

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

IRWIN HODSON GROUP, LLC)

v.)

STATE OF ALASKA, DIVISION OF)
MOTOR VEHICLES)

OAH No. 22-0372-PRO
RFP# 22 09

FINAL DECISION¹

I. Introduction

Irwin Hodson protested the Division of Motor Vehicles' decision awarding to a rival vendor a procurement for license plate and registration supplies and services. Irwin Hodson argued that the procurement was flawed because the division did not apply the evaluation methodology prescribed in the Request for Proposals and because the evaluators who assessed the offers were arbitrary and unfair in their evaluations.

The evidence in the record, however, shows that the division's interpretation of the evaluation methodology was more consistent with the language in the RFP than Irwin Hodson's proposed interpretation. It also shows that the evaluators' comments explaining their scoring of the offers were supported by objective evidence in the record. Accordingly, the division's denial of Irwin Hodson's protest is affirmed.

II. Facts

As we all know, one of the of the Division of Motor Vehicles' many functions is to distribute products relating to license plates, including license plates, registrations, and license plate tabs.² To make this happen, the division contracts with one or more vendors to supply license plate services and supplies. Because the division's existing contracts were set to expire later in 2022, on January 5, 2022, the Department of Administration, Office of Procurement and Property Management, issued a request for proposals (RFP) on the division's behalf, seeking proposals for a new contract for license plate services and supplies.³

¹ This decision is identical to the June 17, 2022, proposed decision except for the addition of footnotes 106 and 114 addressing issues raised in Irwin Hodson's July 7, 2022, Proposal for Action.

² See generally AS 28.10.

³ SOA 82-133. Although the Office of Procurement and Property Management conducted the procurement on behalf of the division, this decision will refer only to "the division" as the entity that made the decisions under appeal.

Although in previous years the division had more than one vendor, this RFP sought to combine all license plate and registration services and supplies into one contract with one vendor.⁴

During the time that the RFP was on the street, two potential offerors, Irwin Hodson Group, LLC, and Intellectual Technology, Inc., submitted several questions about the RFP.⁵ In addition, Irwin Hodson, submitted two protests to the solicitation.⁶ As a result of the questions and the protests, the RFP was amended four times.

Both Irwin Hodson and Intellectual Technology submitted timely proposals.⁷ No other vendors responded.

Irwin Hodson is a license-plate manufacturer based in Portland, Oregon. It has been providing registered vehicle license plates to state governments for over 100 years.⁸ It has been involved in manufacturing Alaska's license plates since about 1959.⁹ Under its proposal, it would manufacture the license plates and contract with other firms for the production of the registrations, tabs, and other materials required under the RFP.¹⁰

Intellectual Technology is a company specializing in license plate supplies. It has been providing registration document printing services for thirty years.¹¹ It has provided Alaska's online registration renewals for the past fifteen (15) years.¹² Its RFP explained that it "had seven years of experience dedicated to license plate production."¹³ For this contract, it proposed to subcontract license plate manufacturing to another firm.¹⁴

Under the RFP, the offers would be awarded points based on the offeror's qualifications and price. Cost was weighted twice as heavily as qualification: The total points available for cost was 600; the total points available for qualification was 300. The two scores would be combined to determine a total score.¹⁵ The offer with the most points would be awarded the contract.

⁴ SOA 88.-89.

⁵ SOA 837.

⁶ *Id.*

⁷ SOA 838.

⁸ SOA 594.

⁹ *Id.*

¹⁰ SOA 594-95.

¹¹ SOA 641.

¹² *Id.*

¹³ *Id.*

¹⁴ SOA 643.

¹⁵ SOA 23-25.

The scoring of the price term was a mathematical exercise performed by the procurement officer. The lowest cost offer would receive all 600 points. Other offers would receive points for cost based on the ratio of the lowest cost to their cost multiplied by 600. Cost points could be adjusted based on whether the offeror qualified for certain preferences described in the Procurement Code.¹⁶

The scoring of the qualifications was done by a three-person proposal evaluation committee. The committee members were not allowed to consider cost and were not told the price offered by the proposers. To determine which vendor the most qualified, Section 5 of the RFP (Evaluation) identified the following five criteria and points:

- Section 5.04, Experience and Qualifications, 50 points;
- Section 5.05, Understanding of the Project, 50 points;
- Section 5.06, Methodology Used for the Project, 100 points;
- Section 5.07, Management Plan for the Project, 50 points;
- Section 5.08, Subcontractors, 50 points.¹⁷

Under each criterion, the RFP listed a series of questions, and advised that “this portion of the offeror’s proposal will be evaluated against the following questions.”¹⁸ The committee members scored the evaluations individually. They were given instructions regarding how to score the five criteria, and were urged to write notes to explain their scoring. After scoring the offers individually, they met as a group on February 28, 2022, to discuss their analyses.¹⁹ Committee members were allowed to change their ratings during the meeting if they were persuaded that their original rating was in error. The procurement officer then tallied the qualification points, added them to the cost points, and determined that Intellectual Technology had the highest point total.²⁰

Irwin Hodson’s price term was considerably lower than that offered by Intellectual Technology. Intellectual Technology, however, had significantly higher qualification scores than Irwin Hodson. Following the scoring, on March 4th, the procurement officer issued a notice of intent to award the contract to Intellectual Technology.²¹

¹⁶ SOA 27-28.

¹⁷ SOA 23.

¹⁸ SOA 25.

¹⁹ SOA 837.

²⁰ SOA 838, 841.

²¹ SOA 709.

On March 14, 2022, Irwin Hodson filed a protest, alleging that the procurement was flawed.²² Irwin Hodson requested a stay. The procurement officer denied the protest on March 29th. The officer effectively denied the stay when, on March 16th, the officer issued the contract to Intellectual Technology. The officer did not notify Irwin Hodson that the stay had been denied.²³

On April 1, 2022, Irwin Hodson appealed the denial of the protest to the Commissioner of Administration. The commissioner referred the appeal to the Office of Administrative Hearings. The commissioner granted a 30-day temporary stay on contract performance, and delegated authority to the Administrative Law Judge to lift or extend the stay. During prehearing proceedings, Intellectual Technology was permitted to participate in the process as an interested party under the procurement code.²⁴

The parties agreed that an evidentiary hearing was not needed because the case could be decided on the record. The stay was allowed to remain in place during an expedited briefing process. All participants submitted briefs. Following a thorough review of the briefs, reply briefs, and record, the stay was allowed to expire. The issues raised in the protest are addressed below.

III. Discussion

A. How are procurement protests analyzed on appeal?

To be sustained, a procurement protest must establish that “legal or factual errors” occurred in the procurement that amount to deficiencies serious enough to warrant a remedy.²⁵ Procurement rules “prevent fraud, collusion, favoritism, and improvidence in the administration of business,” and “insure that the [state] receives the best work or supplies at the most reasonable prices practicable.”²⁶ However, “[t]he requirement of public bidding is for the benefit of property holders and taxpayers, and not for the benefit of the bidders; and such requirements should be construed with the primary purpose of best advancing the public interest.”²⁷ The public interest

²² SOA 711.

²³ SOA 842.

²⁴ AS 36.30.699 (“In AS 36.30.560 — 36.30.695, “interested party” means an actual or prospective bidder or offeror whose economic interest may be affected substantially and directly by the issuance of a contract solicitation, the award of a contract, or the failure to award a contract; whether an actual or prospective bidder or offeror has an economic interest depends on the circumstances.”).

²⁵ AS 36.30.590(b)(2); 36.30.585(b).

²⁶ *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 this case was decided before the current law was enacted, these statements of policy remain instructive.

²⁷ *Id.*

“requires carefully drawn public competitive bidding standards and strict compliance with those standards.”²⁸

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 found to be a deficiency, even if true.²⁹ Thus, in 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.³⁰ In short, an agency must consider all of the important factors and give honest and fair consideration to all proposals.³¹

B. Did the division err by misinterpreting and misapplying the evaluation methodology required in the RFP?

Irwin Hodson’s primary argument is that the division erred by failing to strictly interpret the scoring methodology required in the RFP. Under the RFP, the evaluators were to award 1, 5, or 10 points on a comparative basis for each of the five criterion being evaluated:

Offerors’ responses for each section will be rated comparatively against one another which each PEC member assigning a score of 1, 5, or 10 (with 10 representing the highest score, 5 representing the average score, and 1 representing the lowest score). Responses that are similar or lack dominant information to differentiate the offerors from each other will received the same score. Therefore, it is the offeror’s responsibility to provide dominant information and differentiate themselves from their competitors.³²

Irwin Hodson has suggested an interpretation of the RFP scoring methodology that would require the evaluators to award both proposals a score of “5” on a criterion if the proposals were similar to each other, and a score of “1” and “10” whenever the proposals were, in comparison, different from each other. Under this interpretation, an evaluator could never award one proposal a “5” on

²⁸ *State, Dep’t of Educ. v. Nickerson*, 711 P.2d1165, 1169 (Alaska 1985) (quoting *Kelly v. Zamarello*, 486 P.2d 906, 918 (Alaska 1971)).

