

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

JOLT CONSTRUCTION & TRAFFIC)
MAINTENANCE, INC.)
)
v.)
)
STATE OF ALASKA, DEPARTMENT OF)
TRANSPORTATION & PUBLIC FACILITIES)
)
_____)

OAH No. 21-1746-PRO
FFY21 SR Airport &
Highway Striping

DECISION

I. Introduction

The issue in this case concerns whether a party's failure to acknowledge addenda in a bid solicitation can be waived by the soliciting agency as a minor informality. The project at issue was the Southcoast Region of the Alaska Department of Transportation and Public Facilities' Federal Fiscal Year 2021, Airport and Highway Striping Project.

The lowest bid was submitted by Specialized Pavement Marking, Inc. However, in providing its bid, SPM failed to acknowledge two separate addenda despite clear instructions requiring it to do so. The Region awarded the contract to SPM and denied a bid protest by the second lowest bidder, Jolt Construction & Traffic Maintenance, Inc. It reasoned that both addenda were minor in nature and issued well in advance of the bid opening date, thus entitling all interested parties sufficient time to review the addenda and incorporate any changes into their bids. As such, the Region concluded that SPM's bid was responsive, and it was entitled to waive SPM's failure to acknowledge the addenda as a "minor informality."

This appeal by Jolt followed, and a three-day hearing was held. The evidence at the hearing reflects that SPM's failure to acknowledge the addenda was not a material omission rendering SPM's bid non-responsive. The lack of acknowledgment also did not give SPM any substantial advantage over the other bidders. Accordingly, the Region properly waived SPM's omission as a minor informality. Jolt's bid protest was properly denied and the Region's decision on Jolt's protest is upheld.

II. Facts

The Southcoast Region is responsible for maintaining state highways, bridges, and airports across Southeast Alaska, Kodiak Island, a portion of the Alaska Peninsula and the

Aleutian Chain.¹ It annually solicits bids for a combined roadway and airport striping project across the region.² In 2020, the project was awarded to Jolt.³ In the preceding four years, it had been awarded to SPM.⁴

To conduct solicitations, the Region uses Bid Express (BidX). The BidX program allows contractors to submit their bids electronically after downloading solicitation documents uploaded by the Region.⁵

The Region advertised the 2021 project, opened the solicitation, and uploaded the solicitation documents to BidX, including supplemental information, on the morning of April 5, 2021.⁶ The project required roadway striping in Haines, Juneau, Ketchikan, Prince of Wales, Skagway, Wrangell, and Yakutat. It also included airport striping in Ketchikan, Petersburg, Wrangell, and Yakutat.⁷

Included within the bid solicitation documents were numerous statements and instructions addressing requirements for submission of the bids. The “required documents” form states that “*bids will not be considered if the following documents are not completely filled out and submitted at the time of bidding: . . . 1(d) addenda acknowledgement.*”⁸ The bid attachment’s instruction sheet states that “it is a *bidder’s responsibility to ensure all documents required for this proposal per the Required Documents form have been attached.*”⁹ The bidder acknowledgement form states that “the *bidder is solely responsible for obtaining, reviewing, applying and acknowledging all addenda.*”¹⁰ Section 10-03 of the contract provides that the bid forms are forms “that a bidder *must complete and submit* when making a bid in response to an advertised project. Bid forms may include a bid schedule certification form, *acknowledgment forms* and other documents.”¹¹ Section 20-12 of the contract addresses addenda requirements. It provides that “*bidders must acknowledge all addenda on the bid forms, by fax, or by email before the deadline stated in the invitation to bid.*”¹²

¹ Motion for Summary Adjudication (August 27, 2021) at 1.

² Testimony of D. Lance Mearig.

³ *Id.*

⁴ *Id.*

⁵ Testimony of Jeff Jenkins.

⁶ *Id.*

⁷ R SOA 5.

⁸ *Id.* at 14 (emphasis added).

⁹ *Id.* at 29 (emphasis added).

¹⁰ *Id.* at 31 (emphasis added).

¹¹ *Id.* at 63 (emphasis added).

¹² R SOA at 73 (emphasis added).

