

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

BLOMFIELD COMPANY, INC.)	
)	
)	OAH No. 17-0437-PRO
v.)	OAH No. 17-0543-PRO
)	OAH No. 17-0672-PRO
DOT&PF)	
_____)	Agency No. ITB # 2517H020

DECISION

I. Introduction

The Department of Transportation and Public Facilities (“DOT&PF”) solicited bids for de-icing chemicals to be used during the 2017-2018 winter season. DOT&PF offered the procurement in lots that were bid on and awarded separately. The unsuccessful bidder, Blomfield Company, Inc. (Blomfield) filed three separate protests for Lots 1, 5, and 8; Lots 9 and 10; and Lots 3, 4, 7, 12, and 13. The procurement officer denied all three protests. And Blomfield appealed.

Blomfield has failed to prove by a preponderance of the evidence any violation that gave other bidders a substantial advantage over Blomfield. The issues raised by Blomfield had no impact on price, quality, quantity, delivery, or any other contract condition. And although Blomfield suggests bad faith, Blomfield has failed to provide any allegation, much less direct evidence, that would support a claim that the procurement officer acted dishonestly or unfairly. Instead, the record shows that the procurement officer had a reasonable basis for her actions. And so, the procurement officer’s decisions on all three protests are affirmed.

II. ITB Background and Procedural Overview

DOT&PF issued an Invitation to Bid (ITB # 2517H020), soliciting bids for ice control chemicals to be used on statewide roadways during the 2017-2018 winter season.¹ The solicitation was divided into 13 lots, differing according to chemicals sought, grading, packaging requirements, and locations for delivering the chemicals.² Although DOT&PF solicited bids through a single ITB, each of the lots was to be awarded as a separate

¹ Ex. A at 6, 20-22.

² Ex. A at 19-33.

contract, and bidders were allowed to choose which of the 13 lots to bid on.³ Similarly, DOT&PF evaluated and awarded each lot separately.⁴ The bidding opened on February 14, 2017.⁵

The unsuccessful bidder, Blomfield filed three separate protests for Lots 1, 5, and 8; Lots 9 and 10; and Lots 3, 4, 7, 12, and 13. The procurement officer denied all three protests. Blomfield appealed each protest separately—Lots 1, 5, and 8 (OAH Case # 17-0437-PRO), Lots 9 and 10 (OAH Case # 17-0543-PRO), and Lots 3, 4, 7, 12, and 13 (OAH Case # 17-0672-PRO)—and those cases were consolidated into this proceeding. The parties agreed to submit the matter for decision on the written record.

III. General Legal Principles

Procurement rules “prevent fraud, collusion, favoritism, and improvidence in the administration of business,” and “insure that the [state] receives the best work or supplies at the most reasonable prices practicable.”⁶ The Alaska Supreme Court requires that competitive procurement be conducted with “fairness, certainty, publicity, and absolute impartiality,” and notes that courts will guard “against the award of a public contract to a bidder who has received an unfair competitive advantage.”⁷ However, “[t]he requirement of public bidding is for the benefit of property holders and taxpayers, and not for the benefit of the bidders; and such requirements should be construed with the primary purpose of best advancing the public interest.”⁸

A procurement protest must establish that “legal or factual errors” occurred in the procurement that amount to deficiencies serious enough to warrant a remedy.⁹ If an alleged violation of procurement procedures is not material, then the procedural deviations may not warrant sustaining the protest.¹⁰ “In general, for a protest to be sustained the protestor must

³ Ex. A at 4.

⁴ Ex. A at 4.

⁵ Ex. A at 19.

⁶ *McBirney & Associates v. State*, 753 P.2d 1132, 1135 -1136 (Alaska 1988) (quoting *Gostovich v. City of West Richland*, 452 P.2d 737, 740 (Wash. 1969)).

⁷ *McBirney*, 753 P.2d at 1136 (quoting prior authority).

⁸ *Id.*

⁹ AS 36.30.590(b)(2); 36.30.585(b).

