

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

In the Matter of)	
)	
EAGLE EYE FOOD SERVICES)	OAH No. 19-0156-PRO
)	Agency No. RFP 2019-1200-4146

DECISION

I. Introduction

Eagle Eye Food Services was one of two offerors who submitted proposals seeking a contract from the Department of Public Safety to provide food service for the Department’s training academy. After evaluating the two proposals, the Department awarded the contract to the other offeror. Eagle Eye protested the procurement. The Department denied the protest. Eagle Eye appealed the denial, arguing that the omission of two required items from the prevailing proposal made that proposal nonresponsive. The Department responded that the two items that were omitted were not material, and, therefore, its determination that the proposal was responsive should be affirmed.

At the evidentiary hearing on this case, Eagle Eye had the burden to come forward with facts proving that the two omitted items were material. Although the omitted matters could have shed some light on issues related to staffing and personnel, no evidence was received to show that omission of the items gave the prevailing party a competitive advantage. Instead, the evidence showed that the items were not significant in the evaluation. Accordingly, the denial of Eagle Eye’s protest is affirmed.

II. Facts

The Department of Public Safety operates the Public Safety Training Academy in Sitka, Alaska. The Academy provides courses that can run for 16-18 weeks.¹ The Academy provides dormitories and meals for the law enforcement officers who attend a training. The meals are prepared onsite in the Academy’s kitchen. The Department contracts with a qualified food-service company to manage and staff the Academy’s food service facility, and provide the

¹ Goeden testimony. Lt. Chad Goeden is the Commander of the Academy.

necessary three meals per day, seven days per week. The meals must conform to the schedule of the Academy, which is very tight because of the rigorous training.²

The existing food service contract was going to expire in early 2019.³ In late 2018, the Department distributed a Request for Proposals (RFP) that asked potential contractors to submit proposals for a new contract.⁴ The term of the contract would be for one year, with the option of renewal.⁵

Section 4 of the RFP told contractors what to include in their proposals. It set out seven different subsections. Subsection 1 told contractors who wished to submit a proposal that they “must follow the format set out in this RFP and provide all information requested.”⁶ The next five subsections described the information that was required and how the content of the proposal was to be organized.⁷ Subsection 4.07 required submission of a cost proposal.

Section 5 of the RFP set out the criteria that the Department would use to evaluate proposals. It explained that a proposal could score up to 100 points. It laid out the percentage of the 100 points that was available for each of the six evaluation criteria as follows:

- 5.01. Understanding of the project—5 percent
- 5.02. Methodology used for the project—5 percent.
- 5.03. Management plan for the project—10 percent.
- 5.04. Experience and qualifications—10 percent.
- 5.05. Contract cost—60 percent.
- 5.06. Alaska Offeror preference—10 percent.⁸

For purposes of this protest, the two most important parts of the RFP are subsection 4.06 and section 7. Subsection 4.06 required that a proposal must include resumes of personnel and an itemization of the total cost and the number of estimated hours for each of the individuals named.⁹ The relevant part of Section 7 sets out when the agency may determine that an omission or error in the proposal can be waived:

² *Id.*

³ R. 32.

⁴ 26-77.

⁵ R. 29.

⁶ R. 48.

⁷ R. 48.

⁸ R. 50-51.

⁹ Subsection 4.06 states in full as follows:

Minor informalities that:

- do not affect responsiveness;
- are merely a matter of form or format;
- do not change the relative standing or otherwise prejudice other offers;
- do not change the meaning or scope of the RFP;
- are trivial, negligible, or immaterial in nature;
- do not reflect a material change in the work; or
- do not constitute a substantial reservation against a requirement or provision;

may be waived by the procurement officer.¹⁰

The Department received two proposals. One from Trinity Business Services, LLC, and one from Eagle Eye Food Service, LLC. The procurement officer in charge of the procurement, Jacqueline Lea, determined that both proposals were responsive to the RFP.¹¹ As will be explained later in great detail, this means that she found each had provided all of the required items, and that any deficiencies in a proposal were minor. She also found that each firm was responsible, meaning that it was capable of providing the service. Making these initial findings allowed Ms. Lea to proceed to the next step in the process. She referred the proposals to a proposal evaluation committee to score each proposal on the criteria described in subsections 5.01-5.04. These criteria go to the technical aspects of the proposal and require judgment to evaluate. The criteria in subsections 5.05-5.06 (cost and qualification for the Alaska offeror

SEC. 4.06 EXPERIENCE AND QUALIFICATIONS

Offerors must provide an organizational chart specific to the personnel assigned to accomplish the work called for in this RFP; illustrate the lines of authority; designate the individual responsible and accountable for the completion of each component and deliverable of the RFP.

