BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

NORTHERN POLICY SOLUTIONS, LLC, Complainant, v. INTERIOR ALASKA NATURAL GAS UTILITY, Respondent.	)	OAH No. 21-0043-MUN Agency No. IGU RFP-03-2020

DECISION

I. Introduction

The Interior Natural Gas Utility used a competitive solicitation process to procure a lobbying firm. The Utility's procurement officer scored the three proposals received, and determined that Morgan Partnership, LLC, had submitted the most responsive proposal.

One of the disappointed offerors, Northern Policy, LLC, filed a protest. Northern Policy argued that the Morgan proposal was not responsive to the solicitation. It also asserted that the procurement officer erred by not convening an evaluation committee. In addition, it cited anomalies in the scores awarded by the procurement officer that, in its view, showed that the procurement officer abused his discretion or was biased in favor of Morgan.

In the circumstances of this case, the evidence in the record is not sufficient to support Northern Policy's arguments regarding abuse of discretion or bias. Although Northern Policy submitted an excellent proposal, the procurement officer had a reasonable basis to score it slightly lower than Morgan's proposal. In addition, to the extent that the procurement officer erred by not convening an evaluation committee, that error was not material because Morgan's proposal was responsive and Northern Policy did not prove that soliciting final and best offers would have been in the public interest. Accordingly, the procurement officer's decision is affirmed.

II. Facts

A. Background history of the IGU

The Interior Alaska Natural Gas Utility, generally known as the Interior Gas Utility, or IGU, is a public utility created and owned by the Fairbanks North Star Borough.[1] IGU is

[1] R. 65.

managed as an independent separate legal entity, with its own board of directors. The general manager of IGU is Dan Britton.[2]

IGU's mission statement is "to provide low cost, clean burning, natural gas to the most people in the Fairbanks North Star Borough, as soon as possible."[3] The concept is behind IGU is simple enough—natural gas is an abundant resource in Alaska, and is a more desirable source of energy for the Fairbanks/North Pole area than the oil, coal, and wood that has been traditionally used for heating and cooking. Bringing the concept to fruition, however, has many challenges, including the transportation of gas from Cook Inlet (and possibly in the future, the North Slope), the relative lack of natural gas infrastructure in the interior, and the capital investment required before substantial income can flow back to the Utility.[4]

Although IGU is still young, it has come a long way. The build out of a distribution system and increase in storage capacity is well in hand.[5] The IGU has morphed and matured to reach its current status, including a 2018 merger with a "sister" natural gas utility, called "Fairbanks Natural Gas" or "FNG"[6] In addition, IGU had secured state funding assistance to finance its infrastructure but the appropriation mechanism for the funding was declared unconstitutional, leaving uncertainty about the path forward.[7]

As this background demonstrates, IGU has a clear need for expert lobbyist assistance to promote and explain the Utility's needs and interests with both governmental and private stakeholders. Given that need, when its existing contract expired, it undertook the procurement that is at issue in this protest.

B. The RFP

On November 16, 2020, IGU issued a request for proposals (RFP) seeking to contract with a lobbying firm "to provide a fully range of Lobbying services."[8] The contract would be for one year, with four options to renew before a new RFP had to be issued.[9] Thus, assuming that the Utility was satisfied with the service it received, the contract could last for as long as five years.

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2 R. 58.
3 IGU website, *available at*: https://www.interiorgas.com/.
4 R. 109.
5 R. 65, 109.
6 R. 109; s*ee also, e.g.,* Petroleum News, Vol. 25, No. 01(January 5, 2020) *available at:* https://www.petroleumnews.com/pntruncate/553473193.shtml.
7 R. 88, 96; *see also Forrer v. State,* 471 P.3d 569, 598 (Alaska 2020) ("the subject-to-appropriation bonds in HB 331 violate article IX, section 8").
8 R. 57. For a description of what "lobbying services" generally encompasses, see R. 66-67 (RFP § 3.4).
9 R. 57.

The RFP identified five evaluation criteria, and assigned a percentage weight to the criteria as follows:

- Understanding project and commitment—15 percent;
- Methodology—25 percent;
- Firm's qualifications and experience—20 percent;
- Individual's qualifications and experience—20 percent;
- Cost—20 percent.[10]

To evaluate the cost and methodology criteria, the RFP assigned a work order, called Work Order One. Work Order One assigned tasks to the contractor that, essentially, required provision of comprehensive lobbying services for a legislative session.[11] The offerors were required to submit a binding cost proposal for implementing Work Order One. Costs would then be compared, with the lowest cost receiving the full points to be awarded for the cost criterion.

C. The offerors

Three firms submitted proposals. The proposals for two of the firms, Morgan Partnership, LLC, and Northern Policy Solutions, LLC, are in the record in this protest. The proposal submitted by the third firm, Blumer & Associates, is not at issue in this appeal and is not in the record.

Even a cursory review of the Morgan and Northern Policy proposals reveals that Mr. Britton was faced with an embarrassment of riches when he sat down to evaluate the proposals. Both Morgan and Northern Policy are extremely well-qualified to provide the requested lobbying services.

1. Morgan Partnership, LLC

Morgan Partnership has been in business since 2005.[12] It is a one-person firm, with Yuri Morgan providing the lobbying services. The evidence in the record showed that Mr. Morgan has provided lobbying services for FNG or IGU for many years (although, as will be explained, he was not the registered lobbyist in 2013, or in 2016-18). Mr. Morgan was the incumbent lobbyist for IGU before this RFP. Thus, Morgan was well-qualified for this contract.[13] On the cost criterion, Morgan's proposal bid $30,000 to complete Work Order One.[14]

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10 R. 71.
11 R. 66-67.
12 R. 87. Mr. Morgan has been a registered lobbyist since 2006. R. 84.
13 R.79-91.
14 R. 85.

2. Northern Policy Solutions, LLC

Northern Policy is a relative newcomer to the business of providing lobbying services as a firm—the firm has been in existence since 2019. Nevertheless, this record demonstrates that Northern Policy was also well-qualified. Northern Policy is also a one-person firm, and that person is Gene Therriault. Mr. Therriault's background and experience includes serving in the legislature in leadership positions representing interior Alaska. Since leaving the legislature, he has also served in various public and private capacities, all of which relate to energy issues relevant to this project, including

- Governor's Senior Policy Advisor on in-state energy;
- Vice President of Resource Development and External Affairs for Golden Valley Electric Association;
- Director of Statewide Energy Policy and Outreach, Alaska Energy Authority (AEA);
- Interior Energy Project team lead, Alaska Industrial Development and Export Authority (AIDEA);
- Government Outreach and Legislative Liaison, Alaska Gasline Development Corporation.

Although Mr. Therriault's resume does not directly establish that he provided lobbying services before forming Northern Policy, Northern Policy has argued that the record supports its assertion that he served as the in-house lobbyist for AIDEA and AEA, with specific responsibilities that included lobbying work on this project. Taken as a whole, this record amply proves that Mr. Therriault was very knowledgeable about the project and capable of serving as IGU's lobbyist.[15] On the cost criterion, Norther Policy's proposal also bid $30,000 to complete Work Order One.[16]

D. The scoring, decision, and protest

The procurement officer scored the three proposals without convening an evaluation committee. His scoresheet shows that he found all three proposals to be responsive. The maximum score for each criterion was 10 points. Those scores were then multiplied by the percentage weight given to that criterion, and then summed so that the total maximum points for all criteria added together was 10.

[15] R. 92-110.
[16] R. 102.