¹⁰ *Cf., e.g., Quality Sales Foodservice v. Dep’t of Corrections*, OAH No. 06-0400-PRO at 14 (Commissioner of Administration 2006) (minor variance from bid specification was not material because it did not affect outcome); *Chris Berg, Inc. v. State, Dep’t of Transp.*, 680 P.2d 93, 94 (Alaska 1984) (variance is material if it gives one bidder “a substantial advantage over other bidders and thereby restricts or stifles competition”).

demonstrate prejudice from the error. There is no need to show conclusively that but for the error the protestor would have been selected; it is enough that the protestor would have been competitive and has been deprived of ‘a reasonable chance of receiving an award.’”¹¹ Blomfield bears the burden of proving violations—and prejudice—by a preponderance of the evidence.¹²

The procurement code authorizes the commissioner to “audit and monitor the implementation of the [procurement] regulations and the requirements of [the Code] with respect to using agencies.”¹³ “The commissioner or [the Commissioner’s] delegee applies independent judgment as to questions of law, and determines questions of fact *de novo*,” granting some deference to discretionary decisions by the procurement officer within the limits of the law.¹⁴

IV. Blomfield’s Protest over Lots 1, 5, and 8 (OAH Case # 17-0437-PRO)

In its protest, Blomfield claimed that the bid submitted by the low bidder, Brenntag Pacific, Inc. (Brenntag) was non-responsive because: (1) the supplier, Morton Salt’s, totes are not stenciled; (2) Morton’s bladders are stretch wrapped to keep the product neatly palletized; and (3) Morton’s liners are not sewn into the bags.¹⁵ In this appeal, Blomfield abandoned two of the three original claims but added a new basis: Brenntag failed to submit the contact name, phone number, and email address of their bladder supplier. The remaining claims are discussed below.

A. Facts

Lots 1, 5, and 8 sought sodium chloride—man-made or from natural deposits—packaged in bladders for delivery statewide.¹⁶ The ITB requires bladders with 3-6 mil polyethylene liners that are “adequately secured to provide a waterproof closure.”¹⁷ “The liner must be secured to the body of the bladder so that liners DO NOT separate from the body of the bag.”¹⁸ For Lots 1 and 8, the bidder could select a bladder size between 2,000

¹¹ *In re Aetna Life Insurance*, OAH No. 06-0230-PRO at 29 (May 25, 2006) (quoting *DBA Systems, Inc.*, B-224306, 86-2 Comptroller General Decisions, 722 (1986)).

¹² 2 AAC 64.290(e).

¹³ AS 36.30.040(a).

¹⁴ *Aetna Life Insurance*, at 28; *see also, Lakloey, Inc. v. University of Alaska*, 141 P.3d 317, 321 (Alaska 2006); *Olson v. State of Alaska*, 799 P.2d 289, 293 (Alaska 1990) (discretionary acts of state officials reviewed for abuse of discretion).

¹⁵ Ex. D at 1, 3.

¹⁶ Ex. A at 20, 26, 28, 30.

¹⁷ Ex. A at 23.

¹⁸ Ex. A at 23 (capitalization in original).

to 2,700 pounds.¹⁹ Lot 5 restricts the bladder size to 2,000 pounds.²⁰ Amendment 3 to the ITB required the bidders to submit the bag manufacturer or brand, model number, and a bladder sample with their bids.²¹ Amendment 9 amended the ITB to allow the bidder five additional days after the bid opening to submit the bladder sample, but required bidders to “identify the manufacturer, brand, and model number of the proposed bladder and a contact name, phone number, and email address for the manufacturer.”²²

Blomfield and Brenntag were the only two bidders on Lots 1, 5, and 8.²³ For Lot 1, Blomfield bid \$137,620 and Brenntag bid \$68,736.²⁴ For Lot 5, Blomfield bid \$40,000 and Brenntag bid \$9,276.²⁵ And for Lot 8, Blomfield bid \$335,160 and Brenntag bid \$180,692.²⁶ Brenntag provided a letter from its supplier, Morton Salt, with its bid.²⁷ According to Morton Salt, its bladder liners are not sewn into the bags, but they are tied so the liner stays in place when dispensing the salt.²⁸ Brenntag identified the bladder manufacturer as the Jumbo Bag Corporation, and reported that the model number was Spec 8213.²⁹ Brenntag left the spaces for the bladder manufacturer’s contact name, phone number, and email blank.³⁰

DOT&PF awarded the contract to Brenntag—the lowest bidder on each of the three lots.³¹ On April 3, 2017, Blomfield protested the Notice of Intent to Award Lots 1, 5, and 8 to Brenntag, arguing that Brenntag’s bid was non-responsive because it had failed to comply with packaging specifications.³² Blomfield’s protest was denied on April 17, 2017.³³ Blomfield appeals that decision.³⁴ In this appeal, Blomfield adds a new basis for its protest—