Offerors must provide a narrative description of the organization of the project team and a personnel roster that identifies each person who will actually work on the contract and provide the following information about each person listed:

- title,
- resume,
- location(s) where work will be performed,
- itemize the total cost and the number of estimated hours for each individual named above.

Offerors must provide reference names and phone numbers for similar projects the offeror's firm has completed.

¹⁰ R. 59-60.

¹¹ Lea testimony.

preference), on the other hand, are purely mechanical. Ms. Lea evaluated these criteria. The results of this evaluation were not shared with the committee until after it completed its evaluation.¹²

When the committee's composite score for the 30 points available under subsections 5.01-5.04 was first combined with Ms. Lea's calculation of the 70 points available under subsections 5.05-5.06, Eagle Eye had the highest score.¹³ In awarding points for the Alaska Offeror preference, Ms. Lea had accepted Eagle Eye's representation that it qualified for the Alaska Offeror preference. Trinity then alerted Ms. Lea, and Ms. Lea confirmed, that Eagle Eye was too new a company to qualify for the preference.¹⁴ Ms. Lea therefore recalculated the scoring, and the new computation showed that Trinity had submitted the highest-scoring proposal.¹⁵ Accordingly, the Department issued a notice of intent to award the contract to Trinity, and did, in fact, award the contract to Trinity.

Eagle Eye filed a protest, alleging several deficiencies in Trinity's proposal.¹⁶ After the protest was denied by the procurement officer, Eagle Eye filed an appeal with the Commissioner of Administration.¹⁷ The appeal alleged that Trinity's proposal was nonresponsive because it omitted material that was required under Subsection 4.06 of the RFP. It also alleged that the Department erred by finding that Eagle Eye was not eligible for the Alaska Offeror preference.¹⁸ The appeal was referred to the Office of Administrative Hearings for adjudication.

The Department filed a motion for summary adjudication, requesting that the appeal be dismissed without a hearing. It argued that the decisionmaker should defer to the procurement officer on the issue of responsiveness, and that the issue of the offeror preference was not timely because it had not been raised in the initial protest. Summary adjudication was granted on the issue of the Alaska Offeror's preference because AS 36.30.560 requires that an issue on appeal be included in the initial protest, and the undisputed evidence showed that Eagle Eye had not done that.¹⁹ Summary adjudication was denied on the issue of responsiveness, however, because

¹² Lea testimony.

¹³ R. 104.

¹⁴ Lea testimony.

¹⁵ R. 7. The final score showed Eagle Eye with 248.5 points and Trinity with 285.8 points. *Id.*

¹⁶ R. 1357-58

¹⁷ R. 1362-64.

¹⁸ *Id.*

¹⁹ Ruling on Motion for Summary Adjudication at 3 (March 15, 2019) ().

deference to a procurement officer is not automatic.²⁰ Therefore, more of a factual context for analysis would be necessary than was provided by the Department in its motion before the decisionmaker could conclude that the procurement officer's decision should be affirmed as a matter of law.²¹

A hearing was held before Administrative Law Judge Carmen Clark on June 24, 2019. On October 3, 2019, the case was transferred to Administrative Law Judge Stephen Slotnick. In drafting a recommended decision, ALJ Slotnick listened to the recording of the hearing, and thoroughly reviewed the record.

III. Discussion

A. How do we determine whether a proposal is responsive to the RFP?

After a proposal is received, the procurement officer must determine whether a proposal is “responsible” and “responsive” before the proposal are evaluated.²² In general, an offeror is responsible if the offeror has the financial capacity, and the competence, to complete the job.²³ A responsive offer is one “that conforms in all material respects to the solicitation.”²⁴ Here, the undisputed facts reveal that Trinity's proposal did not include all of the information required under section 4.06. Specifically, the proposal did not include resumes or the itemized total cost and the number of estimated hours for each individual named in the proposal. The question is whether those omissions were material. If yes, then the proposal was not responsive to the RFP.