²⁹ *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, 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”).

³⁰ *King v. Alaska State Housing Auth.*, 633 P.2d 256, 263 (Alaska 1981).

³¹ *Cf., e.g., Global Positioning Serv., Inc., v. Dep’t of Nat. Res.*, OAH No. 12-0083-PRO at 14 (Commissioner of Administration 2013) available at <http://aws.state.ak.us/officeofadminhearings/Documents/PRO/PRO120083.pdf>; *King*, 633 P.2d at 263 (“in exchange for a bidder’s investment of the time and resources involved in bid preparation, a government agency must be held to an implied promise to consider bids honestly and fairly”).

³² SOA 502.

a criterion while awarding the other a “10” or a “1.” Irwin Hodson arrives at this conclusion from a strict reading of the explanation of the scores and a strict interpretation of the term “comparatively.”

In conducting the procurement, however, the procurement officer had a different interpretation of the RFP. In a written memorandum provided to the evaluators before they began their evaluation, the committee members were advised to award five points to a “neutral” proposal.³³ Consistent with these instructions, the evaluators did, in some cases, award 5 points to one while awarding 1 or 10 to the other.³⁴ Irwin Hodson asserts that starting with 5 points for a neutral proposal “is a different evaluation methodology than mandated in the RFP.”³⁵ In Irwin Hodson’s view, this means that the procurement evaluation was flawed and must be overturned. As explained below, Irwin Hodson is in error.

(1) The law does not require a strict interpretation of the methodology for awarding or tabulating numerical scores

Before addressing the actual interpretation of the scoring methodology, this decision will briefly address the requirement of fidelity to the RFP. As Irwin Hodson points out, under well-established procurement law, evaluators must judge proposals based only on the criteria specified in the RFP.³⁶ If an evaluator is using criteria unknown to the proposer, the proposer may never have the opportunity to show that it meets the criteria.

Here, however, the issue is not whether evaluators applied criteria outside the RFP. The issue is whether the evaluators used the correct methodology for awarding scores of 1, 5, or 10. In Irwin Hodson’s view, allowing a scoring methodology that is not described in the RFP would violate the rule requiring fidelity to the criteria in the RFP. Yet, the issue of scoring is different from the issue of evaluating only on the stated criteria—not understanding the methodology for scoring would not necessarily impede an offeror’s ability to address the criteria described in the RFP. The cases cited by Irwin Hodson do not address how to interpret the language in this RFP regarding the methodology for the awarding of points.³⁷ Accordingly, the division’s methodology

³³ SOA 851-52.

³⁴ SOA 385-86.

³⁵ Irwin Hodson Opening Brief at 41.

³⁶ See AS 36.30.250(a); 2 AAC 12.260(b) (“The evaluation must be based only on the evaluation factors set out in the request for proposals.”); see also *Nickerson*, 711 P.2d at 1169 (holding that failure to adopt evaluation criteria for significant factor in RFP was violation of procurement law).

³⁷ Although I agree with Irwin Hodson that fidelity to the RFP is important, the point here is that the cases cited by Irwin Hodson turn on the need for fidelity to the evaluation of listed criteria. Although the cases may imply (and I would agree) that fidelity to the approach for award of points is important, Irwin Hodson has not identified any cases that actually overturn a procurement based on a perceived lack of fidelity to the scoring methodology

for awarding points will be reviewed for whether it was a reasonable interpretation of the RFP, was applied consistently among the offers being scored, and was not anticompetitive or arbitrary. We turn next to that analysis.

(2) The division’s interpretation and application of the scoring methodology was consistent with the RFP

(a) The plain language and the example in the RFP do not support Irwin Hodson’s interpretation

As quoted above, the RFP includes a parenthetical explaining the difference between a score of “10,” “5,” and “1.” This parenthetical states that “with 10 representing the highest score, 5 representing the average score, and 1 representing the lowest score.”³⁸ If a reader were to impose a strict interpretation of the language in the parenthetical, the reader could conclude that with only two proposals, if the evaluator differentiates between them, there must be a highest rated proposal that can only receive 10 points and a lowest that can only receive one point.

The RFP, however, does not say that. It only says (in a parenthetical) what the numbers *represent*. It does not prohibit an evaluator from awarding 5 points to a proposal that the evaluator considers average (or middling) while awarding 10 points to an excellent proposal or one point to a deficient proposal. Therefore, Irwin Hodson’s argument based on the plain language of the RFP is not persuasive.

Moreover, the RFP includes an example of how points might be awarded. It shows that an evaluator who was scoring three proposals could award scores of “5s” and “10s” on a criterion, without ever awarding a score of “1” to any proposal.³⁹ Under Irwin Hodson’s strict interpretation that the RFP requires that the lowest ranking proposal receive a score of “1,” a ranking with only “5s” and “10s” on a criterion, with no “1,” would not be possible. In short, the example proves that Irwin Hodson’s interpretation is incorrect.

prescribed in the RFP. *See, e.g., Nickerson*, 711 P.2d at 1169 (admonishing that bidders must “know in advance what they have to do to satisfy the raters and how they are going to be graded” but holding that failure to adopt evaluation criteria for significant factor in RFP was violation of procurement law; no discussion of methodology for award of points); *Aetna Life Insurance v. Division of Gen. Serv.*, OAH No. 06-0230-PRO at 19 (Dep’t of Admin. 2006) (discussing whether PEC member “used an improper scoring method” but finding no evidence that the member did). In short, Irwin Hodson is correct that straying from the scoring methodology described in the RFP could be a concern. To the extent that Irwin Hodson is arguing that the cases require invalidation of the procurement whenever a PEC does not adhere to a strict interpretation of the scoring methodology, however, that argument is not persuasive.

³⁸ SOA 105.

³⁹ SOA 24.

(b) The term “average” means more than a strict arithmetic mean

Irwin Hodson’s argument is also flawed in how it interprets the term “average.” It implies that the “average” score must be an arithmetic mean between two or more data points. Of course, this is one possible meaning. A common dictionary does indeed include a definition of “average” that focuses on mathematical precision: “equaling an arithmetic mean.”⁴⁰ The same dictionary, however, also provides that the term can be used in a qualitative, rather than mathematically precise, fashion. For example, it also defines “average” to mean

- “something felt as representing an arithmetic average and hence typical of a group, class, or series”;⁴¹ and
- “approximating or resembling an arithmetic mean specif. in being about midway between extremes: not out of the ordinary for members of the group under consideration.”⁴²

Applying these definitions here, the division’s interpretation was consistent with the language in the RFP. The division interpreted the term “average” to mean that a proposal was “neutral”—that is, not out of the ordinary for the group of vendors that could be expected to submit proposals for license plate materials and services. Not only is this consistent with the qualitative definition of “average” it also consistent with common experience—similar to the grading used in a typical schoolroom, where a “C average” grade would connote a grade that is neither excellent nor deficient. There is no reason to interpret the term “average” in a statistical sense to mean an arithmetic mean of a set of data.

(c) Use of the comparative approach does not prohibit an evaluator from awarding five points for an average response

Irwin Hodson also argues that the RFP requires a “purely comparative approach,” which, in its view, requires a “1” and a “10” whenever the proposals are differentiable, rather than a “5” and a “1” or a “5” and “10.”⁴³ A commonsense interpretation of the requirement that proposals “will be rated comparatively against one another,” however, supports the division’s approach. A knowledgeable evaluator who understands what is expected of a vendor with regard to a particular criterion, and who is using judgment to compare two proposals, might conclude that one proposal is average (five points) while another is excellent (10 points) or deficient (one point). This

⁴⁰ Webster Third New Int’l Dict. at 150 (1986).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Irwin Hodson Reply Brief at 6.

approach is just as faithful to the requirement of a comparative approach as a strict requirement that the highest ranking receive 10 points while the lowest ranking receive 1 point. From a commonsense standpoint, it makes sense to give a satisfactory (but not exceptional) proposal five points. If the satisfactory proposal is merely average—neither deficient nor exceptional, but in comparison, not as good as the best proposal, the evaluator does not have to punish the average proposal by giving it the score for the deficient proposal. (Conversely, if the average proposal was better than the deficient proposal, but still was not excellent, the comparative approach would not require the evaluator to reward it by giving it the highest score.) Thus, calling one proposal average, and the other, in comparison, either excellent or deficient, is consistent with the RFP’s requirement that the evaluators use a comparative approach.