¹⁹ Ex. A at 20, 26, 30.
²⁰ Ex. A at 28.
²¹ Ex. A at 40.
²² Ex. A at 44.
²³ Ex. A at 4.
²⁴ Ex. A at 4.
²⁵ Ex. A at 4.
²⁶ Ex. A at 4.
²⁷ Ex. A at 53.
²⁸ Ex. A at 53.
²⁹ Ex. A at 46.
³⁰ Ex. A at 46.
³¹ Ex. A at 5.
³² Ex. B at 1.
³³ Ex. B at 2.
³⁴ Ex. C.

that Brenntag failed to submit the contact name, phone number, and email address of their bladder supplier.³⁵

B. Findings

1. The ITB does not require bladder liners to be sewn into the bags.

Relying on a letter from Brenntag's supplier, Morton Salt, Blomfield insists that strict compliance with the ITB requires the liners to be sewn into the bladders.³⁶ From there, Blomfield argues that DOT&PF relieved Brenntag from strict compliance with the terms of the ITB because the Morton bladder liners are only tied to the bladders, rather than sewn.³⁷ Blomfield claims Brenntag received an unfair competitive advantage.³⁸

But the ITB does not require that bladder liners be sewn into the bladders.³⁹ Instead, the ITB simply states, "[t]he liner must be secured to the body of the bladder so that liners DO NOT separate from the body of the bag."⁴⁰ The evidence shows that the liner bags are tied so that the liners stay in place.⁴¹ Other than an unsupported, conclusory statement that "[i]ndustry standards are that the bags are sewn, not tied," Blomfield offers no support for a finding that tying the liners to the outer bag is inadequate to keep the liners in place.⁴² On the contrary, the evidence in the record supports a finding that tying the liner to the outer bag "so the liner stays in place when dispensing salt" complies with the ITB's requirement that the liners be "secured to the body of the bladder" so that they do not separate from the body.⁴³ In short, Brenntag's bladders meet the ITB's packaging requirements.

Accordingly, Blomfield has failed to prove a violation, and the procurement officer's decision is affirmed on this ground.

2. Blomfield's newly raised basis of protest is untimely.

Blomfield claims that Brenntag's bid was non-responsive because it failed to identify the contact name, email, or phone number for the bladder manufacturer.⁴⁴ DOT&PF argues that this

³⁵ Opening Brief at 9.

³⁶ Opening Brief at 9; Reply Brief at 5.

³⁷ Opening Brief at 9.

³⁸ Opening Brief at 9.

³⁹ Ex. A at 23.

⁴⁰ Ex. A at 23 (capitalization in original).

⁴¹ Ex. A at 53.

⁴² Opening Brief at 9; Reply Brief at 5.

⁴³ *Compare* A at 23 with A at 53.

⁴⁴ Opening Brief at 9; Reply Brief at 5.

is a new, untimely issue.⁴⁵ Blomfield argues that both the packaging deficiencies and the failure to provide manufacturer contact information address the responsiveness of Brenntag's bid, and thus, the new argument is merely additional support for the original protest.⁴⁶

Generally, the timeliness of a new basis of protest raised after the filing of a timely protest depends on the relationship between the later-raised basis and the initial protest.⁴⁷ When a newly raised basis presents new and independent grounds for protest, it will be considered untimely.⁴⁸ Whereas, when the new basis merely provides additional support for an earlier, timely protest, the ALJ will consider the later-raised arguments.⁴⁹

Here, Blomfield's original protest was based entirely on the packaging specifications contained in the ITB and the alleged deficiencies identified in the February 9, 2017 letter from Brenntag's supplier, Morton Salt: (1) that the totes/super sacks are stretch wrapped to keep them neatly palletized; (2) that the totes would not be stenciled with product name, bag count, weight, and delivery destination; and (3) that the liners are tied, not sewn, into the outer bag.⁵⁰ Whereas, Blomfield's new argument, regarding contact information for the bladder manufacturer, is based on Amendment 9—a different provision of the ITB. Although Blomfield characterizes all the protest grounds as challenges to Brenntag's responsiveness, new arguments based on the Amendment 9 requirement for manufacturer contact information, present new and independent factual grounds for Blomfield's protest after the statutory deadline. Accordingly, this protest basis is untimely.

3. In addition to being untimely, failure to provide contact information for the bladder manufacturer was a minor informality.

