under those factors was supported by evidence that was before him, the Commissioner should grant that decision deference in the form of summary adjudication. Southcoast Region argues that it is entitled to summary adjudication if evidence in the record supports the conclusion that the contracting officer acted reasonably in finding MCC non-responsible.

I am mindful, particularly in addressing Southcoast Region's arguments, of the competing dilemmas posed by the procedural posture of this case. Summary adjudication is typically thought of in terms of legal disputes characterized by the absence of disputed material facts. Here, of course, the parties dispute numerous facts about what has gone on in Shelter Cove, how bad it is, and who is to blame. But this is not the Shelter Cove appeal. That dispute is presently not before me – or any adjudicator – on the merits. And, as both parties appear to acknowledge, it would be unadvisable and a poor use of scarce agency resources to conduct a “mock trial” here on the Shelter Cove dispute. What significance, if any, is the existence of factual disputes over Shelter Cove?

As Southcoast Region points out, the procurement officer has considerable discretion in determining non-responsibility. If this case were to go to hearing, then, the ultimate issue for hearing would be whether the procurement officer's decision is an abuse of that discretion, or whether substantial evidence in the record supports his determination that MCC is non-responsible for purposes of this project.

With the responsibility question framed as a discretionary determination, Southcoast Region cites several cases in which factually disputed responsibility issues were adjudicated without a full hearing. In *Alaska Communication Systems*, the Commissioner of Administration granted partial summary adjudication upholding an affirmative finding of responsibility, even where factual disputes arguably existed about the bidder's actual ability to perform the contract.

[T]he existence of a factual issue regarding GCI's actual ability does not, by itself, create a substantial factual issue as to whether the procurement officer abused his discretion. It is in the nature of discretionary determination that they may be accompanied by doubt. The procurement officer's willingness to accept a degree of risk of non-performance is subject to a deferential standard of review by the commissioner, and a purchasing agency is in the best position to determine the

degree of risk of non/performance that is acceptable in light of the available options.<sup>123</sup>

Citing *Flagship Development LLC*, the administrative law judge concluded, and the commissioner concurred, that the procurement officer's determination of responsibility should be reviewed with deference and could be decided on summary adjudication.

Southcoast Region also relies on *Azimi Tabrizi v. State, Department of Administration* to support its position that summary adjudication is appropriate. In *Azimi*, an unpublished Memorandum of Judgment, the Supreme Court affirmed a Superior Court decision affirming a decision by the Commissioner of Administration to deny *Azimi's* protest without a hearing.<sup>124</sup>

*Azimi* had protested the award of a contract to another, higher-ranked bidder. The protest grounds included disagreement with the procurement officer's findings that *Azimi's* bid was non-responsive and that *Azimi* was a non-responsible offeror, as well as the findings that the successful offeror's bid was responsive. Upon review of the protest report, record, and comments, the Commissioner determined "that there are no material facts at issue and that the appeal may be dismissed without an evidentiary hearing." Because the Commissioner's decision was based on the conclusion that "the procurement officer did not abuse her discretion" in finding the other bid was responsive, and higher-ranking, the Commissioner did not reach *Azimi's* arguments about either the responsiveness of his bid or whether he was a responsible offeror.

The Superior Court upheld the decision on non-responsiveness. The Superior Court also said the protester wasn't entitled to a hearing on the procurement officer's non-responsibility finding where the Commissioner had not reached this issue in upholding the award on another basis. The Supreme Court's MOJ upheld these determinations. While *Azimi* is not on all fours with this case – the Commissioner did not grant summary adjudication of a non-responsibility finding, and the Superior Court and Supreme Court's decisions were therefore focused on summary adjudication as to responsiveness of the other party's bid – it nonetheless offers strong support for Southcoast Region's position that the Commissioner may properly uphold a procurement officer's discretionary decision on summary adjudication even where the underlying facts may be in dispute.

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<sup>123</sup> *Alaska Communications Systems v. Department of Education and Early Development*, OAH No. 11-0120-PRO & 11-0178-PRO (Revised Decision, Department of Administration, September 16, 2011).