The question of how to determine whether an omission is material was thoroughly discussed in a decision issued by the Commissioner of Administration in 2006 called “*Quality Sales Foodservice v. Department of Corrections*.”²⁵ *Quality Sales* advised that a variance would be considered material if “it gives the bidder a substantial advantage over other bidders, and

²⁰ *Id.* at 2-3.

²¹ *Id.*

²² AS 36.30.170.

²³ See, e.g. *Black's Law Dictionary* 1312 (6th ed. 1990) (defining “responsible bidder” to mean “[o]ne who is capable financially and competent to complete the work”); see also e.g., *In re Waste Management of Alaska, Inc.* (Dep't of Admin. Case No. 01.08 2002) (“DOT's concerns regarding WMAI's capacity or ability to perform on the terms stated in its bid raise questions of responsibility”).

²⁴ 2 AAC 12.990(12). Although the definition in regulation defines the term “responsive bidder,” the term has the same meaning when applied to a proposal.

²⁵ OAH No. 06-0400-PRO at 12-16 (Dep't of Admin. 2006), available at <https://aws.state.ak.us/OAH/Decision/Display?rec=4732>. The list of considerations in Section 7 of the RFP provides a useful checklist of the issues to be considered in determining materiality.

thereby restricts or stifles competition.”²⁶ *Quality Sales* further elaborated that in determining materiality, the decisionmaker would consider whether the omission had only a “trivial impact or negligible effect on price, quality, delivery, or relative standing of the bidders.”²⁷

An important issue in many procurements is whether the procurement officer’s decision on responsiveness should be given “due deference” by the decisionmaker. *Quality Sales* identified three types of situations that arise in making the responsiveness determination, and the deference that could be given in each as follows:

Type 1: procurements where the bid or proposal contain “a minor technical defect or irregularity which does not and could not affect the substance of a low bid.”²⁸ No deference would be given to finding that the bid or proposal was nonresponsive.

Type 2: procurements in which an omission might have provided a competitive advantage to the prevailing offer, but the evidence is not sufficient to *prove* an advantage.²⁹ The procurement officer could go either way on the issue of responsiveness. The officer would have to use judgment to determine whether the omission was significant enough to deem the proposal nonresponsive. In this situation, the decisionmaker could defer to the procurement officer’s judgment if the decision was supported by a reasonable basis and no policy grounds dictated otherwise.³⁰

Type 3: procurements where the evidence proves that the prevailing offer or proposal gained a competitive advantage by the omission. The procurement officer would have no discretion, and would have to find that the bid or proposal was nonresponsive.

This framework allows us to state the burden on Eagle Eye succinctly: Eagle Eye must prove that either

- (i) The omission gave Trinity a competitive advantage such that without the omission, Trinity’s proposal would not have prevailed (Type 3); or

²⁶ *Id.* at 12-13 (quoting *King v. Alaska State Housing Auth.*, 512 P.2d 887, 892 (Alaska 1973) (citations omitted by *Quality Sales.*).

²⁷ *Id.* at 13 (citations and quotation marks omitted).

²⁸ OAH No. 06-0400-PRO at 13 (quoting *Chris Berg, Inc. v. State, Dep’t of Trans. and Pub. Fac.*, 680 P.2d 93-94 (Alaska 1984).

²⁹ *Id.*

³⁰ *See, e.g., Turbo North Aviation, Ltd. v. Dep’t of Pub. Safety*, OAH No. 05-0658-PRO (Dep’t of Admin. 2006) (“the agency record must show a reasonable basis for the procurement officer’s responsiveness decision for that determination to be upheld.”), available at <https://aws.state.ak.us/OAH/Decision/Display?rec=4728>; *In re Waste Management, Inc.*, Dep’t of Admin. Case No. 01.08 at 7 (Dep’t of Admin. 2002), available at <http://aws.state.ak.us/officeofadminhearings/Documents/PRO/00-11.htm>.

(ii) The omission gave Trinity a substantial advantage in gaining the award, and, in the circumstances of this case, the evidence and policy considerations establish that the prevailing proposal should not be found responsive to the RFP (Type 2). In this situation, a decisionmaker would not defer to the procurement officer's decision. In general, however, in a Type 2 case, the decisionmaker will give due deference to the procurement officer's decision unless it is not supported by a reasonable basis, or considerations of procurement policy support a finding that the proposal was not responsive.³¹

B. Has Eagle Eye met its burden of proving that Trinity's proposal was nonresponsive or that the decisionmaker should not defer to the procurement officer's decision?