Nevertheless, the commissioner's statutory responsibility for statewide procurement oversight, in the context of procurement authority delegated to purchasing agencies, gives the commissioner discretion to decide issues raised on appeal that were not timely asserted in a protest, but were considered by the procurement officer.⁵¹ In this case, the procurement officer considered Blomfield's argument in the protest report.⁵²

⁴⁵ Appellee's Brief at 3.

⁴⁶ Reply Brief at 7.

⁴⁷ *Computer Task Group Inc. v. Division of General Services*, OAH No. 07-0147 at 4 (July 2, 2007).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Ex. A at 2, 53; Ex. B.

⁵¹ *Computer Task Group Inc.*, OAH No. 07-0147 at 5.

⁵² Ex. D at 4.

Under Amendment 9 of the ITB, Brenntag was required to “identify the manufacturer, brand and model number of the proposed bladder and a contact name, phone number and email address for the manufacturer.”⁵³ Brenntag identified the bladder manufacturer but failed to provide the required contact information.⁵⁴ Blomfield argues that the bladder manufacturer contact information was material and non-waivable, and Brenntag’s failure to provide it made Brenntag’s bid non-responsive.⁵⁵ DOT&PF argues that the failure to provide manufacturer contact information does not warrant overturning the procurement officer’s decision.⁵⁶

A public agency’s determination of responsiveness of a bid is within the agency’s discretion when there was a reasonable basis for the agency’s decision.⁵⁷ A bid may be rejected only if there is a material variance from the bid specifications.⁵⁸ A variance is material if it gives the bidder a substantial advantage over other bidders and restricts or stifles competition.⁵⁹ A minor technical defect or irregularity which does not and could not affect the substance of a low bid in any way does not justify rejecting that bid on the ground of unresponsiveness.⁶⁰ And under 2 AAC 12.170(a), bidders may correct inadvertent errors discovered in a bid after bid opening if they are “minor informalities.” 2 AAC 12.990(8) defines “minor informalities” as: “matters of form rather than substance which are evident from the bid document, or are insignificant matters that have a negligible effect on price, quantity, quality, delivery, or contractual conditions and can be waived or corrected without prejudice to other bidders[.]”

Here, there is no evidence that Brenntag’s failure to provide the bladder manufacturer’s contact information gave Brenntag any advantage over Blomfield. Nor is there any evidence that the omission had any impact on price, quality, quantity, delivery, or any other contract condition. Both bidders submitted their bladder samples at the time of bid opening, the contact information was not necessary to evaluate the bids, and the contact information was easily obtainable through a quick internet search.⁶¹ Because Brenntag’s failure to provide bladder manufacturer contact information did not give Brenntag any advantage over Blomfield, the omission was not material.

⁵³ Ex. A at 44.

⁵⁴ Ex. A at 46.

⁵⁵ Opening Brief at 9-10.

⁵⁶ Appellee’s Brief at 10.

⁵⁷ *Chris Berg, Inc. v. State, Dept. of Transportation & Public Facilities*, 680 P.2d 93, 94 (Alaska 1984).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Ex. D at 4.

Furthermore, Blomfield has failed to make any showing that it was prejudiced because of the alleged error. And so, the procurement officer's decision on this ground is affirmed.

V. Blomfield's Protest over Lots 9 and 10 (OAH Case # 17-0543-PRO)

Blomfield protests DOT&PF's decision to reject its bids as the sole bidder for Lots 9 and 10, claiming that DOT&PF erred: (1) by applying 2 AAC 12.860 and 2 AAC 12.190 to its bid; (2) by concluding that Blomfield's proposed price was more expensive than in prior years; and (3) by treating Blomfield differently than the other bidders.

A. Facts

Lots 9 and 10 sought delivery of salt to the Kodiak Station.⁶² Lot 9 sought 100 tons of Sodium Chloride, Type 1, Grade 1 (natural), per the Specification 1 bladder requirements.⁶³ Lot 10 sought 100 tons of Sodium Chloride, Type 1, Grade 2 (natural), per the Specification 3 requirements.⁶⁴ Specification 3 requires salt "obtained from natural deposits ONLY" and "packaged for delivery in bladder."⁶⁵