<sup>124</sup> *Azimi Tabrizi v. State, Department of Administration*, 2003 WL 23002625 (Alaska 2003). Unpublished decisions are not precedential, but may still be persuasive authority as to a particular issue. App. Rule. 214(d)(1).

**B. The parties' cross-motions for summary adjudication of non-responsibility based on the High School Rock Pit issue**

Although the bulk of the parties' arguments in this appeal concern the non-responsibility findings related to Shelter Cove, the procurement officer separately concluded that MCC was non-responsible due to the failure to respond to inquiries about the rock sourcing issue during the responsibility inquiry. Southcoast Region argues that it is entitled to summary adjudication based on MCC's failure to respond to inquiries regarding the rock source issue. MCC, in turn, argues it is entitled to summary adjudication on this issue because the contracting officer had "misinterpreted the bid instructions," that MCC was entitled to "assume the risk" of any rock source choices, and that its failure to answer the inquiries about this issue were therefore reasonable.<sup>125</sup>

To review, in its June 2017 protest of the notice of intent to award the Kake contract to MCC, SECON argued that Southcoast Region should find MCC to be non-responsible based on its treatment of the rock source issue. Specifically, SECON argued that MCC's low bid on the Kake project suggested "an intent to use locally available rock, presumably from the High School Pit," and without appropriate geotechnical analysis to support doing so.

In his June 23 email, AAG Burke asked Mr. Schlemlein to address this issue:

Based on this allegation, please let me know: a) whether MCC built its bid based on the use of rock from the High School Pit; b) if so, what geotechnical data, if any, MCC relied upon in determining that use of rock from the High School Pit was appropriate for purposes of MCC's bid submission.<sup>126</sup>

MCC never responded.

In the First COD, the procurement officer concluded that this failure to respond constituted an alternate ground for finding MCC to be a non-responsible bidder under AS 36.30.360(a), which provides that a bidder's unreasonable failure to promptly provide information requested in a responsibility inquiry is grounds for a non-responsibility finding.<sup>127</sup> The procurement officer then reiterated this finding in the Second COD, noting that even in its protest of the First COD MCC still refused to provide the information sought. The procurement

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<sup>125</sup> Miller Motion, pp. 1, 5, 13-14.

<sup>126</sup> Protest Report Ex. F, pp. 1-2.

<sup>127</sup> Ex. B, pp. 8-9.

officer found that MCC’s ongoing failure to respond only underscored the appropriateness of the initial non-responsibility finding.<sup>128</sup>

MCC complains that this inquiry was “sent via email five business days prior” to issuance of the First COD.<sup>129</sup> MCC also complains the inquiry was “sent to MCC’s attorney (rather than any employee of MCC),” and that it was part of a larger email rather than “a standalone request.”<sup>130</sup> But these characterizations thoroughly mischaracterize the context in which these communications occurred. The inquiry was posed:

- In the context of attorneys exchanging emails about the responsibility-based protest;
- After an express invitation from Mr. Schlemlein to “call or write” him if Southcoast Region or AAG Burke had any questions;
- In an email with the subject matter “Re: Miller/AKSouthcoast Region/Kake Protest;”
- On the same day Mr. Schlemlein was informed that Southcoast Region had been granted an extension of time to continue its investigation into SECON’s protest;
- About a topic that was specifically identified by SECON as a ground for non-responsibility; and
- Introduced in the email with specific reference to the allegations in the protest and to MCC’s failure thus far to substantively respond to those allegations.<sup>131</sup>

There is simply no merit to MCC’s argument that the inquiry was not “in connection with an inquiry with respect to responsibility.”

While MCC argues that “failure to respond to a bid-related inquiry is not grounds, in and of itself, to find a bidder nonresponsible,”<sup>132</sup> this was specifically an inquiry “with respect to responsibility.” AS 36.30.360(a) expressly provides that “the unreasonable failure of a bidder [to] promptly supply information in connection with an inquiry with respect to responsibility is grounds for a determination of nonresponsibility.”<sup>133</sup>

The undisputed facts are that MCC did not substantively respond to Southcoast Region’s inquiry about the High School Rock Pit. Not only did MCC not “*promptly* supply information”

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<sup>128</sup> Ex. C, pp. 11-12.

<sup>129</sup> Miller Opposition, p. 10.