After the solicitation was opened, the Region received two separate inquiries and requests for clarification from potential bidders.¹³ The first, on April 6, 2021, indicated that a drawing sheet for the Yakutat Airport appeared to be missing from the solicitation documents.¹⁴ As a result of that inquiry, on the same day, the Region issued Addendum 1 and uploaded it to BidX, describing changes, and including the missing drawing sheet, YAK-5.¹⁵

On April 8, 2021, the Region received another inquiry from a potential bidder asking “[w]here is the scope of work for line items 200 through 270 to be found?”¹⁶ Based on this question, on April 13, 2021, the Region issued and uploaded Addendum 2 to BidX.¹⁷ Addendum 2 informed bidders of a typographical error contained in Appendix E of the contract documents and specifications.¹⁸ It also included the following language: “[t]he specifications are modified as follows: **Appendix E Roadway Painting. 670-3.3 Location of work. Replace ‘Appendix D’ with the ‘the supplementation information to bidders.’”¹⁹**

The cover pages for Addenda 1 and 2 state that:

bidders are *required to acknowledge receipt of this addendum* prior to the hour and date set for bid letting by one of the following methods: (a) by acknowledging receipt of this addenda on the bid submitted or (b) by fax or email listed above which includes a reference to the project and addendum number. The bid documents require acknowledgment individually of all addenda to the drawings and/or specifications. *This is a mandatory requirement* and any bid received without acknowledgement of receipt of addenda may be classified as not being a responsive bid.²⁰

Both addenda also provide that “bidders are *required to acknowledge this addendum* on the proposal form or by FAX prior to the bid opening.”²¹

The day before the bids were opened, the Region was contacted by SPM. It asked whether downloading the addendum would confirm its acknowledgement of the addendum to the extent that it would not need to fax a confirmation. In response, the Region quoted the addendum’s language that “[b]idders are required to acknowledge this addendum on the proposal form, or by FAX prior to bid opening.”²²

¹³ *Id.* at 376; Testimony of Al Vezey.

¹⁴ *Id.*

¹⁵ R SOA 293-95.

¹⁶ *Id.* at 376; Ex. A; Testimony of Al Vezey.

¹⁷ Testimony of Jonathan Weaver; Testimony of Jeff Jenkins; R. SOA 296-97.

¹⁸ R SOA at 296-97.

¹⁹ *Id.* at 297 (emphasis in original).

²⁰ *Id.* at 293, 296 (emphasis added).

²¹ *Id.* at 298 (emphasis added).

²² *Id.* at 349-51; Testimony of Jeff Jenkins.

The engineer's estimate for the project was \$2,004,777.29.²³ The Region received four bids, including bids from SPM and Jolt.²⁴ SPM's bid was the lowest at \$1,325,512.92 and Jolt's the second lowest at \$1,598,000.00.²⁵ At the April 27, 2021, bid opening, the Region realized that SPM's addendum acknowledgment was not filled out.²⁶ Based on that fact, it announced it would take SPM's bid under advisement.²⁷

The Region then reviewed SPM's bid in detail. As set forth in a document titled "Bidder Determination" prepared by Jeff Jenkins, the Region's Chief of Contracts on April 28, 2021, it concluded that because of the way the BidX system functioned, it was able to conclusively determine that SPM had downloaded and received both addenda in advance of submitting its bid.²⁸

The Region also explained that it had contacted SPM by phone after the bid opening, seeking clarification of its bid documents. In response to this contact, SPM provided the Region with a scanned copy of its bid submission report with a hand-drawn circle in blue ink around the section of the report identified as "Amendments." SPM suggested that it thought this document constituted its acknowledgement of the two addenda.²⁹ As Mr. Jenkins made clear in his testimony at time of hearing, however, the Region never viewed the circled information on SPM's bid submission receipt in the same light as SPM. Instead, the Region readily admitted that contrary to what it had been explicitly instructed, SPM never provided signed addenda acknowledgements as part of its bid submission.³⁰

Nevertheless, the Region concluded that it was entitled to waive SPM's failure to acknowledge addenda if the failure had only a negligible effect on the project's price, quantity, quality, time, or contractual conditions and could be waived without prejudice to other bidders. Finding that this was the case, Mr. Jenkins recommended that SPM's failure to acknowledge the addenda be waived as a minor informality and that its bid be accepted as responsive.³¹

²³ R SOA at 316.

²⁴ Testimony of Jeff Jenkins.

²⁵ R SOA at 316.

²⁶ Testimony of Jeff Jenkins; R. SOA at 367-68.

²⁷ Testimony of Jeff Jenkins.

²⁸ *Id.*; R SOA at 316-18.

²⁹ R SOA at 317-18; Testimony of Jeff Jenkins.

³⁰ Testimony of Jeff Jenkins.

³¹ R SOA at 316-18; Testimony of Jeff Jenkins.