The proposal submitted by Blumer & Associates received the lowest score, 8.34 points (out of 10). For the Northern Policy proposal, the procurement officer deducted one-half point for the firm's qualifications and experience and one point for the individual's qualifications and experience. On all other criteria, Northern Policy received full points. After applying the weighting so that the score was normalized to a total of 10 points, Northern Policy's score was 9.70. Morgan received a perfect score of 10 points.

On December 16, 2020, the procurement officer distributed a notice of intent to award the contract to Morgan.[17] Northern Policy protested the award, asserting that the procurement process was flawed and that the scoring was not supported by the facts.[18] The procurement officer denied the protest. Northern Policy filed an appeal, initiating a process that would require the issues to be considered anew, with deference to the procurement officer's discretionary decisions.[19] The general manager of IGU elected to have the protest heard by a hearing officer, as provided under the IGU's Procurement Manual.[20]

At a case planning conference held on February 5, 2021, to determine the procedures for the appeal, the parties agreed that no evidentiary hearing was required. This meant that the hearing officer would have to decide any factual disputes based on the record in the case. The parties submitted briefs and at Northern Policy's request, oral argument was held on March 5, 2021. The issues and arguments raised by the parties are discussed below.[21]

III. Discussion

Northern Policy makes several arguments in this appeal, but these arguments generally go to one central theme: that the result reached here was so skewed and erroneous that the process had to be arbitrary and capricious.[22] Northern Policy asks that the procurement officer's decision

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17 R. 111-12.

18 R. 113-23.

19 IGU Procurement Manual § 6.13.3.

20 IGU Procurement Manual § 6.13.3(1). The General Manager contracted with the Office of Administrative Hearings to provide a hearing officer. Under the manual, the hearing officer's decision is the final administrative decision.

21 Northern Policy had initially alleged an additional issue relating to jurisdiction, but later withdrew that argument. Although counsel for the General Manager submitted a brief on the issue, that issue is not discussed in this decision.

22 The individual errors alleged by Northern Policy can be described as follows:

1. The procurement officer erred by failing to provide an evaluation committee;
2. The Morgan proposal was nonresponsive because it did not include the mandatory discussion of potential problems and solutions;
3. Even if the omission of the discussion of problems and solutions did not make the offer nonresponsive, the procurement officer abused his discretion by
    a. failing to deduct points for Morgan's methodology and understanding of the project based on the omission;

be overturned and that the proposals be rescored, whether by the hearing officer or an evaluation committee.

Below, this decision will first take each of Northern Policy's claims of error individually, starting with the alleged procedural errors, and then turning to the allegations that the procurement officer abused his discretion. At the end of this discussion, this decision will turn to Northern Policy's overarching claim that the evidence as a whole shows bias and unfairness. Before undertaking this analysis, however, this decision will briefly explain some of the rules for decisionmaking in a protest of an IGU procurement.

A. What rules govern this adjudication?

The IGU Procurement Manual that governs this case instructs that "[t]he review will be based on IGU procedures and generally accepted principles of government purchasing."[23] In applying this standard, this decision will turn to Alaska court and administrative decisions applying general government procurement law.

In an administrative process such as this one, although the strict rules of a court proceeding do not apply, the decisionmaking process is still governed by a set of rules. Those rules will play a large part in how this decision develops.

The first general rule is that the facts found in this decision must be based on competent and reliable evidence.[24] In this case, however, the parties have not asked for an evidentiary hearing. Instead, they have asked that the decision be based on the administrative record. Because no witness has testified, and no affidavits were submitted into the record, we do not have any sworn testimony.

In administrative hearings, it is common to rely on documents, even documents that may be hearsay, to infer the facts. As long as the documents are reliable (and here, no party has alleged otherwise), the decisionmaker can draw reasonable inferences from the record.

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b. not awarding Northern Policy higher scores for experience and qualification;
c. giving inconsistent scores to Northern Policy by differentiating between its qualifications as a business entity and Mr. Therriault's personal qualifications as the person performing the contract; and

4. Taken as a whole, the explanation for all of these issues is that the procurement officer was biased.

[23] IGU Procurement Manual § 6.13.5(d).

[24] *Cf., e.g.,* 2 AAC 64.290. This regulation applies to the extent not in conflict with IGU Procurement Manual. *See Memorandum of Agreement for Adjudication Services* between IGU and OAH (January 21, 2021) ("The assigned administrative law judge will follow the procedures in IGU Procurement Manual 6.13.9, and, to the extent not in conflict, AS 44.64 and its implementing regulations."). This regulation sets general rules for administrative hearings, including a relaxed standard of evidence allowing for hearsay evidence if reliable, and requiring that testimonial evidence be given under oath.

As will be seen, this decision makes many findings of fact based on assertions and inferences that are supported by the record. But crucial to this decision is the inverse result—this decision will decline to make findings when the support is not sufficient. There will be times when a party will ask me to draw an inference from the record that is plausible, but for which a competing inference is also plausible. In the absence of any testimony to explain or augment the documents, the documents in the record may not meet the burden of proof—meaning that the fact that I am being asked to infer is not more likely than other possible inferences. In those cases, this decision will decline to make the proposed finding.[25]

Moreover, a related limitation on the fact-finding of this decision is that this decision must treat claims made in the party's briefs as argument, not fact. Thus, if a fact is asserted in a brief, but not supported in the record, the factual assertion will be ignored. This limitation, too, will factor into this decision.

Finally, the standard of review is a very important consideration. In general, as required by the IGU's procurement manual, this decision will review the procurement officer's decisions under the "abuse of discretion" standard.[26] As the Alaska Supreme Court has made clear, this standard is "a high one."[27] This means that the procurement officer's decision will be affirmed as long as it is supported by a "reasonable basis" apparent in the record.[28] Under this standard, no independent evaluation of the competing proposals will be undertaken. All that matters is whether the record supports that a reasonable person could reach the conclusion reached by the procurement officer. As will be seen, in this case, where the proposals under review are both excellent, and where few facts other than the proposals themselves are in evidence, this deferential standard of review is very difficult to overcome.

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[25] A reader who is familiar with legal proceedings may be confused about why this decision is not applying the "summary judgment" standard of review—a standard that is frequently applied when no evidentiary hearing is held. *See, e.g.,* 2 AAC 64.250. In a summary judgment (called "summary adjudication" in an administrative proceeding) motion, a party is seeking to have a case dismissed as a matter of law. But if facts are in dispute, the opposing party is entitled to an evidentiary hearing. All inferences from the evidence at the summary adjudication stage must be drawn in favor of holding an evidentiary hearing. Here, because neither party wanted an evidentiary hearing, the parties agreed that the decision would be made based on a neutral reading of the documents in the record. This meant that I must decide all facts in dispute based solely on the record, without favoring either side's proposed inferences. (To foreshadow the analysis in this decision, if the summary adjudication standard were to be applied here, we would be going to hearing because Northern Policy has pointed to evidence in the record that, if viewed in the light most favorable to Northern Policy, would support the inferences advocated by Northern Policy. But, as will be seen, without testimony to support those inferences, the documents alone do not amount to proof by a preponderance because the competing inferences are at least as likely.)

[26] IGU Procurement Manual § 6.13.3(f).

[27] *King v. Alaska State Housing Auth.,* 633 P.2d 256, 263 (Alaska 1981).

[28] *Id.*

Under the Utility's procurement manual, however, a less deferential standard could apply to some issues. The manual provides that the decisionmaker will apply independent judgment to Northern Policy's arguments if "necessary to correct a failure to follow the procedures identified in this RFP or IFB or IGU Procurement policies and procedures."[29] Under this standard, the hearing officer will determine whether the facts show that procurement officer's decision was correct—not just whether it was "reasonable." As will be seen next, because Northern Policy does allege a procedural violation, this decision will apply independent judgment to two of Northern Policy's arguments.