In sum, Irwin Hodson’s strict approach to the interpretation of the RFP scoring methodology is inaccurate and not consistent with either the RFP or common sense. The division’s approach, and its description of the scoring as starting with a neutral score of five, is consistent with the RFP. Therefore, Irwin Hodson has not proved that the division erred in its approach to scoring the proposals.⁴⁴

(3) Irwin Hodson was not prejudiced (in fact, it benefited) by the division’s approach

Finally, even if Irwin Hodson were correct, and the RFP must be strictly interpreted to require the PEC to use the ranking of “5” only when the proposals are equal (and, if the proposals are not equal, require that one be a “1” and the other be a “10”), Irwin Hodson was not prejudiced by the division’s approach. In fact, in each case where a “5” was awarded at the same time as either a “10” or “1,” Irwin Hodson benefitted. As Irwin Hodson concedes, “in general, for a protest to be sustained the protestor must demonstrate prejudice from the error.”⁴⁵

Irwin Hodson argues that it can prove prejudice. It posits that whenever a “5” was (in its view, wrongly) awarded in conjunction with either a “10” or a “1,” the reviewer must have judged that the two proposals were not sufficiently distinguishable to make one a “1” and the other a

⁴⁴ In its proposal for action, Irwin Hodson asserts that allowing the evaluators to award 1, 5, or 10 points for each criterion means that this decision does not require that the evaluation be based “solely on comparison between the two (proposals).” IHG Proposal for Action at 1. Yet, choosing from among three possible point awards is what the RFP allowed. In my experience, I have seen RFPs that did require a strict ranking, where evaluators would not have been allowed to choose from three possible point awards or award the same point total for a criterion to both proposals. That might be the strict comparative approach that Irwin Hodson is advocating to be the requirement here. Regardless of what might be considered the most comparative approach, however, the evaluators’ awarding of 1, 5, or 10 points was consistent with use of a comparative approach and Irwin Hodson has not proved otherwise.

⁴⁵ IHG Brief at 27 (citing *Data Transfer Solutions, LLC v. Department of Transportation & Public Facilities*, OAH No. 15-1545-PRO at 25).

“10.” The only possible interpretation of this act, it argues, is that the reviewer really meant that the two were relatively equal. Thus, it concludes, both proposals must be ranked as “5s” on the particular criterion.

In fact, however, the award of “5” for one proposal and “10” for the other clearly shows that the reviewer had concluded that one proposal was better than the other. If we were to impose the strict interpretation of the comparative approach advocated by Irwin Hodson, this would mean that we must award the rank of “1” for the lower proposal and “10” for the better proposal (without regard to whether the review actually considered the lower ranked proposal to be satisfactory). Similarly, where one proposal received a rank of “1,” and the other a rank of “5,” the reviewer clearly regarded one proposal more highly than the other. Under Irwin Hodson’s argument, the correct approach would be to stretch the “5” into a “10.”

In every instance of an award of a “5” for one and a “10” or a “1” for the other, however, Irwin Hodson’s proposal was the proposal that received the lower score. That means that if this decision were to adopt Irwin Hodson’s interpretation, either Irwin Hodson would lose points (because its “5s” would be reduced to “1s” where Intellectual Technology had “10s”) or Intellectual Technology would gain points (because its “5s” would be increased to “10s” where Irwin Hodson had “1s.” Because the total points for each criterion are determined by multiplying the points available for the criterion times a fraction (determined by the ranking points awarded divided by the total possible ranking points), Intellectual Technology would gain substantial points under Irwin Hodson’s approach. Thus, Irwin Hodson was not prejudiced by the division’s interpretation of the scoring methodology in the RFP. This provides an additional reason to reject Irwin Hodson’s argument that the procurement should be invalidated based on the division’s approach to the scoring methodology.

C. Did the evaluators err in the evaluation of the proposals?

In addition to its argument regarding the interpretation and application of the scoring methodology, Irwin Hodson also asserts that the evaluators’ decisions “were arbitrary, unreasonable, and unsupported by objective evidence.”⁴⁶ If Irwin Hodson can prove this allegation, its protest would be sustained.

Irwin Hodson cites to four specific instances where, in its view, the evaluators’ decisions were not reasonable:

⁴⁶ Irwin Hodson Brief at 49.

- The award of a 1 to IHG for Section 5.08, Subcontractors was based on the Evaluators' failure to recognize that the registration tab vendor would not be considered a subcontractor to IHG and is a supplier of tabs similar to any other supplier such as the envelope supplier, box supplier, etc. There is no basis to score IHG as a 1 for this qualification criteria when compared to ITI's subcontractor plan.
- The Evaluators downgraded IHG's proposal based on its proposed schedule, when ITI's schedule provided for longer lead times than IHG's. That is arbitrary and baseless and prejudiced IHG. IHG, given its ability to immediately produce license plates, and its shorter time from implementing its registration tab production, should have been scored higher than ITI on Section 5.07.
- The Evaluators made significant and material factual mistakes in evaluating IHG in relation to Section 5.04, Experience and Qualifications, including by ignoring IHG's letters of recommendation and references while placing undue weight on ITI's references.
- The Evaluators on multiple occasions applied inconsistent methodology to IHG and ITI in relation to the same RFP qualification questions. Their comments reveal that they applied an ad-hoc, undisclosed, and unequal scoring methodology as opposed to the comparative approach mandated by the RFP.⁴⁷

Before tackling the substance of Irwin Hodson's argument, however, this decision must explain how the issue will be analyzed. This requires an explanation of the standard of review and of what is evidence and what is not.

(1) What is the standard of review for analyzing the evaluator's decisions?

In general, although the decisionmaker in an administrative appeal is not required to defer to the decisions made by the commissioner's staff, in procurement cases, in the absence of "any favoritism or lack of commitment to the principles of even-handed and fair procurement," a decisionmaker will give "due deference" to the decisions made in the procurement process.⁴⁸ When reviewing the points awarded by a proposal evaluation committee staffed by professionals with knowledge of the agency's needs, if deference is warranted, the decisionmaker will review the record to determine whether the evaluation was reasonable. In determining whether an evaluation is reasonable, the question to be determined is "whether the . . . record discloses the basis for the evaluators' ratings and adequately demonstrates that they considered all of the

⁴⁷ Irwin Hodson Brief at 50.

⁴⁸ *Lakloey v. Dep't of Trans. and Pub. Fac.*, OAH No. 19-0084-PRO (Dep't of Trans. and Pub. Fac. 2019), available at <https://aws.state.ak.us/OAH/Decision/Display?rec=6626>.

important factors [as identified in the request for proposals].”⁴⁹ An evaluation is reasonable if “the objective facts . . . reasonably support [the] evaluations.”⁵⁰

Here, because the evidence does not indicate that the procurement process was flawed, I will affirm the committee’s decision if objective facts reasonably support its evaluation. This is a deferential standard, and reflects the strong policy that a three-person team, with knowledge of the division’s needs, and that was isolated from being influenced by knowledge of the price factor, is a superior approach to an objective and fair procurement. I will apply independent judgment, however, when reviewing the record for objective facts, and determining whether those objective facts reasonably support the decision.

This brings us to the issue of what it means to refer to “objective facts.” Here, we have not had an evidentiary hearing to explore and explain the record and the committee’s decisionmaking process. The only objective facts that I have to evaluate are the statements in the proposals and the evaluators’ comments. This limitation gives rise to issues that will be important in the appellate process.

First, the arguments made by the parties are not “facts.” Where a party has attempted to explain a particular fact or statement in the record by providing background facts in their briefs or a protest, I cannot accept those explanations as accurate or rely on them as facts in my decision.

Second, the evaluators were not required to review the proposals in a vacuum. They were allowed to rely also on their expertise, knowledge of the industry, and personal experience.⁵¹ Yet, because there has been no evidentiary hearing, I do not know what the committee members knew. Nor have I have been given a basic understanding of the industry other than what I have read in the proposals. Therefore, when I am asked to draw an inference from the evidence regarding whether a committee member’s decision was either reasonable or not reasonable, I will not have a context to draw upon to make the inference either more or less likely.

⁴⁹ *Mikunda, Cottrell & Co., Inc. v. Dep’t of Health and Soc. Servs.*, OAH No. 07-618-PRO at 8 (Dep’t of Admin. 2008) (quoting *In re World Wide Movers, Inc.*, No. 97-004 at 10 (Dep’t of Admin. 1997) (citations omitted)); available at <https://aws.state.ak.us/OAH/Decision/Display?rec=4736>.

⁵⁰ *Id.* (quoting *King v. Alaska State Housing Authority*, 512 P.2d 887, 894 (Alaska 1973)).

⁵¹ *Empyra.com v. Alaska Permanent Fund Corporation*, OAH No. 06-0520-PRO at 8 (Alaska Permanent Fund Corporation 2006) (“[i]n general, an evaluator’s prior knowledge of the past performance of an incumbent contractor, good or bad, is not grounds for disqualification.”) 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.”).

To be clear, this does not mean that I will speculate about what the committee members knew or did not know. Indeed, the absence of an evidentiary hearing cuts both ways. The point here, however, is that the party attacking the decision has the burden of proof. There will be times when I could infer that the objective evidence in the record might not support the decision but I could also infer that it does. Knowing that the committee members could rely on their expertise and knowledge of the industry, having no objective facts as to that expertise and knowledge limits my ability to draw *any* inferences and thus limits my ability to conclude that the preponderance of the evidence supports reversing the decision.

With these limitations in mind, we turn next to the arguments raised by Irwin Hodson.

(2) Does objective evidence support the committee’s decision to award Irwin Hodson one point for Section 5.08, subcontractors?