On May 7, 2021, the Region issued a notice of intent to award the contract to SPM.³² Jolt filed its protest of the intent to award the project to SPM on May 13, 2021.³³ On May 24, 2021, the Region issued its letter of award to SPM.³⁴ Days afterward, the Region denied Jolt's protest. Jolt appealed the decision.³⁵ The appeal was referred to the Office of Administrative Hearings to conduct an evidentiary hearing and issue a proposed decision on behalf of, and for review by, the Commissioner.

The case was originally set for a three-day Zoom hearing on October 4-5, 2021.³⁶ However, just prior to the scheduled hearing, numerous motions were filed. These included motions for summary adjudication and to strike an opposition to the motion for summary adjudication, by the Region, and motions seeking to serve interrogatories and requests for production and seeking an order for production of relevant witnesses, filed by Jolt.³⁷ Based on those motions and the issues they raised, the hearing was rescheduled.³⁸ After it was rescheduled, an order was also issued denying the Region's motion for summary adjudication on numerous grounds, including the existence of genuine issues of material fact and outstanding discovery.³⁹ A three-day Zoom evidentiary hearing was held from November 29 through December 1, 2021.⁴⁰

On the issue of damages, Jolt sought two types of damages. First, it requested an award of bid preparation expenses. It provided evidence and testimony that it incurred \$12,118.50 in reasonable bid preparation costs in submission of its bid.⁴¹ Second, it requested an award of lost business profits.⁴² During prehearing proceedings, however, the Administrative Law Judge ruled that lost profits were not an element of damage that are allowed by statute in a bid protest.⁴³ This ruling was based on AS 36.30.585(c), which states that . . . "the protester's damages are limited to

³² Testimony of Jeff Jenkins; Ex. C, ¶ 43.

³³ R SOA 326-29.

³⁴ *Id.* at 523-25.

³⁵ R. SOA at 352-53; Ex. D.

³⁶ Preliminary Scheduling Order (July 19, 2021).

³⁷ Order Rescheduling Hearing and Remaining Prehearing Dates and Ruling on Outstanding Motions (September 30, 2021).

³⁸ *Id.*

³⁹ Order Denying Motion for Summary Adjudication (October 11, 2021).

⁴⁰ Offering evidence and testimony on behalf of Jolt were Steve Cole, its CEO, Jordan Cole, its project manager, Dave Cruz, President of Cruz Construction, and Al Vezey with Lakloey, Inc. Offering evidence and testimony on behalf of the Region were D. Lance Mearig, its regional director and contracting officer, Jonathan Weaver, its standards specifications engineer, and Jeff Jenkins, its chief of contracts.

⁴¹ Ex. E.

⁴² Order Regarding Additional Briefing Deadlines (November 18, 2021).

⁴³ *Id.*

reasonable bid or proposal preparation costs.” Although Jolt was not allowed to litigate lost profits, it was allowed to make an offer of proof concerning what its lost business profits were and what its evidence would have reflected had it been allowed to present it.⁴⁴

III. Discussion

Jolt contends that this case involves two issues. First, whether the Region’s actions were lawful or in violation of its own express policies and procedures regarding acknowledgment of addenda. Second, whether the Region’s decision to award the contract to SPM was arbitrary and capricious and made in bad faith.⁴⁵ The first issue is fully determinative of the outcome of this case. Because the outcome shows that the Region’s decision was not arbitrary or in bad faith, it is unnecessary to address Jolt’s second issue.

In analyzing whether the Region’s actions were lawful in waiving the addenda acknowledgment requirement, it is important to properly frame the analysis. Throughout this proceeding, both in the briefing on the motion for summary adjudication and at time of hearing, Jolt has focused on the effect of Addenda 1 and 2. As it indicated in its opposition to the motion for summary adjudication, “[t]he question is, according to the Department’s own Policy and Procedure, whether Addendum 2 had only a negligible effect on the price and scope of work for this Project. If it did, SPM’s error was arguably waivable. If it did not, SPM’s bid was *per se* nonresponsive on its face.”⁴⁶

But focus on the *effect of the addenda* is not the proper analysis. Instead, the proper focus here is on the *acknowledgement*, not the content of the agenda. This misplaced focus highlights a discrepancy between Alaska Statute, case law, and administrative code, as contrasted with Department Policy and Procedure. Under the facts here, it is necessary to focus these areas of authority, the apparent discrepancy, and the intent and purpose of the procurement process, to determine whether SPM’s proposal was responsive to the solicitation.