Blomfield was the only bidder on Lots 9 and 10.⁶⁶ Blomfield bid \$200,000 (\$2,000 per ton) on Lot 9 and \$180,000 (\$1,800 per ton) on Lot 10.⁶⁷ On February 23, 2017, DOT&PF issued a Notice of Intent to Award a Contract, notifying Blomfield that the bids exceeded its budget.⁶⁸ DOT&PF thus rejected Blomfield's bids on Lots 9 and 10 and issued a new Invitation to Bid (ITB # 2517S071).⁶⁹ In order to attract more bids under the new ITB, one of the lots (formerly Lot 9) was no longer required to be from a natural source.⁷⁰ On March 22, 2017, the new contract was awarded to Brenntag, with the lowest responsive bid of \$50,000 (\$500 per ton).⁷¹

On March 6, 2017, Blomfield protested the April 3, 2017 Notice of Intent to Award a Contract for Lots 9 and 10, arguing the procurement officer relied on inapplicable regulations and the rejection was "little more than a decision to seek lower prices by simply rebidding lots 9

⁶² Ex. E at 33, 34.

⁶³ Ex. E at 33.

⁶⁴ Ex. E at 34.

⁶⁵ Ex. E at 23 (underlining, bold, and capitalization in original).

⁶⁶ Ex. E at 150.

⁶⁷ Ex. E at 146, 148.

⁶⁸ Ex. E at 146, 148.

⁶⁹ Ex. E at 151.

⁷⁰ Compare Ex. E at 33 with Ex. E at 168. See also Ex. H at 2.

⁷¹ Ex. H at 32; Ex. I.

and 10, which is damaging to the integrity of the competitive bid process.”⁷² DOT&PF denied the protest on March 21, 2017.⁷³ The procurement officer reasoned that the comparable price in 2016 was \$700 per ton and thus Blomfield’s bid was excessive.⁷⁴

B. Findings

1. DOT&PF had valid grounds for rejecting Blomfield’s bids on Lots 9 and 10.

Blomfield’s protest raises the question of whether DOT&PF’s decision to solicit multiple bids in one ITB disqualifies it from protections provided by 2 AAC 12.190 or 2 AAC 12.860. Blomfield claims that the ITB was a single procurement and argues that if DOT&PF wishes to reject Blomfield’s bids on Lots 9 and 10, it must follow 2 AAC 12.870. In Blomfield’s view, 2 AAC 12.870 was the procurement officer’s only authority for rejecting Blomfield’s bids on Lots 9 and 10. DOT&PF claims that because the ITB sought bids on 13 separate lots, it contemplated an award of up to 13 separate contracts. DOT&PF argues that both 2 AAC 12.190 and 2 AAC 12.860 authorized rejection of Blomfield’s bids on Lots 9 and 10.

Although for administrative convenience DOT&PF used one ITB for its statewide de-icing chemicals, that ITB solicited bids on 13 different lots. Bidders were not required to bid on the entire ITB—they were not obliged to bid on every lot. Instead, DOT&PF allowed bidders, including Blomfield, to pick and choose which lots they wanted to bid on. Each lot was awarded separately, potentially resulting in 13 separate contracts. Under these facts, it would be unreasonable—indeed illogical—to treat the ITB as one procurement or bid.

The procurement officer relied on 2 AAC 12.860 when she rejected Blomfield’s bid and decided to resolicit bids on Lots 9 and 10. 2 AAC 12.860 protects the public from wasteful state spending. Under 2 AAC 12.860(4), a procurement officer may reject all bids when the prices exceed available budget and it would not be appropriate to adjust quantities to accommodate available money; 2 AAC 12.860(5) allows a procurement officer to reject all bids when all otherwise acceptable bids received are at unacceptable prices; and 2 AAC 12.860(7) allows the procurement officer to reject all bids when the award is not in the best interests of the state. Here, Blomfield’s bids were the only bids for Lots 9 and 10. In other words, Blomfield’s bids

⁷² Ex. E at 1.

⁷³ Ex. F.

⁷⁴ Ex. F at 2.

were *all* of the bids for Lots 9 and 10. Accordingly, 2 AAC 12.860 is applicable. And the procurement officer's interpretation of 2 AAC 12.860 was a reasonable one.⁷⁵

DOT&PF argues that because Blomfield was the only bidder on Lots 9 and 10, 2 AAC 12.190 also applies. Under 2 AAC 12.190, a procurement officer may award the contract to a sole responsive bidder if the procurement officer finds the price fair and reasonable and other prospective bidders had reasonable opportunity to respond, or there is not adequate time to resolicit bids. But the procurement officer is not required to award a contract to a sole responsive bidder. Indeed, 2 AAC 12.190 allows the procurement officer to resolicit bids or cancel the procurement. The purpose of 2 AAC 12.190 is to give the State the option of accepting bids from sole responsive bidders when the bid is fair and reasonable, while still protecting the State from being bound to a contract when there is no competition and it is feasible to resolicit bids. Blomfield argues that 2 AAC 12.190 does not apply because there were multiple bidders on other lots of the ITB. But as discussed above, each lot amounted to a separate procurement or bid. Blomfield was the sole bidder in response to the ITB for Lots 9 and 10. Accordingly, 2 AAC 12.190 also applies, providing a separate, valid basis for rejecting Blomfield's bids on Lots 9 and 10.