<sup>130</sup> Miller Opposition, pp. 10-11.

<sup>131</sup> Protest Report, Ex. F.

<sup>132</sup> Miller Opposition, p. 11.

<sup>133</sup> AS 36.30.360(a).

in response to this inquiry, it never substantively responded – neither during the investigation leading to the First COD, nor in its protest of that COD, nor even when it filed this appeal.

Lastly, there is no merit to MCC’s argument that the inquiry was not reasonable, such that its complete failure to respond cannot properly form the basis of a non-responsibility finding. SECON’s protest alleged that MCC’s low bid likely ignored the realities of the locally available rock source. Southcoast Region inquired of MCC as to the data underlying the bid. MCC, having ignored that inquiry, now contends it was not required to respond because, even if it had made ill-advised choices vis-à-vis its rock sourcing plans, it would ultimately be responsible for the costs associated with its risky choice. But the issue for purposes of AS 36.30.360(a) is not whether a bidder assumes the risk of poorly thought out bidding assumptions. The issue is that, in making a responsibility determination, Southcoast Region – as the project owner who will bear the risks associated with moving forward in a project with a potentially non-responsible bidder – is entitled to inquire further into the basis and assumptions underlying that bid. A bidder cannot simply refuse to respond and then evade a non-responsibility finding by claiming the inquiry was unreasonable.

In short, the procurement officer appropriately found that MCC’s failure to respond to the inquiry about the rock sourcing issue was a reasonable independent basis on which to conclude that MCC was non-responsible as to the Kake project. Under AS 36.30.360(a), and given MCC’s complete failure to respond to inquiries about this issue, Southcoast Region has met its burden of showing that it is entitled to summary adjudication in favor of this non-responsibility finding.

**C. The parties’ cross-motions as to basing the responsibility determination on issues related to Shelter Cove**

Each party argues that the non-responsibility findings related to the Shelter Cove project warrant summary adjudication in its favor. The above grant of summary adjudication on the alternate basis for the procurement officer’s finding – MCC’s failure to respond to inquiries about the rock sourcing issue in the course of the responsibility inquiry – is alone sufficient to resolve this appeal. That is, having upheld the non-responsibility finding on that basis, it is not necessary to determine whether the finding is separately justified on other additional bases as well. However, in the interests of developing a complete record and clarifying the standards by which responsibility inquiries are made and reviewed, this decision also considers the parties’

arguments about how, if at all, their ongoing disagreements about Shelter Cove inform the responsibility determination.

*1. Findings relating to ongoing/unadjudicated performance disputes on the Shelter Cove project*

Both the First COD on SECON's protest and the Second COD on MCC's subsequent protest found MCC to be non-responsible based on MCC's unsatisfactory work on the Shelter Cove project.<sup>134</sup> MCC argues that it is entitled to summary adjudication because the determination of non-responsibility is based on unadjudicated facts about an ongoing project.<sup>135</sup> MCC argues that, as a matter of law, the contracting officer cannot "consider disputed performance issues related to a current and ongoing project" as evidence of bidder non-responsibility.<sup>136</sup> MCC further argues that the contracting officer's conclusions on this issue were "flagrantly unreasonable."<sup>137</sup>

Southcoast Region counters that of course an agency may consider extant performance problems on ongoing projects in evaluating responsibility for a new contract. Southcoast Region further argues that it is entitled to summary adjudication on its finding of non-responsibility in this case "because the contracting officer's findings of unsatisfactory performance are reasonably based (even if MCC disagrees with Southcoast Region's criticisms)."<sup>138</sup>

MCC argues that there are disputes of material fact about the Shelter Cove project, including who is responsible for various delays, and whether MCC has failed to perform required work or whether Southcoast Region has attempted to change the contract requirements midstream. Southcoast Region acknowledges that the parties are in vigorous disagreement as to their ongoing disputes in Shelter Cove, but denies that these disputed facts are "material facts" for purposes of the Commissioner's review of the procurement officer's discretionary determination of non-responsibility.