A. Intent and Purpose of the Procurement Process.

The procurement process and rules are intended 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.”⁴⁷ The Alaska Supreme Court

⁴⁴ Ex. G (earlier submitted into the record in this case as Ex. B to Jolt’s Final Exhibit List (November 8, 2021)).

⁴⁵ Jolt’s Prehearing Brief (November 17, 2021) at 2.

⁴⁶ Jolt’s Opposition to Motion for Summary Adjudication (September 14, 2021) at 9.

⁴⁷ *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)).

requires that competitive procurement be conducted with “fairness, certainty, publicity, and absolute impartiality,” and that courts guard “against the award of a public contract to a bidder who has received an unfair competitive advantage.”⁴⁸ 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.”⁴⁹

B. How to Determine Whether a Proposal is Responsive to a Solicitation?

With this background, before turning to whether to uphold the Region’s waiving of SPM’s failure to acknowledge the two addenda, we must delve further into the procurement process, inquiring into when an agency would have discretion to consider an imperfect bid responsive to the invitation to bid. This is because after a bid is received, the procurement officer must determine whether it is “responsible” and “responsive” before it is evaluated and whether it conforms to the solicitation.⁵⁰ In general, a bidder is responsible if the bidder has the financial capacity, and the competence, to complete the job.⁵¹ A responsive offer is one “that conforms in all material respects to the solicitation.”⁵²

Here, it is undisputed that SPM’s bid did not include the addenda acknowledgments mandated by the addenda themselves and Section 1(d) of the required documents portion of the bid solicitation.⁵³ The question is whether that omission was material? If it was, then SPM’s bid was not responsive to the solicitation as required by AS 36.30.170.

1. Applicable Alaska Case Authority

A previous OAH case, *Quality Sales Foodservice v. Department of Corrections*,⁵⁴ specifically addressed the standard for evaluating responsiveness in procurement cases. *Quality Sales* involved whether a winning bid was nonresponsive despite failing to satisfy the Invitation

⁴⁸ *Id.* at 1136 (quoting prior authority).

⁴⁹ *Id.*

⁵⁰ AS 36.30.170.

⁵¹ *See, e.g., Black’s Law Dictionary* 1312 (6th ed. 1990) (defining “responsible bidder” to mean “[o]ne who is capable financially and competent to complete the work”); *see also e.g., In re Waste Management of Alaska, Inc.* (Dep’t of Admin. Case No. 01.08 2002) (“DOT’s concerns regarding WMAI’s capacity or ability to perform on the terms stated in its bid raise questions of responsibility”).

⁵² 2 AAC 12.990(12).

⁵³ Testimony of Jeff Jenkins; R SOA 14, 93-94, 96-97.

⁵⁴ OAH No. 06-0400-PRO at 12-16 (Dep’t of Admin. 2006), *available at* <https://aws.state.ak.us/OAH/Decision/Display?rec=4732>. The list of considerations in Section 7 of the RFP provides a useful checklist of the issues to be considered in determining materiality.

to Bid's requirement that it specify, in some instances, what brands of products were to be supplied.⁵⁵

In *Quality Foods*, the ITB specifically admonished that the "failure to identify the brand and pack size offered may cause the state to reconsider the offer non-responsive."⁵⁶ Country Foods, who was deemed the lowest bidder, had failed in some instances, to provide a brand identification as required by the ITB.⁵⁷ The challenger asked for Country Foods's bid to be deemed non-responsive.⁵⁸ The bid protest was denied by the Department of Corrections and Country Foods's bid was deemed responsive.

In analyzing the legal standard for evaluating responsiveness, *Quality Foods*, relied heavily on the Alaska Supreme Court's analysis of procurement issues in *King v. Alaska State Housing Authority* [*King I*],⁵⁹ and *Chris Berg, Inc. v. State, Dep't of Transp. & Pub. Facilities*.⁶⁰ As it explained:

while a 'material' variance from the invitation requires rejection of the proposal, a 'minor' variance does not require rejection of the proposal. A variance is said to be material 'if it gives the bidder a substantial advantage over other bidders, and thereby restricts or stifles competition.'⁶¹

As *Quality Foods* further indicated, the Alaska Supreme Court has acknowledged a range of discretion that can be exercised in determining whether a variance is material or minor. In *Chris Berg*, the Court established the lower limit of that discretion. It held that a "minor technical defect or irregularity *which does not and could not affect the substance of a low bid in any way* does not justify the rejection of that bid on the ground that it is not responsive."⁶² As *Quality Foods* concluded, "[t]here is no discretion to reject a bid in such a situation."⁶³

The upper boundary of the range of discretion – the point at which a variance is sufficiently material that the bid *must* be rejected – was addressed in *King I*. There, it was held that for a bid to be automatically invalidated, it must be proven that the *variance* gave the winning bidder a competitive advantage.⁶⁴

⁵⁵ *Id.* at 1.