B. Did the RFP promise that an evaluation committee would participate in the evaluation of the proposals?

Northern Policy's first argument asserts that the procurement officer made a procedural error by failing to convene an evaluation committee. Northern Policy notes that four sections of the RFP referred to an "evaluation committee."[30] Northern Policy asserts that it interpreted these references to mean that "an Evaluation Committee [would] provide critical input into the evaluation and scoring process that would ensure fair and honest scoring."[31]

Yet, as Mr. Britton admitted in his emails with Northern Policy, no evaluation committee was ever convened.[32] Instead, Mr. Britton, in his capacity as procurement officer, evaluated and scored the proposals, without any input from an evaluation committee. In Northern Policy's view, the failure to convene an evaluation committee was a significant procedural error that must necessarily result in reversal of Mr. Britton's decision.

Northern Policy is correct that a significant failure to follow the procedure laid out in an RFP can be fatal to a procurement.[33] The question here, however, is whether Northern Policy has proved that the Utility failed to follow the procedure required in the RFP.

1. Does the RFP promise that an evaluation committee will advise the procurement officer when evaluating the proposals?

Northern Policy acknowledges that the RFP clearly establishes that "[a]ll responsive proposals will be reviewed and evaluated by the Procurement Officer."[34] Northern Policy does

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29 IGU Procurement Manual § 6.13.3(f).

30 Northern Policy Appeal Brief at 12; *see* R.61-62 (§§ 2.9, 2.10, 2.13, 2.14).

31 *Id.*

32 R. 123; (Northern Policy Exhibit C).

33 *See, e.g., Alaska Comm. v. City of Palmer,* OAN No. 17-0343-MUN (Office of Administrative Hearings 2017) (reversing procurement award based on municipality's failure to score proposals according to criteria in RFP).

34 R. 61, 71. The RFP makes clear that the procurement officer will evaluate and score the offers in both section two, titled "Rules Governing Procurement," and section five, titled "Evaluation Criteria and Process."

not argue that an evaluation committee was supposed to perform that actual ranking and scoring of the proposals. Instead, Northern Policy's argument here is based on commonsense. Northern Policy reasons that an evaluation committee's job is to evaluate. Therefore, when the RFP mentions an evaluation committee, Northern Policy concludes, it must mean that an evaluation committee shall be convened and contribute to (although not make the final decision on the score) the evaluation of the proposals.[35]

Although Northern Policy is correct that the RFP contained references to an evaluation committee, none of the references suggested that an evaluation committee would be convened to help in the scoring of the proposals. Subsection 2.9 of the RFP gave the procurement officer discretion to allow modifications or best and final offers if an evaluation committee determines that it was in the best interest of the Utility to do so.[36] Subsection 2.14 described how the evaluation committee would conduct discussions with offerors if those discussion were held.[37] Subsection 2.10 sets out the discretion of the procurement officer to act on recommendations from the Evaluation Committee to reject a nonresponsive proposal.[38]

These references to the evaluation committee do not, however, state that an evaluation committee will participate in the evaluation. To the contrary, subsections 2.11 and 5.1 expressly leave that task to the procurement officer. Thus, when Mr. Britton evaluated and scored the proposals without input from an evaluation committee, he followed the procedure set out in subsections 2.11 and 5.1.

Moreover, even if the references to the evaluation committee created an ambiguity with regard to whether an evaluation committee would participate in the evaluation process, that ambiguity was present and knowable when the RFP was published. The RFP required that protests "related to the materials, data, and requirements of the RFP" or "based on an omission, error, or the content of the RFP," be filed "prior to the deadline for the receipt of proposals."[39] A long line of procurement cases explain that the purpose of requiring that an objection to a

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35 R. 61.

36 R. 60 ("After proposals are opened, modification may be allowed prior to completion of the evaluation process if the Evaluation Committee determines that it is in the best interest of the IGU to solicit modification or best and final offers.").

37 R. 62.

38 R. 61 ("the Procurement Officer, based on recommendations of the Evaluation Committee, may reject any proposals that do not comply with all the material and substantial terms, conditions, and performance requirements of the RFP.").

39 R. 59.

knowable ambiguity be raised before the deadline is to allow the agency to cure the defect.[40] Thus, to the extent that Northern Policy is asserting that the Procurement Officer committed a procedural error by not seeking advice and counsel from an evaluation committee during the scoring process, Northern Policy's argument is not persuasive.

2. Did the RFP promise that an evaluation committee would be convened to deliberate on responsiveness and the need for final and best offers?

Northern Policy's argument regarding the absence of an evaluation committee becomes much more focused when it turns from a generalized concept of participation in the scoring to the two issues that the RFP actually states will involve an evaluation committee: the issues of responsiveness and solicitation of final and best offers. In Northern Policy's view, even if an evaluation committee was not needed to participate in the scoring, it was necessary to convene an evaluation committee to deliberate over these two issues.

Northern Policy then sharpens this argument even further by pointing out that both issues—responsiveness and the potential value of negotiating with offerors to achieve a final and best offer—are in play. It asserts that the Morgan proposal was not responsive because it omitted a discussion of future problems and solutions, even though such a discussion was required by the RFP. It also asserts that the procurement officer should have solicited final and best offers because with two equal or near-equal proposals, such a solicitation could have resulted in a better price.

Northern Policy argues that the fallout from this error is a change in the standard of review. Given what it sees as a procedural error, Northern Policy concludes that the hearing officer must use independent judgment to determine these two arguments. This is because, as stated earlier, the IGU Procurement Manual requires deferential review for decisions made by the procurement officer "[u]nless necessary to correct a failure to follow the procedures identified in this RFP."[41] Northern Policy concludes that these procedural errors require that the issues of responsiveness and solicitation of final and best offers be reviewed with independent judgment, rather than for abuse of discretion.

The merits of Northern Policy's arguments are addressed below.

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[40] *See, e.g., In re BWC,* 16-1249-PRO at 6 (Dep't of Admin. 2017) ("to identify the type of defect that must be raised at the solicitation stage" we "ask whether the defect could be cured at the solicitation stage."); J*&S Servs., Inc. v. Dep't of Nat. Res.,* OAH No. 14-0472-PRO at 9 (Dep't of Admin. 2014) (holding that protest regarding failure of request for proposals to state how two different scenarios would be evaluated was untimely protest of solicitation because issue was knowable and curable at solicitation stage); available at: http://aws.state.ak.us/officeofadminhearings/Documents/PRO/PRO140472.pdf.

[41] IGU Procurement Manual § 6.13.3(f).

a. Was the failure to convene an evaluation committee a procedural error that requires the hearing officer to apply independent judgment to the issues of responsiveness and solicitation of final and best offers?

Northern Policy is correct that a procedural error can result in a heightened standard of review. It is not correct, however, that this *necessarily* means that the hearing officer must substitute his judgment for the judgment of the foregone evaluation committee regarding the two issues for which an evaluation committee might have exercised judgment. In this case, this RFP did not explicitly promise that there would be an evaluation committee to deliberate on the responsiveness issue and the option to solicit final and best offers. Whether to convene an evaluation committee is left to the discretion of the Procurement Officer. In order to reach Northern Policy's logical argument that the hearing officer must use independent judgment because the evaluation committee was erroneously deprived of the ability to use its independent judgment, we would first have to conclude that the failure to convene a committee was itself erroneous. Given that convening the committee was discretionary, that decision would normally be reviewed under the deferential abuse of discretion standard.