As a threshold matter, there is no merit to MCC's arguments that the procurement officer could not lawfully consider the ongoing Shelter Cove issues in his responsibility determination as to the Kake project. The Standard Specifications specifically identify "unsatisfactory performance on a current contract" as a basis for a non-responsibility finding.<sup>139</sup> As a matter of

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<sup>134</sup> Ex. B, pp. 6-7; Ex. C, p. 8-11.

<sup>135</sup> Miller Motion, pp. 6-12.

<sup>136</sup> Miller Motion, p. 1.

<sup>137</sup> Miller Opposition, p. 8.

<sup>138</sup> Southcoast Region Cross-Motion, p. 14.

<sup>139</sup> Ex. A.



public policy and responsible governance, the Standard Specifications cannot be construed to tie the hands of an agency in the manner MCC suggests. Nor do the Standard Specifications limit a finding of “unsatisfactory performance” for responsibility purposes to situations of default or to adjudicated contract disputes. The use of the broader term “unsatisfactory performance,” rather than those narrower, more specific terms, implies a discretionary ability by the procurement officer to determine whether the situation rises to the level of unsatisfactory performance. A requirement to the contrary would unreasonably hamstring public agencies from acting based on reasonable and informed concerns.

This conclusion does not contradict or undermine the dispute resolution provisions of Shelter Cove of any other contract. To the extent the parties have unresolvable differences on that contract, they may avail themselves of those provisions, and once the differences are adjudicated, the adjudicated results will bind the parties going forward. But Southcoast Region is not required *in the meantime* to ignore its considerable dissatisfaction to the extent ongoing contract performance issues reasonably give rise to concerns about responsibility as to a separate project. In short, to the extent MCC claims it is entitled to summary adjudication because of Southcoast Region’s reliance on Shelter Cove performance concerns in making a non-responsibility determination, MCC’s motion is denied. Concerns about ongoing contract performance are clearly fair game in a responsibility determination.

The more difficult question is whether Southcoast Region is entitled to summary adjudication as to its non-responsibility determination. Plainly, there are many factual disputes about the Shelter Cove contract, whether MCC is meeting its contract obligations, and who is responsible for the various concerns and delays. Equally plain, however, is that this proceeding – a procurement appeal on an entirely separate contract – is not the appropriate venue for resolving the merits of those disagreements. As MCC points out, the Shelter Cove contract has its own dispute resolution procedures, and the state contract code governs such disputes. Detailed exploration of the merits of that dispute in this proceeding would divert this proceeding into an impractical collateral trial.

Southcoast Region argues that the discretionary authority vested in the procurement officer makes it unnecessary to reach the merits of the underlying disputes about Shelter Cove. The question, as Southcoast Region sees it, is not whether Southcoast Region is ultimately right about the Shelter Cove concerns. Rather, the question here is whether there is a reasonable factual basis for the procurement officer’s conclusions that MCC’s performance on Shelter Cove

was unsatisfactory. If this is the ultimate issue in this appeal, then Southcoast Region is entitled to summary adjudication if it has shown that undisputed facts demonstrate the procurement officer's decision is supported by substantial evidence.

It cannot be denied that the parties are engaged in significant disagreements about the progress and requirements of the Shelter Cove project. It cannot be denied that Southcoast Region staff have been dissatisfied about MCC's conduct and performance vis-à-vis these disagreements (just as MCC has been dissatisfied about Southcoast Region's responses). The procurement officer acknowledged that MCC had submitted evidence it believes supports its narrative of Southcoast Region's responsibility for the parties' disagreements. But the procurement officer also documented a lengthy history of disagreements and MCC actions that have given rise to Southcoast Region's concern about MCC's contract performance. And, while MCC disputes the characterization of its performance, there certainly is "substantial evidence" in the record presented here to support the conclusion that MCC was not performing on the contract to Southcoast Region's satisfaction.

As discussed above, the Alaska Supreme Court – albeit in an unpublished decision – has previously upheld the Commissioner's authority to grant summary adjudication in favor of a procurement officer's discretionary decision, even when the underlying facts were disputed.<sup>140</sup> While the Commissioner may not be required to grant summary adjudication in such a circumstance, there is good reason to conclude that he is entitled to do so. To some extent this dispute is academic here, given the conclusion above that the rock sourcing issue was, alone, a sufficient basis for the procurement officer's determination of MCC's non-responsibility as to the Kake contract. However, this decision further concludes that Southcoast Region has also met its burden of showing that substantial evidence in the record before the procurement officer also supported his non-responsibility determination based on Shelter Cove performance issues.