⁵⁶ *Id.* at 6.

⁵⁷ *Id.*

⁵⁸ *Id.* at 9.

⁵⁹ 512 P.2d 887 (Alaska 1973).

⁶⁰ 680 P.2d 93 (Alaska 1984).

⁶¹ *Quality Foods* at 12-13 (quoting *King I*, 512 P.2d at 892).

⁶² *Id.* at 13 (quoting *Chris Berg* 680 P.2d at 94) (emphasis in original).

⁶³ *Id.* at 13.

⁶⁴ *Id.* (citing *King I*, 512 P.2d at 892) (emphasis added).

Quality Foods noted that between these two points of no discretion are instances where the substance of the low bid had been or could have been affected and a competitive advantage may have been obtained, though it has not been proved by a preponderance of the evidence. In such cases, *King I* confirms that rejection for nonresponsiveness is permissible but not required.⁶⁵

Quality Foods involved this middle range – an instance where the low bid had or could have been affected by the variance, but it was not proven by a preponderance of the evidence.⁶⁶ Thus, in this middle range, the agency would have discretion to find a responsive or nonresponsive, depending on circumstances. Although the final decisionmaker is not required to defer to the procurement officer’s exercise of discretion, in some circumstances, “due deference” to the procurement officer will be granted. After discussing this issue in detail, *Quality Foods* held that:

[i]n light of the procurement officer's fair and evenhanded approach to minor deficiencies in the bids, and in recognition of the need to give procurement staff some latitude to manage a complex procurement to reach the overall goal of securing the state the lowest total cost, this is a case where some deference to the procurement officer's judgment is appropriate. Here, his judgment in rejecting the protest has not been shown to be unreasonable.⁶⁷

2. *Applicable Alaska Regulatory Authority*

In addition to Alaska Supreme Court and OAH case law, Alaska regulations also provide direction on whether a proposal is responsive to a solicitation. 2 AAC 12.170 specifies that inadvertent errors discovered after the bid opening, but before the award, *other than minor informalities*, may not be corrected. “Minor informalities” are defined as “matters of form rather than substance which are evident from the bid document, or are insignificant matters that have a negligible effect on price, quantity, quality, delivery, or contractual conditions and can be waived or corrected without prejudice to other bidders.”⁶⁸

⁶⁵ *Id.* (citing *King I*, 512 P.2d at 893 & n.23).

⁶⁶ See generally, *Quality Foods*.

⁶⁷ *Id.* at 16. See also *Eagle Eye Food Services*, OAH No. 19-0156-PRO at 5-7 (Dep’t of Admin. 2019), available at <https://aws.state.ak.us/OAH/Decision/Display?rec=6627> (relying on and affirming analysis articulating the three types of situations that arise in making procurement responsiveness determinations and the deference properly afforded each).

⁶⁸ 2 AAC 12.990(8).

3. *Applicable Department Policy and Procedure*

A final piece of the analysis is Departmental policy and procedure. The Alaska Department of Transportation and Public Facilities' Bid Openings, Policy and Procedure Manual (Policy and Procedure Manual), provides as follows:

Inadvertent errors discovered after opening but before award, other than minor informalities, may not be corrected (2 AAC 12.170). Minor informalities mean matter of form rather than substance which are evident from the bid document, or are insignificant matters that have a negligible effect on price, quantity, quality, delivery, or contractual conditions and can be waived or corrected without prejudice to other bidders (2 AAC 12.990).⁶⁹

The Policy and Procedure Manual also specifies what errors may be waived as minor informalities. These include:

- a) The bidder did not fill in their name and address on the form.
- b) The bidder did not fill in the date of the Invitation for Bids.
- c) The bidder did not acknowledge one or more of the addenda, *and the addenda had only a negligible effect on price, quantity, quality, time or contractual conditions and can be waived or corrected without prejudice to other bidders.*⁷⁰

Finally, bid document errors that are non-waivable include the “[f]ailure to acknowledge *addenda that are determined to have a more restrictive effect on time, quality, quantity, or cost of performance, or impose a technical requirement.*”⁷¹

C. Has Jolt Met its Burden of Proving that SPM’s Proposal was Nonresponsive or That the Decisionmaker Should Refuse Deferring to the Procurement Officer’s Decision?