All three evaluators gave Irwin Hodson a “1” score for Section 5.08. This section asked about the proposer’s subcontractors. All three evaluators noted in their comments that although Irwin Hodson’s proposal had described that it had contracted with two firms, it listed only one vendor, i3-BIS, on the form in the proposal that required disclosure of subcontractors.⁵² Irwin Hodson concludes that the omission of its second vendor was a primary reason for its score of only one point on Section 5.08. This, it asserts, is proof of error.

(a) The evaluators could reasonably have concluded that Irwin Hodson should have included the supplier of tabs in the list of subcontractors

Irwin Hodson argues that the evaluators all erred by assuming that the omitted vendor was a subcontractor. In its view, that vendor was merely a “supplier of tabs.”⁵³ It explains that this vendor is “similar to any other supplier such as the envelope supplier, box supplier, etc.”⁵⁴ It argues that “[t]he distinction between a supplier and a subcontractor is that a supplier provides goods only, whereas a subcontractor provides goods and services.”⁵⁵ It concludes that because it had no obligation to include a supplier in the list submitted under Section 5.08, it was “arbitrary and unreasonable” for the evaluators to assign a score of “1” to Irwin Hodson for Section 5.08.

The analysis of this argument begins by noting that the assertions made by Irwin Hodson in its protest and brief regarding the vendor in question are not facts. The only facts regarding the

⁵² SOA 353 (EV1), 364 (EV3), 376 (EV2).

⁵³ SOA 790. Note that this cite is to an argument made by Irwin Hodson in its protest. Although the protest is included in the record, the assertions in the protest are argument, not facts.

⁵⁴ Irwin Hodson Opening Brief at 50.

⁵⁵ SOA 790.

omitted vendor are the statements in Irwin Hodson’s proposal. Moreover, the question here is not whether Irwin Hodson’s proposed supplier of tabs was providing services or otherwise meets the definition of a subcontractor.⁵⁶ The question here is whether a knowledgeable evaluator could reasonably award Irwin Hodson a “1” for the section on subcontractors. This analysis includes the issue of whether an evaluator could reasonably conclude that the omitted vendor should have been included as a subcontractor. It also includes analysis of whether the evaluators could reasonably have had doubts regarding the included subcontractor, i3-BIS.

With regard to the evaluators’ concern that the Irwin Hodson proposal failed to identify as a subcontractor the firm that would be manufacturing the registration tabs, Irwin Hodson’s proposal repeatedly emphasized that it had reach agreement with this vendor, and that this agreement would be an important element in its ability to provide the deliverables required under the RFP.⁵⁷ Irwin Hodson’s proposal refers to the firm as a “manufacturer” of registration tabs: “The additional registration tab products, as specified in the RFP, will continue to be manufactured by the current Alaska registration tab vendor at their manufacturing facility in Angola, Indiana.”⁵⁸ It describes that the deliverable of pre-printed registration tabs will be “provide[d] via the current registration tab vendor.”⁵⁹ It emphasizes the advantages of having the design and quality of the tabs “pre-approved.”⁶⁰

⁵⁶ Neither the RFP nor the Procurement Code define the term “subcontractor.” Although Irwin Hodson asserts that a vendor of supplies cannot be a subcontractor, the parties have not provided any legal analysis to determine what the RFP meant when it used the term “subcontractor.” My cursory research has revealed some authority, however, for concluding that in some circumstances an entity that contracts to fulfill a deliverable might be considered a subcontractor. *See, e.g., James v. Alaska Frontier Constructors, Inc.*, 468 P.3d 711, 720–21 (Alaska 2020) (noting (in worker’s compensation context) that “to determine whether Alaska Frontier was a subcontractor, evidence would have to establish exactly what part of the main contract Alaska Frontier was required to carry out”); *see also, e.g., Subcontractor*, Black’s Law Dictionary (11th ed. 2019) (defining “subcontractor” to mean “[s]omeone who is awarded a portion of an existing contract by a contractor”; *Subcontract*, Black’s Law Dictionary (11th ed. 2019) (defining “subcontract” as “[a] secondary contract made by a party to the primary contract for carrying out the primary contract, or a part of it”). This does not mean that Irwin Hodson is incorrect that a mere vendor of supplies is not a subcontractor in some circumstances—*cf., e.g., AS 23.30.045(f)(1)* (defining (in worker’s compensation) “contractor” as someone “who undertakes by contract performance of certain work for another but does not include a vendor whose primary business is the sale or leasing of tools, equipment, other goods, or property”). Ultimately, the point here is not whether Irwin Hodson is correct as a factual and legal matter that its tab supplier, R.R. Donnelly, was not a subcontractor. The point here is simply whether the evaluators’ conclusion that R.R. Donnelly was a subcontractor is supported by objective evidence in the record. As explained in this section, this decision finds that even if the evaluators erred in this conclusion, their conclusion was reasonable based on the importance that Irwin Hodson’s proposal placed on R.R. Donnelly’s agreement to provide the tabs.

⁵⁷ SOA 589, 600, 601, 603-04.

⁵⁸ SOA 600.

⁵⁹ SOA 601.

⁶⁰ SOA 603.

Although Irwin Hodson argues that its purchase of these tabs is no different from its purchase of its other internal supplies such as envelopes or boxes, this is not accurate. Those supplies are not deliverables under the contract. The tabs must be configured specifically to meet the division's needs as approved by the division.⁶¹ Irwin Hodson did not mention other suppliers in its proposal, or emphasize that its agreements with those suppliers were important in meeting the requirements of the RFP. Because the tabs are a deliverable under the contract, Irwin Hodson's proposal should either have included the manufacturer of the tabs as a subcontractor or explained why that manufacturer did not need to be listed. By not doing so, Irwin Hodson took the risk that the evaluators would consider the omission of the tab manufacturer important. Therefore, on this record, the evaluators' decision to give a lower score to Irwin Hodson for Section 5.08 based in part on the omission of the tab supplier is supported by objective evidence.

(b) The evaluators' assessment of Irwin Hodson's subcontractor is supported by objective evidence in the record.

Two of the evaluators also noted in their comments under Section 5.08 that they had concerns about Irwin Hodson's acknowledged subcontractor, i3-BIS.⁶² One of the evaluators also noted concerns about i3-BIS under Section 5.01, which asked about the experience of the proposer.⁶³ Irwin Hodson argues that these expressions of concern prove error:

the PEC ignored copious details IHG provided about its actual subcontractor, i3-BIS. Many of the evaluators' responses reflected an objective misreading of IHG's submission. For example, Evaluator 2 responded that "i3-BIS is listed, page 3 of the proposal speaks to their two years' experience in software, printing and mailing experience." And Evaluator 1 accused i3-BIS of a general "lack of experience." But IHG's Submittal Form B explained how i3-BIS had over *40 years* of experience, providing software, technology, and data processing services to government.

Indeed Evaluator 1's comments can be read as expressing bias against i3-BIS. Evaluator 1 characterized i3-BIS as "too big of a generic company." Not only does i3-BIS's extensive relevant experience distinguish itself as anything but generic, its size is neither relevant nor harmful to the services it would provide on IHG's bid.⁶⁴

With regard to the evaluators' concern that Irwin Hodson's proposal did not demonstrate adequate experience, the problem for Irwin Hodson is that although it is a long-time manufacturer

⁶¹ SOA 89-91.

⁶² SOA 353 (Evaluator 1); SOA 376 (Evaluator 2).

⁶³ SOA 351 (Evaluator 1).

⁶⁴ Irwin Hodson Reply at 16.

of license plates, objective evidence supports a conclusion that its teaming with i3-BIS to provide all services and supplies for the state's license plate and registration requirements is new. Irwin Hodson's proposal describes i3-BIS as a Tennessee software and technology company that has experience in meeting at least some of Tennessee's registration needs.⁶⁵ Based on this record, this limited, single-state experience is grounds for evaluators to express concern about experience.

Further, although the proposal touts that Irwin Hodson and i3-BIS have teamed to meet Indiana's license and registration needs, the proposal actually references what the team *will* accomplish, not what it has accomplished.⁶⁶ What a team will do in the future does not count toward experience. Finally, while the response asserts that i3-BIS's "expertise is directly transferrable" to the tasks described in the RFP, sometimes expertise does not transfer from one field to another as seamlessly as one might hope or expect.⁶⁷ The evaluators could reasonably be concerned that a software company might not be proficient at meeting the registration needs of the division and might not prioritize the customer care tasks it would be asked to perform. The response's reliance on a transfer of experience rather than actual experience is grounds for giving the evaluators less confidence. In short, the objective facts regarding i3-BIS support the evaluators' scores on the experience and subcontractor criteria. Accordingly, Irwin Hodson's protest of the score for Section 5.08 is rejected.

(3) Did the evaluators apply disparate standards to the evaluation of the proposals' proposed timelines for delivery of deliverables?

Both proposals offered proposed timelines for supplying the deliverables required under the RFP. For most products, the timelines proposed by Irwin Hodson were shorter, or the same, as the timelines proposed by Intellectual Technology. Yet, all three evaluators made comments under three criteria that indicated that they gave lower scores to Irwin Hodson in part because they considered Irwin Hodson's proposed timeline to be less advantageous than Intellectual Technology's.