2. There is no evidence that the procurement officer failed to consider Blomfield's bids fairly and honestly.

Blomfield alleges that the procurement officer failed to consider its bids honestly and fairly.⁷⁶ The only support Blomfield provides for this claim is speculation that its bids for Kodiak were summarily rejected because Blomfield filed claims arising from two 2016 procurement contracts for de-icing chemicals and grader blades for the Kodiak station.⁷⁷

In the absence of a showing of actual bias or prejudice, procurement officials are presumed to act in good faith and to exercise honest and impartial judgment.⁷⁸ To overcome the presumption, a protestor must provide direct evidence of actual bias or prejudice, rather than speculation and inference.⁷⁹

⁷⁵ See *Davis Wright Tremaine LLP v. State, Dept. of Administration*, 324 P.3d 293, 301-02 (Alaska 2014).

⁷⁶ Opening Brief at 16.

⁷⁷ Opening Brief at 16.

⁷⁸ *In Re Kyllonen*, OAH No. 08-0399-PRO at 6 (Commissioner of Administration 2009); *North Pacific Erectors, Inc. v. Division of General Services*, OAH No. 11-0061-PRO at 14 (Commissioner of Transportation and Public Facilities 2011).

⁷⁹ *Kyllonen*, OAH No. 08-0399-PRO at 6; *North Pacific Erectors, Inc.*, OAH No. 11-0061-PRO at 14.

But the preponderance of the evidence here shows that the procurement officer conducted a reasonable investigation and concluded that Blomfield's bids were unfairly high and exceeded DOT&PF's budget.⁸⁰ She compared Blomfield's prices to the price paid for the same chemicals at the same location in 2016, and determined that Blomfield's prices were more than two and one-half times higher than the price paid the year before.⁸¹ In particular, under Blomfield's 2016 contract, DOT&PF paid \$700 per ton of salt delivered to Kodiak.⁸² Whereas, Blomfield's 2017 bid was \$1,800 per ton for Lot 9 and \$2,000 per ton for Lot 10—a one-year price increase of 185% and 157%, respectively.⁸³ The total increase in cost to DOT&PF would have been \$240,000 over what DOT&PF would have paid at the 2016 price. The procurement officer consulted DOT&PF Regional staff, who informed her that Blomfield's bid for Lots 9 and 10 exceeded DOT&PF's budget.⁸⁴ After resoliciting bids for Lots 9 and 10, the lowest responsive bid was \$500 per ton—\$280,000 less than Blomfield's bid—underscoring how high Blomfield's bid was.⁸⁵ Although Blomfield takes issue with the procurement officer's conclusions, Blomfield has not offered any evidence to refute the factual basis for those conclusions.

In short, Blomfield has failed to provide any allegation, much less direct evidence, that would support a claim that the procurement officer acted dishonestly or unfairly. Indeed, the procurement officer provided a reasonable explanation and valid grounds for rejecting Blomfield's bid for Lots 9 and 10. And so, Blomfield's suggestion of dishonesty or unfairness in the procurement officer's decision are insufficient to sustain the protest.

VI. Blomfield's Protest over Lots 3, 4, 7, 12, and 13 (OAH Case # 17-0672-PRO)

Blomfield protests the contract award of Lots 3, 4, 7, 12, and 13 to Alaska Garden and Pet because it failed to submit certified test results showing its product would meet the specifications of the ITB.⁸⁶ Blomfield argues that Alaska Garden and Pet was given a competitive advantage because it could have decided never to turn in certified test results.

⁸⁰ Ex. H at 4.

⁸¹ Ex. H at 4.

⁸² Ex. F at 2.

⁸³ Ex. E at 146 and 148.

⁸⁴ Ex. H at 2.

⁸⁵ Ex. H at 32.

⁸⁶ Ex. J at 1-3.