Based on the above-referenced authority, the next question is whether Jolt has met its burden in this case. Has it adequately demonstrated that SPM’s proposal was nonresponsive or that the decisionmaker should refuse deferring to the procurement officer’s decision? The analysis of this issue is complicated by an apparent inconsistency between the Department’s Policy and Procedure and the applicable statutory, case law, and regulatory authority.

Here, the inconsistency concerns precisely what is required to be analyzed concerning the effect of the alleged deviation. Is it the effect of Region’s waiver of the acknowledgment of

⁶⁹ Ex. B, p. 3 (¶ C.4.).

⁷⁰ *Id.* at p. 4 (¶ C.4.e) (emphasis added).

⁷¹ *Id.* at p. 5 (¶ C.4.f) (emphasis added).

addenda requirement, or alternatively, is it the effect of the addenda themselves? It is the answer to this question that determines the outcome of this case.

As noted above, the statutory, case law, and regulatory authority, are all consistent in that taken together, they stand for the proposition that it is *the effect of the waiver, variance or irregularity* that is important in analyzing whether the bid is responsive.⁷² Here, the “irregularity” is SPM’s failure to provide the addenda acknowledgements, and the Region’s waiver of that requirement as a minor informality.⁷³

However, the Department’s Policy and Procedure Manual has a different focus. It suggests that in construing whether the failure to acknowledge addenda can be waived as a minor informality, one must analyze the effect of the addenda themselves.⁷⁴ And specifically, a non-waivable failure to acknowledge addenda occurs in instances where the *addenda* are determined to have a more restrictive effect on the time, quality, quantity, cost or performance or impose technical requirements.⁷⁵ Accordingly, in this instance, the Department’s own Policy and Procedure Manual would mandate an analysis of the effect of the addenda themselves as opposed to simply an analysis on the Region’s waiver of the addenda acknowledgment requirement.

As will be explained later, any conflict between the Department’s internal policies (which have not been adopted by regulation) and legal authority would be resolved by adherence to the legal authority. Because legal analysis generally seeks to avoid conflict and harmonize competing standards, however, this decision will first address the Region’s action in light of the effect of Addenda 1 and 2.

1. The Effect of Addenda 1 and 2

The facts of this case highlight the importance of whether focus is placed on the effect of the addenda or on the effect of the waiver for failure to acknowledgment the addenda. Here, because the effect of the addenda is arguably relevant under the Department’s Policy and Procedure, that issue was a significant focus at time of the hearing. The Region argued that the addenda had a negligible effect on the overall bid package, whereas Jolt argued the opposite.

Addendum 1 addressed a missing drawing sheet for the Yakutat Airport, YAK-5.⁷⁶ Based on an inquiry from a potential bidder regarding the missing drawing sheet, the Region

⁷² AS 36.30.170; 2 AAC 12.990(12); *King I*, 512 P.2d at 892; *Chris Berg* 680 P.2d at 94; *Quality Foods* at 13.

⁷³ R SOA at 316-18; Testimony of Jeff Jenkins.

⁷⁴ Ex. B at p. 4 (¶ C.4.e).

⁷⁵ *Id.* at p. 5 (¶ C.4.f) (emphasis added).

⁷⁶ R SOA at 376; Testimony of Al Vezey.

issued Addendum 1, describing changes, and including the missing sheet.⁷⁷ By the Region's own admission, the drawing sheet had previously been prepared and intended to be included in the bid package all along. Its omission from the initial bid package was a simple oversight.⁷⁸

The missing drawing sheet, YAK-5, contained an itemization and detailed summary of drawing sheets YAK-1 through YAK-4. It provided the totals for the different striping and marking components that were to be performed at the Yakutat Airport portion of the project.⁷⁹ It identified the specific colors, dimensions, quantities, total square feet of the areas, length, angle, radius, etc., of the striping work. It included nearly a hundred rows of very specific and detailed information, many of the rows containing three or four separate columns each.⁸⁰ Testimony from Jolt's witnesses suggested that this information was required by bidders to accurately calculate and prepare their bids.⁸¹

The Region argued that bidders could have prepared their bids without relying on YAK-5. It suggested that this could have been done by "scaling" the drawings in sheets YAK-1 through YAK-4 and by referencing the "Typicals."⁸² A "scale drawing" is a drawing that has been reduced or enlarged from its original size to a specified scale.⁸³

The "Typicals" show runway marking details, including the various dimensions and shapes of required airport runway markings, symbols, and lines.⁸⁴ At hearing, the Region asserted that although YAK-5 was missing from the ITB, all a bidder had to do was reference the information contained in the Typical sheets, scale the drawings contained in YAK-1 through YAK-4, and then do the math and calculations to "crunch" the appropriate numbers required for bidding the project.⁸⁵

The Region's position on that point, however, was disputed. Witnesses Steve Cole, Al Vezey and Jordan Cole, all testified that the information contained in the missing drawing sheet YAK-5 was reasonably necessary for bidders to accurately prepare responsive bids.⁸⁶ Even if bids could have reasonably been prepared without relying on YAK-5, the evidence supports a

⁷⁷ R SOA 293-95.