Irwin Hodson argues on appeal that giving Intellectual Technology better marks for its less advantageous timeline is proof that the evaluators applied disparate standards to their evaluations. Accordingly, it asks that the evaluations be rejected as unfair and unequal.

⁶⁵ SOA 595.

⁶⁶ SOA 595 ("IHG and i3-BIS have successfully partnered in the State of Indiana offering similar products and services to what is required in this RFP. Within the IHG Indiana facility, i3-BIS has a full-scale operation where they will print approximately 7.4 million registration forms and tabs annually for the Indiana Bureau of Motor Vehicles.").

⁶⁷ *Id.*

(a) The RFP’s approach to timelines

Three sections of the RFP included a question relating to a proposer’s time schedule for delivery. Section 5.05 (Understanding) included a question that asked “[h]as the offeror demonstrated an understanding of the state's time schedule and can meet it?”⁶⁸ Section 5.06 (Methodology) included a question that asked, “[d]oes the methodology interface with the time schedule in the RFP?”⁶⁹ Section 5.07 (Management) included a question that asked, “[d]oes it appear that the offeror can meet the schedule set out in the RFP?”⁷⁰

Each of these criteria, however, included several other questions that the evaluators were to consider. These questions probed many aspects of the proposal’s understanding, methodology, and management. The timeline question was only one of several questions that the evaluators were asked to consider for each criterion.⁷¹

Moreover, the RFP did not set out a specific schedule for most of the deliverables. It set May 1st as a date for entering into a contract. It also required that the contractor be able to accept registration renewal data from the division “within 60 days of contract signing.”⁷² Other than that, it did not require a due date—it merely advised the proposers that their proposed schedule would be evaluated as one consideration of many regarding their understanding, methodology, and management of the project.

(b) Intellectual Technology’s proposed timelines

Intellectual Technology’s proposal addressed the 60-day deadline for transfer of the registration file as follows: “ITI understands that the DMV is requiring the offeror to conduct the file transfer for registration documents and tabs without plates that are conducted online within 60 days of contract signing.”⁷³ It stated that it is currently performing this service for the division as a subcontractor and that it has always met the two-day turnaround requirement for mailing “online renewals.”⁷⁴ With regard to its general timeline for supplying deliverables, Intellectual Technology stated the following:

At a project overview, ITI is projecting the following milestone timelines to implement the Registration Tabs and License Plates solution. All

⁶⁸ SOA 25.

⁶⁹ SOA 25.

⁷⁰ SOA 26.

⁷¹ SOA 25-26. The RFP included four questions under Understanding, three under Methodology, and nine under Management.

⁷² SOA 95

⁷³ SOA 648.

⁷⁴ *Id.*

timelines are taken from the RFPs projected contract issued date of May 1, 2022.

- **0 days:** implementation of vehicle and snowmachine registration renewals
- **120 days:** implementation of central fulfillment for boat and snowmachine tabs
- **180 days:** implementation of personalized plates with registration, mailed directly to the customer
- **180 days:** implementation for printing and fulfilling bulk DMV office stocked plates

ITI is confident in our ability to meet the timelines dictated by this RFP.⁷⁵

(c) Irwin Hodson’s proposed timelines

Irwin Hodson’s proposal first addressed timelines with the following caution: “Per Section 1.11, RFP Schedule, it is the desire of the State to have a contract issued by May 1, 2022, approximately two (2) months from the intent to award. Given the current economic situation and global supply chain issues, it would be virtually impossible for any vendor to be ready to provide the deliverables as required under this RFP by May 1, 2022.”⁷⁶ It noted that “[c]urrent industry lead times for raw materials can range anywhere from 12-14+ weeks.”⁷⁷

The proposal then gave an overview of the stock and tooling required for license plate production. It stated that with its inventory and tooling set up, “[f]or the May 1st new contract start, IHG will be able to continue to provide Alaska with a steady supply of license plates.”⁷⁸ With regard to paper products, Irwin Hodson affirmed that it had enough specialized envelopes to “mail Alaska’s personalized/specialty plates without any disruption.” For registration documents and tabs for direct mailing, the proposal noted that Irwin Hodson and its subcontractor would need 60 days for set up and approval. For tabs only, it would be relying on the product provided by the current vendor, but it would still seek approval. For both deliverables, the proposal advised that “the current lead time for these products is 12-14 weeks” following approval.⁷⁹

The proposal summed up the proposed timelines as follows:

Realistically, within the current global supply chain, the timeline for IHG to be able to provide all deliverables under this new contract would be approximately 14 weeks following Alaska DMV sign off and approval of all samples.

⁷⁵ SOA 657.

⁷⁶ SOA 600.

⁷⁷ SOA 600.

⁷⁸ SOA 601.

⁷⁹ SOA 601.

As a friend of the state for more than 60 years, IHG recommends that the DMV place immediate orders with the current vendors for a minimum of six (6) months' worth of supply of license plates and registration tabs. Given the current lead times, this will allow the state to remain whole while transitioning into a new contract period.⁸⁰

In summary, although Irwin Hodson's response is not completely clear as to its schedule for supplying deliverables, it appears that Irwin Hodson would be able to deliver at least some license plates immediately and all products within about 14 weeks. Intellectual Technology did not promise delivery of license plates until 180 days—almost 26 weeks—after signing. Therefore, Irwin Hodson proposed a shorter ramp-up and delivery time.

Yet, as Irwin Hodson notes, each evaluator made notes in their comments that were critical of Irwin Hodson's approach to timelines.⁸¹ In contrast, the evaluators' notes were less critical of Intellectual Technology's proposed timelines.⁸²

I agree with Irwin Hodson that evaluators must apply the same standards to each proposal under evaluation. Giving one proposer a free ride while docking another for an identical or superior proposal on a criterion would be unfair.⁸³ If the RFP had a criterion based solely on the length of time for delivery, Irwin Hodson should have received the better score on that criterion.

⁸⁰ SOA 602. The discussion and schedule described above was included in Irwin Hodson's answer under Section 5.05 (Understanding). The proposal also addressed the schedule when addressing Section 5.06 (Methodology). This answer advised that

Given the current global supply chain, IHG will require additional time past the May 1st contract signing date to supply all deliverables required under this solicitation. Despite the proposed methodology being the same as it is today, the lead times to acquire raw materials are at historically extended timelines ranging anywhere from 12-14+weeks for fulfillment plus subsequent delivery.

Unfortunately, IHG cannot place an order with the raw material vendors until the official contract with the State is signed, and approvals have been obtained on all samples. Immediately upon sample sign off and approval, IHG will have purchase orders ready to send to each one of the respective vendors of the material required to fulfill the deliverables.

SOA 607. The proposal then cross-referenced its answer to Section 5.05 (Understanding).

⁸¹ SOA 352-53; 359-62; 372-74. The content of the evaluator's comments is discussed below.

⁸² See generally SOA 356-57; 366-69; 378-81; but see also SOA 357 (EV 1 expressing "concern" about Intellectual Technology's timeline for personalized plates); SOA 381 (EV 2 noting that Intellectual Property will not meet the schedule for personalized plates).

⁸³ See, e.g., *Matter of: Weston-Er Fed. Servs., LLC*, B-418509 (June 1, 2020) ("where an agency treats offerors unequally by, for example, reading some proposals in an expansive manner and resolving doubt in favor of the offeror, while reading other proposals narrowly and applying a more exacting standard that requires affirmative representations within the four corners of the proposal, we have found such evaluations to involve disparate treatment.").

(d) Irwin Hodson has not proved that any evaluator applied a disparate standard or awarded disparate scores for timelines

As stated above, Irwin Hodson promised delivery of product—especially license plates—sooner than Intellectual Property. If date of first delivery of license plates was the focus of a criterion in the RFP, then Irwin Hodson should have received the higher score on that criterion.

A fair reading of the RFP, however, is that the division wished to contract with one entity to avoid the problems associated with its former practice of having contracts “with multiple vendors to provide supplies and services for the goods and services related to registration tabs and license plates.”⁸⁴ It was seeking offers that would provide “a modernized and streamlined process for issuing vehicle license plates and registration tabs” and “promote efficiencies among the network of field offices, business partners and commission agents.”⁸⁵ It wanted to “minimize overhead and inventory for the DMV.”⁸⁶

Given these goals, an evaluation of a proposer’s schedule, as it relates to the proposer’s understanding, management, and methodology, would not necessarily focus on how soon the proposer would be able to supply product. The pertinent issue with respect to the offeror’s timeline could be when the integrated entity would provide greater efficiency with lower inventory and overhead for the division. An evaluator was not required to reward an offeror who would supply product under the old system, but who was vague about making changes for the long term, even if that offeror could generate supply more quickly than an offeror who was implementing the changes sought by the RFP.