Here, however, the procurement officer did not assert that he exercised his discretion to decline to convene an evaluation committee. Instead, the procurement officer explained in an email to Mr. Therriault that he did convene a committee, but that he served as an evaluation committee of one person.[42] If true, that was a procedural error. A committee of one person cannot meet to provide advice to itself.[43] Thus, although the failure to convene a committee would not be error, actually convening a committee of one, and having that one person be the same as the person to whom the committee was providing advice, was error.

Although it was error to have convened an evaluation committee of one person, an important concept in the review of procurement decisions is materiality—if an alleged violation of procurement procedures is not material, then it may not be a deficiency, even if true.[44] Thus, in

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[42] R. 123, Northern Policy Exhibit D (Dec. 10, 2020 email from Dan Britton to Gene Therriault stating, "In this case the committee was myself."). Although the procurement officer also indicated that the references to the evaluation committee were left in this RFP by mistake, without any oral testimony explaining these emails, I must take his comment that he served as an evaluation committee at face value.

[43] This decision does not hold that serving as a one-person committee is wrongful in every case. Here, however, the context makes clear that if an evaluation committee was convened, it was to be independent of the procurement officer. R. 61-62. In this circumstance, serving as a one-person committee was error (even though not convening any committee would not have been an abuse of discretion).

[44] *Cf., e.g., Quality Sales Foodservice v. Dep't of Corrections,* OAH No. 06-0400-PRO at 14 (Commissioner of Administration 2006) available at http://aws.state.ak.us/officeofadminhearings/Documents/PRO/PRO060400.pdf (holding that minor variance from bid specification was not material because it did not affect outcome); *Chris Berg,*

an administrative review of a procurement process, an agency is not required to find error if a deficiency is minor or not material. Considerations regarding the seriousness of an alleged deficiency include the good faith of the agency, whether it had a reasonable basis for its decision, the amount of discretion afforded the agency, and whether the alleged deficiency was a violation of statute or regulation.[45]

The issue of materiality applies here because although the procurement officer erred by acting as a one-person evaluation committee, if his decisions in that capacity were correct, the error would not be material. Therefore, next, this decision will decide the issues of responsiveness and solicitation of best and final offers without deference to the procurement officer's decision on these issues. If the decisions that the Morgan proposal was responsive, and that there was no need to solicit final and best offers were correct, then the error in serving as the evaluation committee would not be material.

b. Was Morgan Partnership's response nonresponsive?

A general principal of procurement law is that a nonresponsive proposal or bid will not be accepted. Under Alaska law, a proposal is responsive when it "conforms in all material respects to the solicitation."[46]

Northern Policy is correct that the RFP required offerors to "[i]nclude a summary of any potential problems you believe may be encountered in the performance of the contract and creative suggestions for addressing these problems."[47] The RFP did not state, however, that a failure to provide the summary and solutions would render a proposal nonresponsive.

Indeed, the RFP advised that "failure to include complete information as requested may result in a lower score or disqualification of the proposal depending on the severity of the discrepancy."[48] Moreover, the RFP did not designate that the inclusion of the summary of problems and solution would be scored as a separate evaluation criterion. Instead, the summary was included within the scored factor of "understanding of the project and commitment.[49]

The section of the RFP on the evaluation process, subsection 5.1, advised that the initial review for responsiveness would require only two tests: Was the offer received on time? And did

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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").

45 *King v. Alaska State Housing Auth.,* 633 P,2d 256, 263 (Alaska 1981).

46 *See, e.g.,* 2 AAC 12.990(9) (defining "nonresponsive" as "a bid or proposal that does not conform in all material respects to the solicitation").

47 R. 68.

48 R. 67.

49 R. 68; 71

the firm meet the minimum experience and qualifications?[50] The RFP stated that after rejecting offers that did not meet one of these two criteria, "[t]he Procurement Officer will evaluate the remaining proposals based on the evaluation criteria and weighting listed in this section."[51] Thus, under subsection 5.1, the discretion of an evaluation committee or the procurement officer to declare an offer nonresponsive appears limited.

Finally, although the Morgan proposal did not include a section entitled "summary of potential problems and solutions," the proposal and its attached letter do identify potential problems. The April 15, 2020, letter to Mr. Britton attached to the Morgan proposal identifies the following problems:

- the scarcity of unrestricted general funds;
- the possible unconstitutionality of the funding mechanism adopted for repaying the debt incurred to build the storage facility;[52]
- the legislature having been paralyzed over Covid-19;[53] and
- projected deficits in the state budget.[54]

As far as proposing solutions to these problems, the proposal is not strong, but it does identify

- Maintain[ing] strong relationships with public officials from both sides of the [aisle];[55]
- gaining "insight into the broader political landscape" and "identify[ing] opportunities and threats and [] tactics" through "concurrent representation of public utilities alongside other industries";[56] and
- working with "Alaska's Congressional Delegation to explore and secure any federal grant or other funding opportunities"[57]

These problems and solutions are readily apparent from the text of the proposal and attachment. Even if the problems and solution were less apparent, the failure to include a separate section on problems and solutions would not render the Morgan proposal nonresponsive. As noted above,

50 R. 71.
51 R. 71.
52 R. 88.
53 R. 89.
54 *Id.*
55 R. 81.
56 R. 82
57 R. 83.

the RFP did not state that a failure to specify problems and solution would lead to rejection of the proposal as nonresponsive.[58]

The opposite result—declaring the Morgan proposal nonresponsive ba—would be anticompetitive because it would reduce the number of proposals to be evaluated. To the extent that the Morgan proposal was deficient on the required summary of problems and solutions, that deficiency could be taken into account when scoring the proposals. Thus, even applying independent judgment to the responsiveness issue, the Morgan proposal was responsive.

c. Was it error to not hold discussion with the proposers to obtain final and best offers?

Northern Policy notes that, after the scoring was tabulated and normalized to a ten-point scale, there was only a three-tenths of a point difference between the Northern Policy proposal and the Morgan proposal. Given the closeness of the scores, Northern Policy reasons that an evaluation committee might well have recommended that the procurement officer hold discussions with the offerors, as allowed under subsections 2.9, 2.13, and 2.14 of the RFP. These discussions could well have resulted in a lower price being offered by at least one offeror, which could have saved the Utility money. To Northern Policy, the failure to hold such meetings, and obtain the best price, was error. When reviewed under an independent judgment standard, in its view, it will have to result in a reversal of the procurement decision.

Even applying independent judgment, however, on this record, this argument is not persuasive. Northern Policy assumes that attempting to obtain a lower price is always in the public interest, but has not provided any law or facts to support that assumption. No evidence suggests that the price proposed by both Northern Policy and Morgan, $30,000 to implement Work Order One, was above-market value for similar high-quality lobbying services. No evidence suggests that IGU would be well-served by paying its lobbyist a lower sum that could be below market value for the services.

The evidence in this record shows that the board approved the solicitation that made cost only 20 percent of the evaluation criteria.[59] Issues that went to the quality of the services account for 80 percent of the criteria. This tells us that quality of the services was far more important to

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[58] *Cf., e.g., Construction Machinery,* OAH No. 10-0258-PRO at 7 n.23 ("[T]here is no indication that the terms of the solicitation required a finding of non-responsiveness for failure to comply with the specification in question, which would present an entirely different situation. If the terms of the solicitation expressly require compliance with a particular specification as a condition of responsiveness, the procurement officer generally does not have discretion to accept a product that fails to meet the mandatory specification."); *available at:* https://aws.state.ak.us/OAH/Decision/Display?rec=4749.