⁷⁸ Testimony of Jeff Jenkins; Testimony of Jonathan Weaver.

⁷⁹ R 287-90 (YAK-1 through YAK-4); R SOA 295 (YAK-5).

⁸⁰ R SOA 295.

⁸¹ Testimony of Steve Cole; Testimony of Jordan Cole; Testimony of Al Vezey.

⁸² Testimony of Jeff Jenkins; Testimony of Jonathan Weaver; R SOA 273-75 (the Typicals); R SOA 287-90 (YAK-1 through YAK-4).

⁸³ See <https://www.collinsdictionary.com/us/dictionary/english/scale-drawing>.

⁸⁴ R SOA 273-75 (the Typicals).

⁸⁵ Testimony of Jeff Jenkins; Testimony of Jonathan Weaver.

⁸⁶ Testimony of Steve Cole; Testimony of Jordan Cole; Testimony of Al Vezey.

finding that bids were more likely to be inaccurate without YAK-5.⁸⁷ Moreover, the testimony established that some aspects of the job (about three percent) could not have been calculated from the drawings and Typical^s.⁸⁸ Although the question is close, the preponderance of the evidence supports a conclusion that receipt of Addendum 1 was material for purposes of bid accuracy and consistency among bids.

Moreover, even if a bid *could* theoretically have been prepared without reliance on YAK-5, a significant problem with the Region's argument is that doing so would have required bidders to scale the drawings in YAK-1 through YAK-4.⁸⁹ But these documents, YAK-1 through YAK-4, told bidders not to do so: "DO NOT SCALE FROM THESE DRAWINGS USE DIMENSIONS."⁹⁰ Further, the hearing testimony left little doubt that to both scale the drawings and to crunch the appropriate numbers would have taken a considerable amount of additional time and effort and would have added for the potential of error in the submission of bids, as opposed to simply using the totals contained in the missing YAK-5.

In sum, it would have been unreasonable for a bidder to have been required to submit its bid without the addition of Addendum 1. Testimony also confirmed that the Yakutat Airport portion of the project was a significant and sizeable portion of the overall project.⁹¹ Accordingly, Addendum 1 had a material impact on the project's time, quality, quantity, cost of performance, and technical requirements.

A similar conclusion is also reached as to Addendum 2. After Addendum 1 had been issued, a potential bidder asked the Region about an apparent missing scope of work for ITB line items 200 through 270⁹² Based on that question, the Region issued Addendum 2.⁹³ It informed bidders of a typographical error contained in Appendix E of the contract documents and

⁸⁷ Compare Testimony of Jordan Cole; Testimony of Al Vezey *with* Testimony of Jeff Jenkins; Testimony of Jonathan Weaver.

⁸⁸ Testimony of Jonathan Weaver. Mr. Weaver, the contracting officer for the Region, testified that by scaling the drawings from YAK-1 through YAK-4 and using the Typical^s, a contractor could have arrived at the appropriate numbers for all but roughly three percent of what was needed to submit a bid for the Yakutat Airport portion of the project. Mr. Weaver's testimony on this point was slightly inconsistent. At one point in his testimony, Mr. Weaver confirmed that if a bidder used the "Typical" drawing sheets, a bidder would only have been required to scale the drawings for roughly three percent remaining numbers required to bid the Yakutat Airport portion of the project. At another point in his testimony, however, Mr. Weaver seemed to suggest that even by scaling the drawings in YAK-1 through YAK-4 and using the Typical^s, a bidder would still have been unable to crunch the numbers required for roughly three percent of the Yakutat Airport portion of the project.

⁸⁹ Testimony of Jonathan Weaver.

⁹⁰ R SOA 287-90 (YAK-1 through YAK-4) (emphasis in original).

⁹¹ Testimony of Steve Cole; Testimony of Jordan Cole; Testimony of Al Vezey.