In this regard, at least two of the evaluators’ observations and scores would not support an inference that they applied a disparate standard. Evaluator 1’s and Evaluator 3’s comments are consistent with a concern regarding the timeline for transitioning to the new approach, rather than a timeline for first delivery of product. For example, Evaluator 1 noted that Irwin Hodson expressed “an overall negative tone to DMV’s vision.”⁸⁷ The evaluator was concerned that Irwin Hodson didn’t “seem to understand DMV’s” focus on “new, modernized, creative, streamlined solutions.” With regard to understanding of timelines, the evaluator acknowledged that Irwin Hodson “[c]an meet plate needs on Day 1.”⁸⁸ Yet, Evaluator 1 emphasized that Irwin Hodson

⁸⁴ SOA 7.

⁸⁵ SOA 8.

⁸⁶ *Id.*

⁸⁷ SOA 351.

⁸⁸ SOA 352.

“thinks the timeline is impossible” and that it “doesn’t sound like” Irwin Hodson understood and could meet the schedule.⁸⁹

With regard to how well Irwin Hodson’s methodology “interface[d] with the time schedule in the RFP,” Evaluator 1 commented that “[i]t doesn’t seem so,” noting that “[t]hey have inconsistent times throughout the RFP.”⁹⁰ Under a similar question for management, Evaluator 1 noted that Irwin Hodson “expressed many concerns over the schedule.”⁹¹

Evaluator 1’s observation of a negative tone in Irwin Hodson’s proposal is supported by objective evidence in the record. Irwin Hodson’s proposal is critical of what it characterizes as the division’s “substantial deviation from the current approach.”⁹² It instructs the division that the RFP “really should be two separate bids.”⁹³ Further, the proposal admonishes the division that “it would be virtually impossible for any vendor to be ready to provide the deliverables as required under this RFP by May 1, 2022.”⁹⁴ Given that the RFP did not require deliverables under the new system by May 1, 2022, objective evidence supports Evaluator 1’s decision to award Irwin Hodson only five points on section 5.05, Understanding. Further, Evaluator 1’s concerns about Irwin Hodson’s methodology and management regarding timeliness are also supported by objective evidence in the record. Although Evaluator 1 was able to discern that Irwin Hodson could supply plates on day one, Irwin Hodson also frequently advised that the format of the RFP, and issues with the global supply chain, could affect its schedule.⁹⁵ Objective evidence supports a concern regarding Irwin Hodson’s schedule for implementing the division’s vision for a new streamlined process.

Evaluator 3 was also critical of Irwin Hodson’s approach to timelines. For example, in Section 5.06, Methodology, under question (3), which asked, “Does the methodology interface with the time schedule in the RFP?,” Evaluator 3 noted as follows:

Evaluator Notes: No, they have mixed messaging about the orders and shipping.

a. The think the first order will be place as soon as the contract is signed and say that is not enough time.

⁸⁹ SOA 352.

⁹⁰ SOA 352.

⁹¹ SOA 353.

⁹² SOA 599.

⁹³ *Id.*; see also, e.g., SOA 589.

⁹⁴ SOA 600. SOA 602.

⁹⁵ SOA 589, 599-602.

- b. They talk about 12-14 weeks then elsewhere they say 14 weeks then they say 12-14+ weeks.
- c. They then say we need to order a 6-month supply of plates and 12-month supply of tabs.
- d. This is inconsistent messaging. These varying turnaround times and suggestions that DMV order large quantities makes it unclear as to whether they would be able to meet our needs or even hold to terms negotiated should they be awarded the contract.⁹⁶

These concerns are supported by objective evidence in the record. Irwin Hodson's proposal does, indeed, (1) promise license plates on day one; (2) suggest that supply chain issues will cause delays of up to 14+ weeks; and (3) recommend that the division immediately order six-months' worth of supply. A reasonable person could be confused and concerned by this approach.⁹⁷

With regard to evaluation of Intellectual Technology's timelines, Evaluator 1 made three comments. In Section 5.05, Understanding, in response to the question, "[h]as the offeror demonstrated an understanding of the state's time schedule and can meet it?," Evaluator 1 commented, "Full fulfilment of renewals will be excellent."⁹⁸ In section 5.06, Methodology, in response to the question, "Does the methodology interface with the time schedule in the RFP?," Evaluator 1 commented, "Yes, 2 days for tabs, weekly for plates (allows us to review no-no plates)."⁹⁹ In section 5.07, Management, in response to the question, "Does it appear that the offeror can meet the schedule set out in the RFP?," Evaluator 1 commented, "[c]oncerning timeline for personalized plates but that could be worked with."¹⁰⁰ Evaluator 3 had only one comment regarding Intellectual Technology's timeline. Under Section 5.05, Understanding, in response to the question, "Has the offeror demonstrated an understanding of the state's time schedule and can meet it?," Evaluator 3 commented, "yes and yes."¹⁰¹

Although these two evaluators had relatively few comments regarding Intellectual Technology's schedule, they both commented extensively under all three criteria (Understanding,

⁹⁶ SOA 361. This evaluator repeated these same comments in answer to the question "4) Has the offeror demonstrated an understanding of the state's time schedule and can meet it?" in Section 5.05. SOA 359.

⁹⁷ Although I understand Irwin Hodson's argument that its suggestion that the division immediately place an order with the current vendors for six month's worth of supply was merely a "friendly recommendation," see Irwin Hodson Reply Brief at 13, I can also understand Evaluator 3's concern that this admonition creates uncertainty about how well Irwin Hodson can perform under the system. SOA 360.

⁹⁸ SOA 356.

⁹⁹ SOA 356.

¹⁰⁰ SOA 357.

¹⁰¹ SOA 367.

Methodology, and Management) regarding Intellectual Technology's "innovative solutions."¹⁰² They support their observations with examples drawn from Intellectual Technology's proposal.¹⁰³

Here, Irwin Hodson has asked that I draw an inference that Evaluator 1's and Evaluator 3's scores for Understanding, Methodology, and Management were based on application of a disparate standard. In its view, the evaluators applied a more rigorous standard for evaluation of timelines to Irwin Hodson than they did to Intellectual Technology. Without testimony, of course, we do not know why these two evaluators scored the proposals as they did. We can only make inferences from their comments in the record.

The evidence in this record does not support an inference that they applied a disparate standard with regard to timelines. Although we will not speculate regarding precisely what was on their minds, the evidence is consistent with an approach that, when considering timelines, emphasized the timeline for transition to the division's new system for a streamlined approach rather than the timeline for first delivery of product. Further, as discussed below, when awarding points for understanding, methodology, and management, concerns other than timelines, especially the issue of innovation, were important considerations in the score. The evidence supports an inference that the evaluators applied equal standards on these criteria.

Analysis of Evaluator 2's comments, however, presents a closer question. Evaluator 2's comments imply that when evaluating Irwin Hodson, Evaluator 2 was concerned about the time of delivery. For example, in Section 5.05, under Understanding, in response to the question, "Has the offeror demonstrated an understanding of the state's time schedule and can meet it?", Evaluator 2 commented "Lead time is currently ranging 12-14+ weeks for raw material making the May 1st deadline impossible to meet."¹⁰⁴ This implies that Evaluator 2 considered the May 1st contract signing date a deadline for delivery. If so, and if Evaluator 2 was concerned about time of delivery (rather than time for implementing a new streamlined approach), we would expect Evaluator 2 to be even harsher when evaluating Intellectual Technology because Intellectual Technology's first delivery would be much later than Irwin Hodson's.

Yet, in response to the same question regarding Intellectual Technology's understanding of timelines, Evaluator 2 commented that "yes, they have clearly defined their understanding of the time schedule. They have addressed challenges that may arise in meeting these deadlines as

¹⁰² SOA 355-57; 365-69.

¹⁰³ *Id.*

¹⁰⁴ SOA 372

well as presented solutions and other options to help prevent delays (pages 6-8).”¹⁰⁵ Again, if Evaluator 2 was applying the same standard of needing to meet a May 1 delivery date that the evaluator appeared to apply to Irwin Hodson, we would expect a much different comment. Thus, for this evaluator, the evidence could support an inference of application of a disparate standard.

Finding support for an inference, however, is not the same as proving that inference by a preponderance of the evidence. The problem for Irwin Hodson here is that other inferences are possible. The evidence shows that Evaluator 2’s comments reflect the approach taken by the offeror. The two proposals take very different approaches to the issue of timelines. Although we will not speculate on what Evaluator 2 was actually thinking, one could infer that Evaluator 2 was evaluating the proposals on their own terms. To the extent the evaluations are disparate, it would be because the approaches are disparate. Irwin Hodson approaches the questions on timelines as if RFP was asking about a May 1 delivery date. Intellectual Technology approaches the question differently, looking at time for full implementation of a system of delivery that would accommodate the division’s concerns about inventory and innovation. If this inference is correct, and Evaluator 2 was evaluating the proposals at face value, then Evaluator 2’s approach would not be unfair to Irwin Hodson.¹⁰⁶

In short, an inference that Evaluator 2 applied disparate standards is plausible. An inference of a fair evaluation based the offeror’s own approach is just as plausible. Accordingly, Irwin Hodson has not met its burden of proof.

Moreover, even if Irwin Hodson had proved that Evaluator 2 erred by applying a different standard with regard to the issue of time of delivery, Irwin Hodson still would not have proved that this was a material factor in Evaluator 2’s award of scores for understanding, methodology, and management. As explained next, Evaluator 2, like the other two evaluators, had a strong focus on transitioning to a new regime when evaluating understanding, methodology, and management.