The evidence in the record at the time of the First COD showed a lengthy pattern of dissatisfaction on the part of Southcoast Region, with conflicts sufficient to require in-depth involvement by lawyers on both sides. Southcoast Region had ongoing concerns that MCC has refused to acknowledge or meet its contractual obligations as to surveying, slope-staking, and other issues.<sup>141</sup> Disagreements over these issues have continued and escalated for months. By the time of the Second COD, Southcoast Region had documented considerable ongoing

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<sup>140</sup> *Azimi*, 2003 WL 23002625 (Alaska 2003).

<sup>141</sup> *See Ex. B*, pp. 6-7 and exhibits cited therein.

disagreement on what it viewed as basic contract requirements, multiple failures of MCC to meet Southcoast Region's expectations for contract performance, and multiple instances in which MCC appeared to accept a requirement or obligation, and then "rescind" that acceptance.<sup>142</sup>

While MCC may well disagree with Southcoast Region about the requirements of the Shelter Cove contract, this is not the forum to adjudicate that dispute, and Southcoast Region is entitled to consider what it views as unsatisfactory performance in determining MCC's responsibility as a bidder. Because substantial evidence in the record supports the procurement officer's conclusion that MCC has performed unsatisfactorily as to Shelter Cove, this decision concludes that summary adjudication in favor of Southcoast Region's non-responsibility decision is appropriate on this basis as well.

## 2. *Findings relating to Shelter Cove supplier payment issues*

Similarly, the parties separately each argue they are entitled to summary adjudication as to the non-responsibility finding related to Shelter Cove supplier payment issues. Upon learning that MCC owed more than \$330,000 to Tyler Rental, and more than \$130,000 to Austin Powder, the procurement officer concluded that MCC was non-responsible under specification nos. 102-1.13(5) (failure to pay or settle amounts due on previous contracts); 102-1.13(13) (lack of sufficient financial resources to perform the contract); and/or no. 102.1.13 (unsatisfactory performance on a current contract) and 109-1.06 (under which failure to pay subcontractors constitutes unsatisfactory performance).

MCC argues that it is entitled to summary adjudication as to this determination because suppliers are not subcontractors under the Standard Specifications, and because it has obeyed prompt payment laws with regard to payments to its suppliers.<sup>143</sup> Southcoast Region disagrees with MCC's legal analysis, and argues that, because the procurement officer had a reasonable basis in the record to conclude that MCC had not timely paid its suppliers, the Commissioner should summarily uphold the non-responsibility finding.

MCC notes that the non-responsibility definition involving non-payment, Standard Specification 102-1.13(5), only addresses non-payment as to *previous* contracts. MCC argues that this exclusion of current contracts – particularly when current contracts are included in other sections of the non-responsibility definition – must mean something.<sup>144</sup> MCC also argues that

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<sup>142</sup> See Ex. C, pp. 8-11 and 2nd COD Ex. O (Foster Aff.).

<sup>143</sup> Miller Motion, pp. 8-12.

<sup>144</sup> As to the idea that non-payment on a current contract can give rise to a finding of non-responsibility because Standard Specification 109-1.06 defines failure to pay subcontractors as "unsatisfactory performance,"

disputed facts about the nature of the underpayments, and its claims of having been underpaid by Southcoast Region, make the non-responsibility finding inappropriate, or at least preclude summary adjudication.

Southcoast Region disagrees. Citing *Alaska Communications Systems* and *Flagship Development LLC*, Southcoast Region contends that, for purposes of the summary adjudication motion:

[T]he issue is not whether the contracting officer proved MCC's failure to pay [Austin and Tyler]. The issue is whether 'the procurement officer's determination of responsibility had a reasonable basis in the record and was not an abuse of discretion.'<sup>145</sup>

MCC is correct that facts about its agreements with its suppliers are disputed. But Southcoast Region is correct that it is undisputed that: (1) at the time of both CODs, MCC owed \$330,000 to Tyler and \$134,604.92 to Austin; (2) as of the First COD, no written repayment agreements were in place, and, further, Austin had made a claim on MCC's bond; (3) MCC's written payment plan agreement with Tyler post-dates the First COD; and (4) MCC has refused to produce a non-redacted version of its agreement with Tyler. These undisputed facts form a reasonable basis in the record for concern about MCC's financial responsibility.