[59] R. 71.

the board than price. Moreover, two very high-quality proposals both came in at $30,000; another proposal (which is not in the record) came in at $55,000.[60] This is evidence that the price offered was reasonable—or perhaps on the low side for the range of possible market prices. Because no evidence supports Northern Policy's argument that solicitation of final and best offers would be in the public interest, the failure to hold discussions and obtain final offers was not error.

C. Has Northern Policy proved that the procurement officer abused his discretion in scoring the proposals?

We turn next to Northern Policy's arguments that address how the procurement officer exercised his discretion in scoring the proposals. As stated above, the IGU Procurement Manual requires that the procurement officer's scoring decisions be reviewed under the "abuse of discretion" standard.

The Alaska Supreme Court has advised that "[w]e review discretionary actions that do not require formal procedures under the arbitrary and capricious or abuse of discretion standard."[61] This standard of review requires deference to the agency. "The deferential abuse of discretion standard of review is proper in appeals of discretionary acts not requiring formal procedures because it allows agencies latitude to act that is commensurate with their discretion."[62] It has also made clear that when a decision is "within the agency's discretion," the decision is "subject, on judicial review, to an ascertainment that there was a reasonable basis for the agency's action."[63] As explained above, under this deferential standard, the only inquiry will be whether the record provides a reasonable basis for the procurement officer's decisions.

1. Did the procurement officer abuse his discretion by failing to deduct points for Morgan's methodology and understanding of the project based on the omission of a section describing problems and solutions?

Above, this decision has already determined that the omission of a section describing problems and solutions did not make the Morgan proposal nonresponsive. But Northern Policy makes a stronger argument regarding the problems/solutions requirement when it compares its own response to that requirement to the Morgan proposal's response, and questions why Morgan was not docked points for its less robust submission.

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60 R. 121.

61 *Olson v. State, Dep't of Nat. Res.,* 799 P.2d 289, 293 (Alaska 1990).

62 *Id.*

63 *Chris Berg, Inc. v. State, Dep't of Transp. & Pub. Facilities,* 680 P.2d 93, 94 (Alaska 1984).

Without question, the Northern Policy response is superior in responding to the requirement of identifying problems and solutions.[64] Where we had to glean the Morgan proposal's problems and solutions from the text and the attachment, Northern Policy provided a succinct and informative one-page attachment listing six issues and describing a proposed action to deal with those issues.[65] It also described in the text of its response how it could leverage its past knowledge of interior Alaska support for energy projects in other regions to obtain statewide support for IGU projects.[66] Thus, on the matter of identifying problems and solutions, standing alone, an evaluator could have awarded Northern Policy more points than Morgan.

Yet, as Northern Policy notes, both its proposal and the Morgan proposal received a perfect score of 10 points on the evaluation criterion of "Understanding Project and Commitment" (of which the requirement to address problems and solutions was a subset).[67] To Northern Policy, the procurement officer's failure to deduct points from Morgan when Northern Policy was so clearly superior on this required item was an abuse of discretion.

The problem for Northern Policy, however, is that it cannot show that the procurement officer's award of 10 points to Morgan on the understanding and commitment criterion was arbitrary. The identification of problems and solutions was but one aspect of the understanding and commitment criterion. Taking Morgan's proposal as a whole, including the attached letter of April 15, 2020, describing status of IGU's priorities for the 2020 legislative session, the Morgan proposal certainly demonstrates a high level of understanding and commitment. Although in comparison to the Northern Policy proposal, the Morgan proposal is less complete on its analysis of problems and solution, the evaluator was not required to deduct points for having a less robust answer than another presenter on a sub-issue contained within the overall criterion.

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[64] *Compare* R. 96-97, 106-109 (Northern Policy proposal's textual discussion of challenges and solutions; attachment describing six pending action issues and proposed action to address those issues, and other attachments from which additional problems and solutions can be gleaned) *with* R. 81, 88-89 (Morgan proposal's text and attachment from which some problems and solutions can be gleaned). To be clear, the point I am making here is that the Northern Policy proposal's identification of problems and creative solutions is objectively superior on its face to that of the Morgan proposal. No testimony is needed to come that conclusion. This decision does not imply that the Northern Policy proposal is objectively superior overall to the Morgan proposal. This decision acknowledges that both proposals appear on their face to be excellent overall. One may be superior to the other, but for me to determine which is superior would require an in-depth inquiry involving supplemental evidence and testimony. Given the posture of this case, it is not necessary for me to make that inquiry or reach a conclusion and I do not do so.

[65] R. 106.

[66] R. 97.

[67] R. 121.

2. Did the procurement officer abuse his discretion by considering factors not in the RFP or facts not included within the four corners of the Morgan proposal?

Northern Policy notes that the evaluation scoresheet for the three proposals includes the following typewritten notation at the bottom of the page:

> Morgan Partnership has identified Yuri Morgan as the Individual Responsible. Yuri has provided Lobbying Services to FNG, IGU [directly] for many years and his continuous involvement in all [previous] FNG/IGU legislative activity results in the highest experience ranking both for the [Firm] and Individual.[68]

Northern Policy argues that "[t]his statement is both alarming and telling in its inappropriateness."[69] To Northern Policy this statement shows that the procurement officer abused his discretion because it means that the procurement officer made past contractual service with IGU or FNG a factor in the evaluation, when no such factor was identified in the RFP.[70] In Northern Policy's view, this violates the common requirement of procurement law that the evaluation will be "based on the evaluation process and criteria identified in the Request for Proposals" and that the evaluator "will not use other factors, criteria, or processes."[71]

In addition, Northern Policy alleges, this statement proves that the procurement officer abused his discretion by considering his personal knowledge of Mr. Morgan's past experience. According to Northern Policy, "[t]he MP response does not contain any [detailed] account of past work for IGU beyond a two-page report regarding failed efforts in 2020."[72] Northern Policy concludes that the procurement officer used private knowledge, rather than information in the Morgan proposal, to score the Morgan proposal. To Northern Policy, this use of personal knowledge violates procurement law requiring that the scoring be based solely on information contained in the "four corners" of the proposal.

Northern Policy's arguments, however, are not persuasive. First, the statement that Mr. Morgan's past service merits the highest score for experience does not convert contractual service with IGU and FNG into a factor. The factor for evaluation was "qualifications and experience." Mr. Morgan merited the highest rating for experience based on, of course, his experience. That

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68 R. 121; Northern Policy Exhibit C.
69 Northern Policy Brief at 30.
70 *Id.* at 31.
71 IGU Procurement Manual §6.5.5(1); *see also, e.g.,* 2 AAC 12.260(b) ("[t]he evaluation must be based only on the evaluation factors set out in the request for proposals.").
72 Northern Policy brief at 31.

his experience happened to be in service to IGU and FNG does not convert that type of experience into a factor.

For example, Mr. Therriault's experience is also very impressive. Mr. Therriault received nine out of 10 points for the factor of "Individual's Qualifications and Experience." That Mr. Therriault received such a high score may well have been in part because of his experience of serving in the legislature. If so, that would be perfectly legitimate. It would not convert service with the legislature into a factor.[73]

Second, for the procurement officer to consider the length and breadth of Mr. Morgan's service was not going beyond the four corners of the Morgan proposal. The proposal notes that Mr. Morgan "has credibly and reliably served organizations seeking representation before Alaska's legislative and executive branches of state government since 2006."[74] It further explains that "[f]or eleven years through six legislative cycles and four separate Administrations, Mr. Morgan has engaged Alaska's top public officials to bring affordable energy options and air quality benefits to Interior Alaska residents."[75] These statements provide sufficient background to warrant the high score for individual and firm experience.