¹⁰⁵ SOA 378.

¹⁰⁶ In its Proposal for Action, Irwin Hodson quotes this decision’s analysis of Evaluator 2’s approach and the conclusion that the evidence does not prove a disparate standard because Evaluator 2 may have been evaluating each proposal on its own terms. IHG Proposal for Action at 3-4. Irwin Hodson argues that evaluating the proposals on their own terms means that Evaluator 2 could not have been following the “comparative evaluation approach described by the RFP.” *Id.* at 4. I do not agree. Evaluator 2 could have been comparing the two on their own terms, and found Intellectual Technology’s approach to be better than the terms of Irwin Hodson’s proposal. Thus, comparing the two, on their own terms, is certainly possible, and may have been what Evaluator 2 did. (To be clear, this decision does not find that Evaluator 2 did evaluate the proposals on their own terms. This decision simply holds that Irwin Hodson did not prove that Evaluator 2 applied a disparate standard.)

(e) **Irwin Hodson has not proved that the evaluators' scores for Understanding, Methodology, and Management were based on time of delivery**

Above, this decision has shown that the evidence supports an inference that at least two of the evaluators approached the issue of timelines with regard to how soon the offeror proposed to implement a system that addressed the division's need for innovation and streamlining. Even more important to rejecting Irwin Hodson's argument, however, is that the three criteria of the RFP at issue asked about the proposer's understanding, management, and methodology for implementation of the system sought by the RFP. The timeline was merely one of many ubissues under those criteria. None of the criterion was based on the schedule for first delivery of product.

As stated above, the comments made by all three evaluators for each of the three criteria for both Irwin Hodson and Intellectual Technology demonstrate that the evaluators were concerned about many aspects of understanding, management, and methodology. For example, all three evaluators expressed concern that Irwin Hodson's proposal was not innovative. Evaluator 1 said of Irwin Hodson's proposal that "It's not modernized or streamlined and they don't give any indication that they are capable of thinking that way in the future."¹⁰⁷ Evaluator 2 noted that "The proposal is for the current process. There is no mention of any other options to streamline the process creating efficiencies minimizing overhead and inventory for DMV."¹⁰⁸ Evaluator 3 said of Irwin Hodson, "this contractor is proposing to keep things as is, did not offer any innovative solutions, does not agree with our wants to streamline and innovate."¹⁰⁹

In contrast, the evaluators were impressed with Intellectual Technology's approach to innovation. For example, Evaluator 1 commented that "[t]hey are open to flexibility/adaptation over time to constantly streamline. The reporting and automation would be very helpful and increase efficiencies in ordering. They came with ideas that we didn't even think of."¹¹⁰ Evaluator 2 said of Intellectual Technology that "the proposal offered multiple solutions and abilities to modernize and streamline the current process. They explored print-on-demand, direct shipping, and the current processes. They gave a real time reporting process we hadn't explored in the past and the impression they are also open to adapting to new technologies as they become available."¹¹¹ Evaluator 3 noted, "[t]his offeror proposes methodology that goes above and

¹⁰⁷ SOA 352.

¹⁰⁸ SOA 373.

¹⁰⁹ SOA 362-63.

¹¹⁰ SOA 355.

¹¹¹ SOA 381.

beyond what the RFP scoped. There are innovative solutions to warehousing issues and real-time tracking capabilities which we did not specifically scope out and are very interested in achieving.”¹¹²

Given that the criteria were multifaceted, and that the evaluators expressed comments on many issues, we do not have any evidence of how much weight the issue of time of delivery was given over the other issues that were part of the evaluation. Evaluators are not required to give equal weight to the issues raised in the questions.¹¹³ Here, the evaluators did comment and expressed concern regarding Irwin Hodson’s timelines. Where an evaluator has mentioned an issue in comments, we know that the evaluator was sufficiently concerned about the issue to document it, but we do not know how it stacked up against other issues also mentioned by the evaluator. Without more evidence, even if the evaluators might have applied a disparate standard to the issue of date of delivery (which, as discussed above, can be inferred for only one evaluator, and is not proved for any), we could not conclude that the disparate standard resulted in a material difference in their ratings.¹¹⁴

Moreover, as explained earlier, the evaluators were instructed to rate the proposals on a comparative basis. Here, the record provides objective evidence that the evaluators had a legitimate basis for preferring Intellectual Technology’s proposal over Irwin Hodson’s, on various aspects of understanding, methodology, and management, other than time of delivery. The burden is on Irwin Hodson to come forward with evidence that but for the alleged disparate treatment of time of delivery the outcome would have been different. Given no testimony regarding how important the issue of time of delivery was to the evaluators, and the obvious importance of innovation to the evaluators, Irwin Hodson has not met that burden.¹¹⁵

¹¹² SOA 367.

¹¹³ *Empyra*, OAH No. 06-0520-PRO at 12 (“When a proposal identifies a general factor or consideration, assigns a point total to that factor, and lists specific questions or considerations be taken into account in connection with that factor, the evaluators need not rate each subsidiary issue separately and award points to each.”).

¹¹⁴ In its proposal for action, Irwin Hodson notes that it does not need to prove conclusively that an error would have resulted in its being awarded the procurement. It need only prove that “it has been deprived of a reasonable chance of receiving an award.” IHG Proposal for Action at 5-6 (quoting *Data Transfer Solutions, LLC v. Department of Transportation & Public Facilities*, OAH No. 15-1545-PRO at 25 (quoting *In re Aetna Life Insurance*, OAH No. 06-0230-PRO (May 25, 2006))). I agree. With regard to the issue of timelines, however, Irwin Hodson has both not proved any error and it has not proved that a mistake regarding timelines would have deprived it of a reasonable chance of receiving an award. Time of first delivery appears to be much less important than innovation to the criteria of understanding, methodology, and management.

¹¹⁵ This does not imply that in other circumstances the materiality of applying disparate standards could not be proved without explanatory testimony. In this case, however, it is not clear that anyone applied a disparate standard, the disparate standard was alleged regarding an issue that was not well defined, and the issue of timeliness was only one of many aspects of the criteria under evaluation.

In sum, Irwin Hodson’s proposal would have resulted in an earlier delivery of product than Intellectual Technology’s proposal. If an evaluator had ranked the two proposals solely on the issue of date of delivery, the evaluator should have ranked Irwin Hodson’s proposal higher. Irwin Hodson has not proved, however, that any evaluator applied a disparate standard to the issue of date of delivery. Therefore, this procurement will not be found in error on the basis that the evaluators applied disparate standards to the two proposals.

(4) Did the evaluators err by ignoring IHG’s letters of recommendation and references while placing undue weight on ITI’s references?

Section 5.04 of the RFP asked the evaluators to rate a proposer’s “experience and qualifications.” The RFP included five questions under this inquiry. The last question asked, “[h]as the firm provided letters of reference from previous clients?”¹¹⁶ This question would be evaluated by the PEC.

In a somewhat different format, Section 1.04 of the RFP was titled, “Prior Experience.” This section set out a minimum experience requirement. A response that did not meet that minimum experience requirement would be rejected as “nonresponsive.”¹¹⁷ This section required that “[t]he Offeror must provide previous vendors that the Offeror conducted business with, identify a brief scope of work and a contact phone number.”¹¹⁸ This experience requirement did not require a *letter* of reference. It merely required a reference. The presence of the reference would be evaluated by the procurement officer during the initial evaluation for responsiveness. This evaluation was done before the responses were given to the performance evaluation committee.

Intellectual Technology’s proposal included one 2020 letter of reference, from the Kentucky Secretary of Transportation.¹¹⁹ The letter was in letter format. The proposal also included three references, listing officials from Kentucky, Arizona, and South Dakota.¹²⁰ The references include contact information and a synopsis of the services that Intellectual Technology performed for the agency. They are not in letter format and do not purport to be letters of reference.

¹¹⁶ SOA 106.

¹¹⁷ SOA 86.

¹¹⁸ *Id.*

¹¹⁹ SOA 644.

¹²⁰ SOA 643, 645.

Irwin Hodson’s proposal included two letters of reference. One was a 2020 letter from an Oregon official who identified herself as a “Senior Legislative Analyst” with the Oregon DMV.¹²¹ The other was a 2015 letter from an Alaska official with the division who identified herself as an “Administrative Officer II.”¹²² The proposal identified four references, listing officials from Oregon, Hawaii, Indiana, and Tennessee.

The evaluators’ comments show that they were critical of Irwin Hodson’s letters of reference. In particular, all three evaluators were concerned that the letter from the Alaska Division of Motor Vehicles employee was not current.¹²³ As Evaluator 1 commented, “They provided one [from] an analyst in Oregon and one highly outdated one from an ex-DMV employee in Alaska. It is highly concerning to me that they could not produce quality references.”¹²⁴ No evaluator commented on Irwin Hodson’s references.