A. Facts

Lots 3, 4, 7, 12, and 13 sought delivery of a runway de-icer, prilled urea, to various locations within Alaska.⁸⁷ Lots 3 and 7 also provided for as-needed deliveries of urea to three of the locations.⁸⁸ DOT&PF required the deliveries of Lots 3, 7, and 12 to be made in bulk, while Lots 4 and 13 required delivery in bladders.⁸⁹ The ITB required each bidder to confirm in writing that the offered product would meet the ITB’s specifications, including all State specifications and FAA requirements.⁹⁰ Specifically, the ITB required each bidder to submit Material Safety Data Sheets (MSDS) and certified test results from an independent laboratory with their bids.⁹¹ DOT&PF warned each bidder that failure to submit the written confirmation of compliance “may cause the State to determine the bid non-responsive and reject the bid.”⁹²

Blomfield and Alaska Garden and Pet bid on all five of the lots (i.e. Lots 3, 4, 7, 12, and 13), while Brenntag bid on Lot 4 only.⁹³ For Lot 3, Blomfield bid \$186,000, and Alaska Garden and Pet bid \$81,980.⁹⁴ For Lot 4, Blomfield bid \$204,000, Brenntag bid \$161,640, and Alaska Garden and Pet bid \$157,200.⁹⁵ For Lot 7, Blomfield bid \$203,500, and Alaska Garden and Pet bid \$158,385.⁹⁶ For Lot 12, Blomfield bid \$117,250 and Alaska Garden and Pet bid \$59,000.⁹⁷ And for Lot 13, Blomfield bid \$644,910, and Alaska Garden and Pet bid \$360,000.⁹⁸

Blomfield submitted a “Compliance Letter” and two “Certificates of Analysis” with test results from Blomfield’s supplier, Wantong Import and Export Company (Wantong).⁹⁹ Blomfield also submitted a Statement from Shandong Salt and Salt Chemical Products Quality Supervision Inspection Station (Shandong), stating, “All of Wantong’s test results were performed by Shandong Salt and Salt Chemical Products Quality Supervision Station, an independent laboratory, on behalf of Wantong for Sodium Chloride, Urea and Calcium Chloride

⁸⁷ Ex. J at 29, 31, 34.
⁸⁸ Ex. J at 29, 31, 34.
⁸⁹ Ex. J at 29, 31, 34.
⁹⁰ Ex. J at 17, 24.
⁹¹ Ex. J at 17.
⁹² Ex. J at 17 (underlining and bold in original).
⁹³ Ex. J at 5.
⁹⁴ Ex. J at 5.
⁹⁵ Ex. J at 5.
⁹⁶ Ex. J at 5.
⁹⁷ Ex. J at 5.
⁹⁸ Ex. J at 6.
⁹⁹ Ex. M at 17, 19-20.

for the Alaska Contract.”¹⁰⁰ Reasoning that there was no way to verify from the documents provided by Blomfield that the test results reported by Wantong were actually derived from tests performed by an independent lab, the procurement officer determined that Blomfield’s submittals did not meet the requirements of the ITB.¹⁰¹ The procurement officer concluded that none of the bidders provided certified test results from an independent laboratory with their bids.¹⁰² Rather than cancel the procurement and resolicit bids, the procurement officer delayed the requirement for certified test results until after the bid opening and before the contract award.¹⁰³ DOT&PF notified the low bidder, Alaska Garden and Pet, that independent laboratory test results must be submitted to the procurement officer before the award.¹⁰⁴ On April 5, 2017, Alaska Garden and Pet submitted certified lab results, which were verified by the DOT&PF Lab engineer.¹⁰⁵

DOT&PF awarded the contract to Alaska Garden and Pet—the lowest bidder on each of the five lots.¹⁰⁶ Blomfield protested the award, claiming Alaska Garden and Pet failed to submit certified test results showing its product would meet the specifications of the ITB.¹⁰⁷ DOT&PF denied the protest on May 2, 2017.¹⁰⁸

B. Findings

Blomfield argues that Alaska Garden and Pet was given a competitive advantage because it could have decided never to turn in certified test results. Blomfield’s theory is that after being announced the lowest bidder, Alaska Garden and Pet could have decided whether or not it was going to perform and, if it decided it did not want to perform, it could simply fail to provide the certified test results.¹⁰⁹ DOT&PF responds that none of the other bidders, including Blomfield, submitted certified test results from an independent laboratory with their bids.¹¹⁰ And rather than

¹⁰⁰ Ex. M at 18.