We begin the analysis by noting that if the omission only affected scoring for subsection 5.03 (Experience and Qualifications), giving Trinity a zero (out of 10) for that subsection would not change the outcome.³² Nevertheless, a showing of an actual competitive advantage here is theoretically possible. For example, if evidence showed that the omissions masked a serious deficiency in personnel, that could affect the scores for methodology, management plan, and experience and qualifications³³ It might also affect the analysis of whether Trinity is a responsible firm.

Here, however, Eagle Eye has not come forward with evidence regarding deficiencies in Trinity's personnel. Instead, it has made two arguments. First, it argues that the words "must provide" that precede the words "resume" and "itemize the total cost and the number of estimated hours for each individual named above" in subsection 4.06, establishes an absolute requirement. In Eagle Eye's view, any failure to provide required information is fatal and must lead to rejection of the proposal as nonresponsive.

³¹ This summary does not foreclose an argument that other factors could result in not giving deference to the procurement officer's decision. No such argument was received in this case.

³² Although the final score showed Eagle Eye with 248.5 points and Trinity with 285.8 points, this number is more than the 100 points allotted in the RFP because the scores for each member of the committee were added together (with the cost score and the preference score included in each reviewer score) rather than averaged. R. 148. If averaged, the difference between the two scores would be 82.3 for Eagle Eye and 95.2 for Trinity. This demonstrates that, as Ms. Lea testified, even if Trinity's score for experience and qualifications was zero, Trinity would still be the highest scoring proposal. If the omissions affected other categories in Section 5, however, Trinity, in theory, might not have the highest score.

³³ In determining whether a term in an RFP is material, an agency may consider the RFP as a whole. *See Alaska Comm. Syst. v. Dep't of Educ. and Early Dev.*, OAH Nos. 11-0120/0178-PRO at 17 (Dep't of Admin. 2011) available at <https://aws.state.ak.us/OAH/Decision/Display?rec=4757>.

As fully described above, however, the cases do not support Eagle Eye’s approach.³⁴ Many (if not all) proposals deviate or stray in some degree from the strict requirements of an RFP. It would not be in the state’s interest to impose a burden of perfection on procurements. Moreover, the RFP clearly stated that minor informalities could be waived. Therefore, the procurement officer was not required to reject an offer that was responsive in all material aspects, even if the offer omitted some information that was required.

Eagle Eye’s second argument is based on its submission into the record of a 2015 procurement protest decision written by a procurement officer for the Department of Education and Early Development.³⁵ That protest has a remarkable similarity to this case—it also involved a protest of an award of an institutional food service contract in Sitka (albeit for Mt. Edgecumbe High School, not the Academy). In that case, however, the protestor was Trinity. The major issue in the protest was whether the prevailing party’s proposal was nonresponsive because it omitted required items—a sample snack menu and a required nutritional analysis. The procurement officer agreed with Trinity that prevailing proposal was nonresponsive because of the omissions. He canceled the award and issued a new notice of intent to award to Trinity.³⁶

Eagle Eye’s inclusion of this exhibit raises the argument that Trinity’s omissions of resumes and itemization of costs are equivalent to the omissions in the 2015 procurement of a sample menu and a nutritional analysis. This argument, however, is not persuasive for several reasons. First, the decision was not appealed and is not precedent in other procurement cases. Second, even if we apply the reasoning of the procurement officer here, the 2015 procurement decision merely reflects that the case was a Type 2 case—a case in which the agency had discretion to consider an omission material. The procurement officer’s explanation in the 2015 procurement provides a strong rationale for considering the omitted information material—particularly the nutritional analysis, which was required by federal law.³⁷ Nothing in that decision would support a holding that omitting required items in a food-service procurement

³⁴ See, e.g., *id* (“when it comes to deciding whether or not a particular term is material in the context of an RFP, consistency with the literal language may not be necessary.” (citing *Gunderson v. University of Alaska, Fairbanks*, 922 P.2d 229, 235 (Alaska 1996))); *Laidlaw Transit, Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1033 (Alaska 2005) (rejecting “rigid enforcement” of acknowledgement requirement because it “would have elevated form over substance, frustrating the district’s and the regulation’s clear intent to create a competitive bidding process for pupil transportation.”).

³⁵ Eagle Eye Exhibit (Protest Decision, RFP 2016-0500-2935, food service at Mt. Edgecumbe High School (Robert Roys, Procurement Officer (July 9, 2015))).