The evaluators were not critical of Intellectual Technology’s letter.¹²⁵ Evaluator 1 commented favorably on one of Intellectual Technology’s references: “I highly respect Arizona’s opinion.”¹²⁶

Irwin Hodson argues that the evaluators’ comments prove that their evaluations were arbitrary. In its view, the evaluators were “ignoring IHG’s letters of recommendation and references while placing undue weight on ITI’s references.”¹²⁷ In particular, Irwin Hodson focuses on Evaluator 1’s statement that the evaluator respected Arizona’s opinion. It notes that Arizona was merely a reference, not a letter of reference, for Intellectual Technology. It argues that

If Evaluator 1 contacted Arizona to inquire about ITI, but failed to contact any of IHG’s jurisdictional references, then unequal treatment was provided to IHG and ITI and IHG’s protest should be sustained on that ground alone. If Evaluator 1 did not contact Arizona to inquire about ITI, then Evaluator 1’s opinion regarding “respect” for Arizona’s opinion is irrelevant because ITI did not provide any letter of reference from Arizona.¹²⁸

Irwin Hodson’s argument has no merit. In alleging unequal treatment, Irwin Hodson is requesting an inference of unequal treatment based on innuendo, with no evidence or facts

¹²¹ SOA 597.
¹²² SOA 598.
¹²³ SOA 351, 359, 371.
¹²⁴ SOA 351.
¹²⁵ SOA 355, 365, 377.
¹²⁶ SOA 355.
¹²⁷ Irwin Hodson Brief at 50.
¹²⁸ SOA 770-71.

showing actual unequal treatment. For example, no evidence supports an allegation that Evaluator 1 contacted one set of references but not the other. Without evidence, the statements in the record do not support the inference of unequal or arbitrary treatment. Objective evidence in the record shows that Irwin Hodson's Alaska letter of reference was not recent.¹²⁹ The Oregon letter was from a legislative analyst.¹³⁰ An evaluator could conclude that these were not "quality references." Further, it was not error for an evaluator to comment favorably on a reference.

(5) Has Irwin Hodson proved that the evaluators generally applied an ad-hoc, undisclosed, and unequal scoring methodology?

In addition to the specific allegations of unequal and arbitrary treatment discussed above, Irwin Hodges also makes a broad, generalized allegation that the procurement as a whole includes "multiple occasions" where the evaluators "applied inconsistent methodology to IHG and ITI in relation to the same RFP qualification questions" and failed to apply "the comparative approach mandated by the RFP."¹³¹ In making this argument, Irwin Hodson dismisses Intellectual Technology's proposal as "disingenuous sales pitch."¹³² In contrast, it characterizes its proposal as "being candid about well-known logistical issues."¹³³

I have thoroughly read through the RFP, both proposals, and the evaluators' comments.¹³⁴ Although Irwin Hodson is correct that the Intellectual Technology proposal contains "sales pitch," the same is true of Irwin Hodson's proposal. Taking a bird's eye view of the procurement, the main issue for the evaluators regarding Irwin Hodson's proposal was summarized by Evaluator 1 as follows: "they don't seem to understand DMV's vision of new, modernized, creative, streamlined solutions. Everything proposed is the exact same, or worse. There is also an overall negative tone to DMV's vision and I'm concerned that if they don't believe in the vision, they would not assist in facilitating it."¹³⁵

Objective evidence supports an assessment that Irwin Hodson's proposal is critical of the division's approach. An evaluator could reasonably conclude that Irwin Hodson would be less likely to adapt its process to address the division's need for "a modernized and streamlined

¹²⁹ SOA 598.

¹³⁰ SOA 597.

¹³¹ Irwin Hodson Brief at 50.

¹³² Irwin Hodson Reply at 11.

¹³³ *Id.* at 10.

¹³⁴ SOA 82-133, 592-708. I have also thoroughly read Irwin Hodson's brief, reply brief, and the arguments in the record incorporated by Irwin Hodson into its brief. In addition, the division's brief contains a lengthy summary of the evaluators' comments. Division Brief at 14-36.

¹³⁵ SOA 677.

process for issuing vehicle license plates and registration tabs” and to “promote efficiencies among the network of field offices, business partners and commission agents.”¹³⁶ Even though Irwin Hodson has identified some minor errors in some of the evaluators’ comments, the record viewed as a whole does not support a conclusion that the evaluators were unfair or arbitrary. Accordingly, Irwin Hodson’s protest is not sustained.

D. Was the division’s error in failing to grant Irwin Hodson the recycled products credit material?

In computing the cost factor, the procurement officer awarded Irwin Hodson the maximum number of points. The points for Intellectual Technology for cost were then computed as a fraction of the points available, based on the ratio of Irwin Hodson’s price to Intellectual Technology’s price. Thus, the lower Irwin Hodson’s price, the fewer points awarded to Intellectual Technology for cost.

In determining Irwin Hodson’s price offer, the procurement officer did not give Irwin Hodson a five percent price reduction for use of recycled products. The division now concedes that this was error because the price reduction is required by statute.¹³⁷ Because the price reduction would have lowered Irwin Hodson’s price points, the error means that Intellectual Property was awarded more points for cost than it should have been awarded.

The parties agree that 464.10 points should have been to Intellectual Property for cost.¹³⁸ Instead, the procurement officer awarded 488.53 points.¹³⁹ Irwin Hodson argues that this error was material, arguing that, in combination with the other errors it claims, it has proved that it should have been awarded the contract.

This decision has now upheld the award of points to Intellectual Property on qualifications. When the corrected cost points (464.10) are added to Intellectual Technology’s qualification points (250), Intellectual Technology’s points total 714.10.¹⁴⁰ Irwin Hodson’s points remain the same as calculated in the initial procurement—696.67. Because Intellectual Technology’s point total remains more than Irwin Hodson’s point total, correction of the error does not change the outcome.

¹³⁶ SOA 8.

¹³⁷ Division’s brief at 6 (citing AS 36.30.337).

¹³⁸ Irwin Hodson brief at 36; Division brief at 7.

¹³⁹ SOA 763.

¹⁴⁰ SOA 763.

E. Did the division err by failing to notify Irwin Hodson that its request for a stay was denied?

In its protest, Irwin Hodson argued that the division's failure to grant a stay, and failure to inform Irwin Hodson that the stay had been denied, were errors. Those issues were mooted by the Commissioner's action of staying Intellectual Technology's performance pending review of the protest by the Office of Administrative Hearings. This decision denying the protest confirms that Irwin Hodson was not prejudiced by the denial of the stay.

The issue of notice, however, is an important issue. When a stay is denied, a protestor has a right to request additional process, which might include expedited administrative proceedings or a petition for review to the superior court. The opportunity to request additional process can be important in later determining the appropriate remedy if the protest is sustained. If a protestor is not given notice of the denial, however, the protestor's ability to meaningfully pursue additional process may be affected.¹⁴¹

Here, Irwin Hodson was not given notice that the stay had been denied and that a contract had been let. But for the Commissioner's stay of performance of the contract pending review, implementation of the contract might have affected the possible range of remedies. This could affect the options available for the agency as well as the interests of the parties. Notice is an important element of due process of law and administrative agencies may be prohibited from enforcing statutory deadlines when they have not provided sufficient notice to allow an aggrieved party to pursue further process.¹⁴² Although the commissioner's action here means that this decision does not need to explore the issue further, notice of a denial of a stay is an important issue worthy of being referred to the Chief Procurement Officer. The Chief Procurement Officer can consider whether this issue is appropriate for further training or regulatory action.

IV. Conclusion

The division's interpretation of the scoring methodology in its RFP comports with the RFP and with common sense. Irwin Hodson has not proved that the evaluators applied a disparate standard to evaluating the two proposals. Objective evidence supports the evaluators'

¹⁴¹ Cf., e.g., *Lakloey, Inc. v. DOT&PF, Southcoast Region*, OAH No. 19-0084-PRO at 13 (Dep't of Trans. and Pub. Fac. 2019), available at <https://aws.state.ak.us/OAH/Decision/Display?rec=6626> (noting that "the ability to protest would be more potent before the award of a contract than after" and finding error in failure to give notice of intent to award as required by law).

¹⁴² Cf., e.g., *Manning v. Alaska R.R. Corp.*, 853 P.2d 1120, 1124 (Alaska 1993) (finding error in enforcement of administrative appeal deadline because agency's "statement falls far short of the notice requirement").

comments and indicates that they considered each of the criterion. Accordingly, the division's denial of the protest is sustained.

DATED: August 1, 2022.

A handwritten signature in blue ink, appearing to be 'S. Slotnick', written over a horizontal line.

By: _____

Stephen C. Slotnick
Administrative Law Judge

Adoption

Under the authority of AS 36.30.675, and in accordance with AS 44.64.060, I adopt this Decision as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this 1st day of August, 2022.



By: _____
Stephen C. Slotnick
Administrative Law Judge

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the forgoing was provided to the following individuals:

~~Rebecca Lipson & Michael Schechter - by email~~
~~Morgan Griffin & Dept of Law & Christine Nash - by email~~
~~Christopher Siottee & Ashley Ginter - by email~~
~~Mark Crandley & Brent Smith - by email~~
Signature Jeffrey R. Peltier Date 8-1-2022