¹⁰¹ Ex. M at 4.

¹⁰² Ex. M at 2.

¹⁰³ Ex. M at 2.

¹⁰⁴ Ex. M at 2.

¹⁰⁵ Ex. M at 2.

¹⁰⁶ Ex. J at 6-7.

¹⁰⁷ Ex. J at 1-3.

¹⁰⁸ Ex. K.

¹⁰⁹ Reply Brief at 7.

¹¹⁰ Appellee’s Brief at 23.

cancelling the procurement and resoliciting bids, the procurement officer delayed the requirement for certified test results until after the bid opening and before the contract award.¹¹¹

There is no dispute that Alaska Garden and Pet failed to submit certified test results with its bid and that the procurement officer allowed it to submit the test results after the bid was opened. The question is whether the procurement officer's decision to delay the requirement for certified test results until after the bid opening and before the contract award gave Alaska Garden and Pet a substantial advantage over Blomfield, thus warranting the overturn of the procurement officer's decision.¹¹²

As discussed, a public agency's determination of responsiveness of a bid is within the agency's discretion when there was a reasonable basis for the agency's decision.¹¹³ A bid may be rejected only if there is a material variance from the bid specifications.¹¹⁴ And a variance is material if it gives the bidder a substantial advantage over other bidders and restricts or stifles competition.¹¹⁵ Blomfield must prove by a preponderance of the evidence that but for the alleged error here, Blomfield "would have been competitive and has been deprived of 'a reasonable chance of receiving an award.'"¹¹⁶

Here, there is no evidence that the procurement officer's decision to delay the requirement for certified test results until after the bid opening and before the contract award gave Alaska Garden and Pet any advantage over Blomfield. Nor is there any evidence that the delay in requiring the results had any impact on price, quality, quantity, delivery, or any other contract condition—the timing of requiring the independent test results is not material. The ITB did not require the procurement officer to reject bids that did not have test results with them; instead, the ITB warned bidders that failing to submit independent test results with their bids could result in rejection.¹¹⁷ None of the bidders complied with the ITB's independent lab test results requirement. Although Blomfield submitted test results from its manufacturer, the procurement officer's conclusion that those results were not compliant with the ITB was

¹¹¹ Ex. M at 2.

¹¹² *Aetna Life Insurance*, at 29 (quoting *DBA Systems, Inc.*, B-224306, 86-2 Comptroller General Decisions, 722 (1986)).

¹¹³ *Chris Berg, Inc.*, 680 P.2d at 94.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Aetna Life Insurance*, at 29 (quoting *DBA Systems, Inc.*, B-224306, 86-2 Comptroller General Decisions, 722 (1986)).

¹¹⁷ *Id.*

reasonable: there was no way to verify from the documents provided by Blomfield that the test results reported by the manufacturer were actually derived from tests performed by an independent lab.¹¹⁸ And rather than reject all of the bids and resolicit bids after the bid prices were public, it was completely reasonable for the procurement officer to relax the timing for submitting the independent test results. The procurement officer did not, however, waive the requirement. Had Blomfield been the low bidder, the procurement officer would have required it to submit test results from an independent lab before the contract award. Because none of the bidders complied with the requirement, the procurement officer's decision to allow the low bidder to submit independent test results after the bid opening but before the contract award did not give Alaska Garden and Pet any advantage over the other bidders. Moreover, Blomfield has failed to make any showing that it was prejudiced. And so, the procurement officer's decision on this ground is affirmed.

VII. Conclusion

DOT&PF solicited bids through a single ITB for 13 lots and potentially 13 separate contracts. The issues raised by Blomfield had no impact on price, quality, quantity, delivery, or any other contract condition. There is no evidence of any violation that gave other bidders a substantial advantage over Blomfield. And although Blomfield suggests bad faith, Blomfield has failed to provide any allegation, much less direct evidence, that would support a claim that the procurement officer acted dishonestly or unfairly. Instead, the record shows that the procurement officer had a reasonable basis for her actions. She did not abuse her discretion. And so, the procurement officer's decisions on all three protests are affirmed.

Dated: September 22, 2017

Signed

Jessica L. Srader
Administrative Law Judge

¹¹⁸ Ex. M at 4, 17-20.

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 1st day of November, 2017.

By: Signed
Signature
Leslie D. Ridle
Name
Commissioner of Administration
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]