Moreover, to the extent that the procurement officer relied on his personal knowledge of Mr. Morgan's experience in awarding full points for experience, that would not be a violation of procurement law.[76] The "four corners" doctrine that Northern Policy cites does not apply to a procurement of personal services through an RFP. When evaluating an RFP, "[i]n general, an evaluator's prior knowledge of the past performance of an incumbent contractor, good or bad, is not grounds for disqualification."[77]

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[73] As explained in the next subsection, that Northern Policy lost one point for individual qualification and experience is objectively reasonable considering his educational qualifications and relatively short experience as a for-hire lobbyist. Because no evidentiary hearing was held, however, we do not know why Mr. Britton deducted one point for individual qualifications and experience. (And his reason for doing so is not important because all that matters in this context is whether it was objectively reasonable.) The point here is that if Northern Policy had received a perfect score on qualifications and experience it would not mean that service with the legislature, AGC, and AIDEA were converted into evaluation factors. It would only mean that this type of service satisfied the factor of experience.

[74] R. 81. *See also* R. 87.

[75] R. 81.

[76] Although we do not know the extent to which Mr. Britton relied on his personal knowledge, I agree with Northern Policy the record supports an inference that he did rely on this knowledge to some extent.

[77] *Empyra.com v. Alaska Permanent Fund Corporation*, OAH No. 06-0520-PRO at 8 (Alaska Permanent Fund Corporation 2006) available at http://aws.state.ak.us/officeofadminhearings/Documents/PRO/PRO060520.pdf; *North Pacific Erectors, Inc. v. Division of Gen.Serv.,* OAH No. 11-0061-PRO at 17 (Dep't of Admin. 2011) available at http://aws.state.ak.us/officeofadminhearings/Documents/PRO/PRO110061.pdf ("even absent any specific language in an RFP, evaluators may rely on their own personal knowledge of the past performance of an offeror, good or bad.").

In oral argument, the parties were asked to comment on the administrative cases holding that an evaluator may use prior knowledge of a contractor's performance in scoring proposals. Northern Policy argued that this decision should not rely on the cases of state agencies because, in its view, these cases are not binding on the IGU.

Northern Policy is correct that cases decided by state agencies based on state procurement law are not binding on this case, which is governed by the IGU procurement manual. The cases are instructive, however, and help determine the "generally accepted principles of government purchasing" in Alaska, which, as stated earlier, are binding in this case.[78] Therefore, this decision will cite to administrative cases that decide issues of general procurement law in Alaska. Here, these cases provide persuasive guidance that an evaluator may use knowledge of past experience when evaluating a proposal received in response to an RFP.

Moreover, the cases cited by Northern Policy for the proposition that an evaluator cannot consider personal knowledge of experience, *Chris Berg, Inc. v. State, Department of Transportation and Public Facilities,* and *Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt*, are not on point.[79]

In *Chris Berg*, a procurement officer had to use some "elementary mathematics" to interpret the line-items costs in a competitive sealed bid in order to understand the bid.[80] He then called the bidder to ensure that his interpretation was correct. The court found that this process did not violate procurement law because the issue was minor and did not confer a competitive advantage.[81] The concurrence noted, however, that making the phone call might have strayed outside the four corners of the proposal, but, once made, clearly required acceptance of the bid as responsive.[82] In short, *Chris Berg* does not address the issue raised by this case. Moreover, *Chris Berg* involved an Invitation to Bid (ITB), which is different from an RFP. An ITB relies solely on price for determination, while an RFP relies on qualitative factors in addition to price.[83] Nothing in *Chris Berg* holds that an evaluator cannot consider personal knowledge of a proposer's experience when scoring an RFP.

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78 IGU Procurement Manual § 6.13.3(d).

79 *Chris Berg,* 680 P.2d 93 (Alaska 1984)**;** *Eel River,* 64 Cal.Rptr.3d 316 (Cal. App. 2013).

80 680 P.2d at 95.

81 *Id.*

82 *Id.* (Rabinowitz, J., concurring).

83 *Compare, e.g.,* IGU Procurement Manual at § 6.4 (Requests for Bids) *with* IGU Procurement Manual § 6.5 (Requests for Proposals); *Compare also, e.g.,* AS 36.30 Article 2 (Competitive Sealed Bidding) *with* AS 36.30 Article 3 (Competitive Sealed Proposals). For a case that explains that ITBs are evaluated differently than RFPs, see, e.g., *Flagship Development, Inc. v. Division of Gen. Servs.,* OAH No. 06-0249-PRO (Dep't of Admin. 2006) ("there are significant differences in the treatment of bids and proposals with respect to responsiveness.").

In *Eel River,* a county board of supervisors ignored the evaluation of factors in the RFP performed by staff and awarded a franchise to an offeror who was neither the low bidder nor the most qualified.[84] The court reversed, and noted that "Bidders cannot be required to guess at the standards by which they will be measured, and are entitled to expect that the bid that most fully satisfies the specified criteria would be awarded the franchise."[85] As explained above, however, Mr. Britton's reliance on knowledge of an offeror's experience did not add new criteria or factors to the RFP because the RFP made clear that experience was a factor.[86]

In sum, Northern Policy's arguments alleging error in the procurement officer's statement regarding Morgan's experience are not persuasive.

3. Did the procurement officer abuse his discretion by not awarding Northern Policy higher scores for experience and qualification?

The RFP set out that 20 percent of a proposal's score would be based on the firm's qualifications and experience and 20 percent would be based on the individual's qualifications and experience.[87] The RFP required a statement of qualifications and resumes of key personnel, including education, work history with references, and a listing of specific projects on which they served.[88] The RFP separately requested "documentation verifying the qualifications and experience of the firm."[89] The RFP explained that here it was looking for information on "providing lobbying services to similar entities."[90] It required details regarding three clients, including a description of level of service, who within the firm provided the service, length of the service, and a client contact.[91]

Northern Policy argues that the procurement officer abused his discretion by docking Northern Policy one-half of a point for its firm's qualifications and experience, and one point for the qualifications and experience of its principal agent, Mr. Therriault. Northern Policy makes two arguments here. First, Northern Policy argues that its proposal shows that Northern Policy and Mr. Therriault are indisputably highly qualified and experienced on all relevant measures. It

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84 64 Cal.Rptr.3d at 323.
85 Id. at 336.
86 The cases do caution, however, that evaluators must avoid speculation and rely only on their own personal knowledge or that of a co-evaluator. *North Pac. Erectors,* OAH 11-0061-PRO at 17-18; *see also Empyra.com*, OAH No. 06-0520-PRO at 8; *Alaska Archives v. Department of Education and Early Development*, Department of Administration No. 97-005 at 5, n.8 (Dep't of Administration 1997).
87 R. 71.
88 R. 69.
89 *Id.*
90 R. 70.
91 *Id.*

documents Mr. Therriault's extensive previous service in government—including service in the legislature representing interior Alaska—and his specific work on many aspects of the interior Alaska natural gas distribution project. It notes that this previous service included "conceiving of, negotiating for, and securing passage of complex legislation that allowed for the creation of the current IGU structure."[92] Northern Policy concludes that anything less than full points for its firm's and its individual's qualifications and experience is an abuse of discretion.