³⁶ *Id.*

³⁷ *Id.* at 2-3.

proposal automatically makes a case a Type 3 case (meaning that it has to be found nonresponsive). Indeed, the decision clearly shows that the procurement officer exercised judgment. He found some omissions to be nonmaterial (such as the omission of yoghurt from a sample menu).³⁸ Only two of the omissions were found to be material, and only after analyzing the importance of those omissions to the procurement.³⁹

Thus, the only lesson we learn from the 2015 procurement is that, as we have already discussed, agencies must use judgment to determine whether an omission is material. Furthermore, taking a closer look at the two omissions here reveals that the two omitted items in Trinity's proposal here were not nearly as important to this procurement as the nutritional analysis appeared to be to the 2015 procurement.

First, with regard to the resumes, some information that would be in a resume is provided in the biographical sketches provided by Trinity.⁴⁰ Moreover, although in theory the requested resumes could be a Type 2 matter, the evidence admitted at the hearing actually shows that the resumes were not important. As the Commander of the Academy, State Trooper Lt. Chad Goeden, testified, the identification of personnel in the RFP is not binding. The agency expected that personnel would turn over.⁴¹ Therefore, a conclusion that the omission of the resumes is not material is supported by record, and Eagle Eye has not met its burden of proving otherwise.

Second, with regard to the omission of the cost per person itemization, that omission is more serious than the omission of the resumes. Proposals can sometimes mislead agencies by loading up with a list of qualified personnel who are in the firm, but who will not actually be working on the project. Itemizing the cost per person would identify for the agency whether the highly-qualified personnel described in the proposal will be really working on the project.⁴² That information could be important when evaluating the methodology, the management plan, and the experience and qualifications of the personnel and the firm, and whether the firm is responsible. Thus, the omission of the itemization is squarely a Type 2 case, and could be grounds for finding the proposal nonresponsive.

³⁸ *Id.* at 2.

³⁹ *Id.* at 3.

⁴⁰ R. 937-39.

⁴¹ Goeden testimony.

⁴² Although the itemization, like the resume, is not binding, it could still be a useful evaluation tool in that it could help identify whether the proposal's inclusion of top personnel was real or window dressing. It also could be useful in determining whether the firm is responsible if an itemization showed a shortcoming, such as designating far too few hours for necessary tasks.

Taking the evidence of the proposal as a whole, however, in this case this omission does not compel a finding that the omission was material. Eagle Eye has not provided any evidence that would support an inference that the Trinity personnel who will be providing services to the Academy will not be qualified, or that Trinity has underestimated the cost of providing services. Moreover, the information provided in Trinity’s proposal—in particular, the organization chart and the description of the individuals who will be in Sitka doing work—does support the inference that the omission of the itemization was not material.⁴³ In short, Eagle Eye has not met its burden of proving that the omission of the itemization was material. The procurement officer’s decision that the omission was not material is supported by a reasonable basis in the record.

Thus, the evidence supports giving due deference to the procurement officer’s decision. The remaining question is whether procurement policy would support not giving deference, and instead finding Trinity’s offer nonresponsive. Here, the only policy argument raised by Eagle Eye is that proposals should be complete and meet the requirements of the RFP, and that it is not fair when one company provides a complete RFP and the other does not. This policy argument has merit. A countervailing policy, however, is that the state is best served by increasing competition among vendors. To eliminate a potential contractor for lack of perfection in a proposal would decrease competition. In the circumstances of this case, policy considerations do not warrant a finding that the omissions of the resumes and the itemization of costs were material.⁴⁴

⁴³ R. 937-40.

⁴⁴ I would caution any vendor, however, that this decision does not give vendors an open door to omit required items. The analysis here, and in the 2015 procurement officer decision discussed above, show that a response that omits required items is always at risk of a finding of nonresponsiveness. This risk is especially prevalent at the procurement officer level, where judgment is first exercised.

IV. Conclusion

Eagle Eye has not proven that items omitted from Trinity Business Services' proposal were material. Therefore, the procurement officer's decision that Trinity's proposal was responsive is affirmed.

Dated: October 22, 2019.

Signed _____
Stephen Slotnick
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Administration, adopts this Decision, under the authority of AS 44.64.060(e)(1), 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 5th day of November, 2019.

By: *Signed* _____
Name: Kelly Tshibaka
Title: Commissioner

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