Most critically for the purposes of this motion, MCC's argument ignores the difference between a finding of non-responsibility based on nonpayment of previous contracts (Standard Specification 102-1.13(5)) and a finding of non-responsibility based on insufficient financial resources (Standard Specifications 102-1.13(13)).<sup>146</sup> As summarized in the First COD, "[b]ecause the Shelter Cove project is ongoing, because of substantial disputes that have recently come to a head . . . , and because MCC would have to work the Kake project simultaneously with the Shelter Cove project, MCC's financial responsibility in the Shelter Cove project is germane to whether it is responsible for purposes of SECON's protest."<sup>147</sup>

The troubling facts established in the record – including the outstanding, long-overdue payments to multiple suppliers, as well as ongoing project delays that would have led to an overlap on the two projects – are sufficient to give rise to a finding that MCC has insufficient

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MCC argues that the suppliers are not "contractors" under the Standard Specifications. Southcoast Region responds that the Standard Specifications require prompt payment to subcontractors, and that Alaska prompt payment laws include suppliers under the definition of sub-contractor. See AS 36.90.20(2). It is not necessary to resolve this disagreement here, given the ample other bases on which to uphold the financial non-responsibility finding.

<sup>145</sup> Southcoast Region Cross-Motion, p. 13, quoting *Alaska Communication Systems*.

<sup>146</sup> See Standard Specifications 102-1.13(13) ("lack of . . . financial resources . . . required to perform the contract").

resources to be considered a responsible bidder for the Kake Road project. This is a fundamentally discretionary determination, and a reasonable one based on the undisputed facts. Because the undisputed evidence is that the procurement officer's non-responsibility finding on this ground has a substantial evidentiary basis, summary adjudication of the non-responsibility finding is appropriate on this ground as well.<sup>148</sup>

#### **IV. Conclusion**

Southcoast Region has met its burden of showing that it is entitled to summary adjudication of its finding that MCC was a non-responsible bidder on the Kake Road project due to MCC's failure to respond to the responsibility-related inquiry concerning rock sourcing on its bid. Southcoast Region has further met its burden of showing that, in the unique procedural posture of this administrative appeal, the Commissioner can grant summary adjudication upholding the procurement officer's discretionary determination that MCC is a non-responsible bidder on the Kake Road project due to the financial and performance issues in Shelter Cove. While the parties disagree about the facts underlying their disputes about Shelter Cove, there is substantial evidence here supporting the procurement officer's determination. For purposes of the discretionary finding of non-responsibility on the Kake Road project, and without prejudice to the parties' ability to adjudicate any Shelter Cove contract disputes in an appropriate forum, the undisputed existence of substantial evidence supporting the non-responsibility determination – even if contrary evidence also exists – is sufficient to justify summary adjudication by the Commissioner in favor of Southcoast Region's discretionary determination.

DATED: December 1, 2017.

By: Signed  
Cheryl Mandala  
Administrative Law Judge

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<sup>147</sup> Ex. B, p. 4.

<sup>148</sup> MCC has also argued that it is entitled to summary adjudication because, to the extent to which the COD contained findings about MCC's lack of "trustworthiness," such findings impermissibly relied on the contracting officer's "emotions" and "personal feelings." MCC Motion, pp. 5, 15. MCC argues that "trustworthiness, by definition, is a feeling or expression of emotion" and is therefore an inappropriately subjective basis on which to determine responsibility. MCC Opposition, p. 12, fn. 6. It is not necessary to resolve this issue because the non-responsibility determination was not based on trustworthiness alone and survives without the trustworthiness determination.

## Adoption

Under the authority of AS 44.64.060(e)(1), I adopt this decision as the final administrative determination in this matter.

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 4<sup>th</sup> day of January, 2018.

By: Signed  
Marc Luiken, Commissioner  
Dep't of Transportation & Public Facilities

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