Second, it notes that the procurement officer's scoring is inconsistent. Northern Policy is a one-person firm. This means that the firm's qualifications and experience and the agent's qualifications and experience should have been identical—if one is docked one-half of a point, the other should receive the same score. Northern Policy concludes that it has proved that the difference between the two scores was arbitrary—in its view, the procurement officer simply picked random numbers to dock Northern Policy on these two measures.[93]

This decision accepts all of Northern Policy's arguments regarding Mr. Therriault's experience and qualifications as true. Indeed, Northern Policy's thorough briefing of this case, and its presentation at oral argument, demonstrate that Mr. Therriault has extensive knowledge and experience with the project and that he is facile and articulate in putting that knowledge to use. Further, as Northern Policy points out, when Mr. Britton needed information regarding a particular issue, he turned to Mr. Therriault, and Mr. Therriault provided the answer.[94] This is evidence that the procurement officer also agrees with Northern Policy that Mr. Therriault is a recognized expert on the project.

The problem for Northern Policy, however, is that Morgan Partnership also demonstrates extraordinary qualifications and experience. Mr. Morgan's resume indicates that his firm has been providing lobbying and consultant services since 2006. His proposal lists ten clients, including other utilities. In addition to this longstanding experience in lobbying, he has experience as a field engineer in the oil and gas industry, as a legislative aide, and as an investment officer with the Alaska Department of Revenue. His education includes a Bachelor of Science degree in geological engineering from the University of Alaska, Fairbanks, a Masters of

92 Northern Policy brief at 36.
93 Northern Policy brief at 38-39.
94 R. 121 (copy of text messages between Dan Britton to Gene Therriault showing that Mr. Britton asked Mr. Therriault for information regarding a bond extension and that Mr. Therriault was able to provide an answer).

Business Administration from the Melbourne Business School, and that he hold a "Chartered Financial Analyst" designation.[95]

As stated above, the review here is not to determine which of the two proposals is superior. The review here is only to ask whether the procurement officer's scoring had a reasonable basis.

The starting point for this review is to note that, as Northern Policy itself observed, the scoring between the Northern Policy proposal and the Morgan proposal was quite close—as Northern Policy stated, "the MP and NPS responses were scored to be three tenths (.3) of a point apart."[96] This score reflects the difference between the two when the 1.5 points deducted for Northern Policy's individual and firm qualifications and experience are normalized to a 10-point scale using the weights for each evaluation factor.[97] Because the score for the Morgan proposal was close to that of the Northern Policy proposal, we need only see a few differences between the proposals to establish an objectively reasonable basis for the scoring.

Looking at the difference between the qualifications and experience of the two firms, Morgan has a longer track record as a lobbyist firm. It has more clients. Northern Policy has had a business license for a much shorter time—since January 25, 2019.[98] Its only lobbying client at the time it prepared the proposal was a *pro bono* client, the Fairbanks Food Bank.[99] Without in any way discounting the expertise that Mr. Therriault's significant personal experience brings to the firm, it was objectively reasonable for the procurement officer to deduct one-half of a point from Northern Policy's firm's score based on the length of time that the firm has been in business and its client base.

With regard to the difference between the qualifications and experience of the two individuals, Mr. Therriault's breadth of experience in state government, and with this project in particular, including lobbying experience as an in-house lobbyist for government corporations, is impressive. Nevertheless, it would have been objectively reasonable for an evaluator to consider his relative lack of experience as a for-hire lobbyist, and lack of experience in building a client base, and, when compared with that of Mr. Morgan, score Mr. Therriault somewhat lower on individual experience and qualifications. Further, with regard to education, Mr. Therriault has a

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95 R. 80-91.
96 Northern Policy brief at 40.
97 R. 121 (Northern Policy Exhibit C).
98 R. 96.
99 R. 98. Northern Policy also had a consulting client, MatSu Electric Ass'n, but explained that this work "did not involve direct lobbying work." *Id.*

Bachelor of Science in Business Administration and an Associate of Arts degree in computer information systems, both from the University of Alaska, Fairbanks. It would have been objectively reasonable for an evaluator to score Mr. Therriault somewhat lower on the qualifications factor than Mr. Morgan, whose education in geological engineering (put to use in the oil and gas industry), investment training, and Master's Degree all could be quite useful in implementing this contract.[100] Accordingly, reducing Northern Policy's score by one point for the individual's qualifications and experience was not an abuse of discretion.

With regard to Northern Policy's argument that giving the Northern Policy firm a different score than the individual score for Mr. Therriault is proof that the scores were arbitrary, the opposite is true. Here, the RFP distinguished between the individual and firm. It asked about the individual's education, and work history with references and phone numbers. It separately asked for "documentation verifying the qualifications and experience of the firm."[101] Clearly, the procurement officer recognized the overlap between Mr. Therriault as the key member of the firm, and the firm itself, and credited Mr. Therriault's vast experience to the firm (otherwise, the firm would have received a much lower score). It still was objectively reasonable, however, to score the individual one-half point lower on the "qualifications" parameter based on the individual's education—a factor not necessarily considered when evaluating the qualifications and experience of the firm.

4. Did the procurement officer abuse his discretion by considering a misrepresentation regarding Morgan Partnership's experience?

Returning to the issue of the procurement officer's statement that the Morgan proposal's perfect score on the qualifications and experience factors was based on Mr. Morgan's "continuous involvement in all [previous] FNG/IGU legislative activity," Northern Policy argues that this misstates the facts. It came forward with records from the Alaska Public Office Commission to prove that Mr. Morgan did not serve as the registered lobbyist for IGU or FNG in 2013, or 2016-18.[102] It concludes that both the procurement officer's statement on the score sheet, and the

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[100] Although the utility of investment training may not be obvious, and no testimony was received regarding this issue, it is general knowledge that investment training involves evaluating the fundamentals of companies and how to reduce risk, both of which could be of use when representing IGU. It also generally requires understanding of complex financing arrangements. Thus, a reviewer could reasonably conclude that Mr. Morgan's credentials could be very useful to his role as a lobbyist.

[101] R. 69.

[102] *See* Northern Policy Second Exhibit A. This exhibit was accepted into the record only as evidence that neither Mr. Morgan nor any private lobbyist was registered as the lobbyist for FNG in 2013 and 2016-18. The summary was not accepted as evidence that Mr. Morgan did not represent FNG or IGU in any other year. Counsel

Morgan proposal's representation that "for eleven years" it had "engaged Alaska's top public officials" on the project were material misrepresentations of fact. In Northern Policy's view, this proves that the procurement officer abused his discretion.

Northern Policy is correct that basing a procurement award on a significant error could be an abuse of discretion.[103] Here, however, Northern Policy has not proved a misrepresentation of material fact or that Mr. Britton materially relied on a misunderstanding of the facts.

The Morgan proposal does not say that Mr. Morgan was the registered lobbyist for FNG in 2013 or 2016-18. It merely claims to have "engaged Alaska's top public officials" and that this engagement has spanned "eleven years through six legislative cycles and four separate Administrations."[104] No evidence in this record suggests that this claim is untrue. Even if Mr. Morgan was not the registered lobbyist for four of those years, he still could have been involved in some level of engagement on the project.

With regard to the procurement officer's statement citing Mr. Morgan's "continuous involvement in all [previous] FNG/IGU legislative activity," that statement might or might not be true. Because no evidentiary hearing was held, we do not know to what extent Mr. Morgan was involved in FNG/IGU legislative activity in 2013 or 2016-18. In addition, even if the procurement officer did misunderstand about Mr. Morgan's lack of involvement as a registered lobbyist during the years 2013 and 2016-18, there is no evidence that this misunderstanding was material. Even without being the registered lobbyist during those years, Mr. Morgan still has considerable experience. A reasonable evaluator with a correct understanding of Mr. Morgan's role could still have awarded full points for experience.

Northern Policy had the burden of proving that the procurement officer materially relied on a misunderstanding of fact. Given that no evidentiary hearing was held to determine the facts, Northern Policy can only speculate on whether there was a misunderstanding and on whether any misunderstanding might have made a difference in the scoring. Accordingly, the evidence regarding Morgan Partnership's tenure as a lobbyist for FNG/IGU does not prove that the procurement officer abused his discretion.

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for the procurement officer came forward with evidence that in some years, Mr. Morgan was working as a subcontractor.

[103] *Cf., e.g., King.,* 633 P.2d at 263 (agreeing that "there is no reasonable basis for an administrative decision based on a numerical analysis where the numerical result is produced by an arithmetical error").

[104] R. 81.

D. Has Northern Policy proved that the procurement officer was biased in favor of Morgan?

We come now to Northern Policy's main argument—that the evidence in this record proves that the procurement officer did not give a fair review to the proposals. In Northern Policy's view, the procurement officer's decision shows bias and favoritism towards Morgan Partnership. To Northern Policy, Morgan's winning score was a *fait accompli*, meaning that Northern Policy never received a fair evaluation.

In support of its argument, Northern Policy cites to Alaska cases establishing that procurement rules must be applied to "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."[105] Northern Policy notes that in procurement law, a government agency is "held to an implied promise to consider bids honestly and fairly."[106] Northern Policy stresses that Alaska Supreme Court has "demanded" that government procurements must be carefully managed to avoid "the appearance of impropriety."[107]

In Northern Policy's view, it has proved favoritism because, in its view, the procurement officer's decisions, taken together, add up to a pattern of biased and arbitrary action done solely to favor Morgan. To Northern Policy, no other explanation could reasonably account for the failure to deduct points for Morgan's omission of problems and solution, for the deduction of points for Northern Policy's qualifications and experience, and for the statement on the scoresheet extolling Morgan's experience as a lobbyist for IGU.

The analysis of Northern Policy's argument begins with pointing out two hurdles that allegations of favoritism and appearance of impropriety must clear. The first hurdle is the presumption of good faith that attaches to governmental officials doing their official duties: "In the absence of any evidence of bias or prejudgment, procurement officials are presumed to act in good faith and to exercise honest and impartial judgment."[108] Although this presumption is

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105 *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)). Although *McBirney* was decided before the current law was enacted, these statements of policy remain instructive.

106 Northern Policy Brief at 8 (quoting *King*, 633 P.2d at 263 and citing *Laidlaw Transit, Inc. v.Anchorage Sch. Dist,* 118 P.3d 1018, 1025 (Alaska 2005) and *Lakloey, Inc v. University of Alaska*, 141 P.3d 317(2006) as additional sources for the quoted language).

107 Northern Policy Brief at 18 (citing *Dick Fischer Dev. No. 2, Inc. v. State, Dep't of Admin.,* 838 P.2d 263, 266 (Alaska 1992) (citing *Keco Indus., Inc. v. United States,* 203 Ct.Cl. 566, 492 F.2d 1200, 1203-04 (1974)); *see also id.* at 10 (citing *McBirney*, 753 P.2d at 1135 -1136); *id.* at 33.

108 *North Pacific Erectors, Inc. v. Division of Gen. Servs.,* OAH No. 11-0061-PRO at 14 (Department of Transportation and Public Development 2011) (citing *Bruner v. Petersen*, 944 P.2d 43, 49 (Alaska 1997); *Earth Resources v. State, Department of Revenue*, 665 P. 2d 960, 962 n. 1 (Alaska 1983)).

rebuttable, it presents an evidentiary burden to Northern Policy: "[t]o overcome the presumption, a protestor must provide direct evidence of actual bias or prejudgment, rather than speculation."[109] Even though circumstantial evidence could suffice to overcome the presumption, where competing inferences from the evidence could go either way, no inference of bad faith will be drawn.

Second, the cases finding a wrongful appearance of impropriety in a procurement rely on either conduct outside the decisionmaking process or actual evidence that the evaluation included wrongful conduct. In *J&S Services v. Tomter,* for example, the Alaska Supreme Court cited to the procurement officer's "numerous contacts" with an offeror, which, although possibly not bad faith, gave rise to "an appearance of impropriety."[110] In *McBirney,* there was a similar appearance of impropriety caused by contacts with a potential offeror, as well as actual impropriety caused by providing the draft RFP to the potential offeror.[111] In *In re Bachner Company, Inc. and Bowers Investment Co.,* the hearing officer found actual impropriety when an evaluator admitted to changing his scores to compensate for what he perceived as another evaluator's favoritism, rather than scoring based on the merits of the proposal.[112]

Here, in contrast, the only conduct at issue supporting Northern Policy's assertion of an appearance of impropriety is how the procurement officer scored the proposals. No evidence suggests that the procurement officer had unauthorized contact with an offeror or provided materials to one offeror that were not provided to all. Northern Policy is asking for an inference that the procurement officer's decisions were based on favoritism based solely on scores awarded, and the notation regarding Mr. Morgan's experience. It does not cite to other conduct or acts that showed favoritism toward one offeror or animus or bias against another. In this circumstance, where the evidence shows that the procurement officer's decisions were supported by a reasonable basis, the presumption of good faith means that there is insufficient evidence to support an inference of bad faith.

Moreover, Northern Policy's argument that the procurement officer's scoring was a perfunctory *fait accompli* is not supported by the evidence. To the contrary, the procurement officer's scoresheet supports an inference that the procurement officer engaged in reasoned

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109 *Id.*

110 139 P.3d 544. *J&S* allowed the complainant to bring a civil suit against the procurement officer in his personal capacity to determine whether there was actual subjective bad faith in addition to the appearance of impropriety.

111 753 P.2d at 1136-38.

112 Dep't of Admin. Case Nos. 02.06/.07, *available at* https://aws.state.ak.us/OAH/Decision/Display?rec=4721.

decisionmaking. For example, the Blumer & Associates proposal was scored lower on three of the four qualitative criteria.[113] The Northern Policy proposal was scored higher than the Blumer proposal. This evidence supports a conclusion that the procurement officer was exercising judgment and weighing the merits of the competing proposals. Indeed, that the Northern Policy deductions were for only one-half point on one criterion, and one point on another, also supports a conclusion that the procurement officer was using a reasoned and nuanced process. If the scoring had been a perfunctory exercise in ensuring that a favorite was to win, we would expect random deductions spread across the competing proposals.

Given that no hearing was held, the evidence supporting an inference that the procurement officer failed to engage in reasoned decisionmaking is not persuasive. Applying the presumption of good faith, Northern Policy has not proved that the procurement officer failed to do his duty to honestly and fairly review the proposals.

IV. Conclusion

The evidence in the record in this case shows that the procurement officer had to evaluate two outstanding proposals for providing lobbying services to IGU. Although the procurement officer erred by designating himself as a one-person evaluation committee for purposes of making recommendations on responsiveness and soliciting final and best offers, the evidence shows that this error was not material. In addition, the procurement officer had a reasonable basis for his scoring of the competing proposals. His notation regarding Mr. Morgan's experience does not demonstrate reliance on misinformation or a wrongful application of criteria or knowledge. Finally, the evidence in this record does not support a conclusion that the procurement officer was biased or unfair. Accordingly, the procurement officer's decision awarding the lobbying contract to Morgan Partnership is affirmed.

DATED: March 12, 2021.

By: *Signed*
Stephen Slotnick
Administrative Law Judge

[113] R. 121.

NOTICE

This decision is the final administrative decision under IGU Procurement Manual § 6.13.4(h). 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.

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