⁹² R SOA at 376; Ex. A; Testimony of Al Vezey.

⁹³ *Id.*; Testimony of Jonathan Weaver; Testimony of Jeff Jenkins.

specifications.⁹⁴ Per the ITB, Appendix E was supposed to include all of the project's roadway painting specifications.⁹⁵ It is undisputed that roadway painting was a significant portion of the entire project.

In the original ITB, Appendix E, Section 670-3.3, Location of Work, instructed bidders to "[a]pply painted traffic markings to the facilities listed in the tables and drawings in Appendix D."⁹⁶ However, Appendix D had nothing to do with the project's scope of work or location of work. Instead, Appendix D was the project's Safety Plan Compliance Document.⁹⁷ As such, contrary to what was originally indicated in the ITB, all the details for the project's location of work were, in fact, located in the supplemental information to bidders. That supplemental information consisted of approximately 147 pages of very detailed project specifications.⁹⁸ It also included at least 12 pages of information which were critical to both bidding and performing work on the project.⁹⁹ Addenda 2 indicated that "[t]he specifications are modified as follows: **Appendix E Roadway Painting. 670-3.3 Location of work. *Replace* 'Appendix D' *with* the 'the supplementation information to bidders.'**"¹⁰⁰

The Region contends that Addenda 2 was insignificant because all 147 pages of information referenced in the supplemental documents were already included within the ITB even before Addenda 2.¹⁰¹ Jolt asserts that the supplemental information is not part of the documents that form the basis of the parties' contract. Instead, supplemental information is simply information that may be helpful, but is not necessary, for a bidder to submit their bid.¹⁰² While the parties debated at length regarding whether a bidder is ultimately legally bound by supplemental information in an ITB, determination of that issue is unnecessary.¹⁰³

This is because whether the 147 pages of materials at issue in Addenda 2 were included within the initial ITB or whether a successful bidder might ultimately be contractually bound by

⁹⁴ R SOA at 296-97.

⁹⁵ *Id.* at 003.

⁹⁶ *Id.* at 237.

⁹⁷ *Id.* at 233-35.

⁹⁸ *Id.* at 377-512.

⁹⁹ Testimony of Steve Cole.

¹⁰⁰ R SOA at 297 (emphasis in original).

¹⁰¹ Testimony of Jeff Jenkins; Testimony of Jonathan Weaver.

¹⁰² Testimony of Steve Cole; Testimony of Jordan Cole; Testimony of Al Vezey.

¹⁰³ Through its witness questioning, Jolt sought to assert that because supplemental information is not referenced in the definition of "contract" in the defined terms provisions of the ITB, this automatically means that the supplemental information does not form part of the legal agreement between the Region and SPM. R SOA 63; Testimony of Steve Cole; Testimony of Dave Cruz. To the contrary, the Division contended that a party is bound by all the ITB documentation. Testimony of Jonathan Weaver; Testimony of Jeff Jenkins.

supplemental information is immaterial. What is important is that this documentation was initially incorrectly referenced and identified. It was only through the issuance of Addenda 2 that this important and detailed project information was *correctly and accurately* identified and referenced in relation to the project. As such, just as with Addendum 1 above, Addendum 2 had a material impact on the project's time, quality, quantity, cost of performance, and technical requirements.

2. *The Effect of the Region's Waiver of SPM's Failure to Acknowledge*

Contrasted with the significant substantive effect of Addenda 1 and 2 is the effect of the Region's waiver of SPM's failure to acknowledge the addenda. The evidence on this point was relatively undisputed.

Jeff Jenkins, the Region's Chief of Contracts, testified regarding how the Department's BidX system functioned. As he indicated, the BidX program tracks when the ITB information and documentation is uploaded into the system and when and that same documentation is subsequently downloaded by prospective bidders.¹⁰⁴ As he testified, anytime the Region makes a change to the project's documentation, there is what is referred to as an "EBSX" file created. The EBSX file is individual and unique to the documentation that exists for the project at any given point in time.¹⁰⁵

BidX only allows the latest version of the ITB to be downloaded once changes have been made to the documentation by the Region. In other words, once addenda are created and uploaded into BidX by the Region, a bidder can only download the ITB documentation including the addenda. This is confirmed by the EBSX file identifier. As such, by analyzing the specific EBSX file downloaded by a prospective bidder, the Region can confirm the documents in the bidder's possession, and thus presumptively used and relied on by a prospective bidder in submitting its bid.¹⁰⁶ In this instance, it was confirmed that SPM had the most recent and updated version of the ITB documentation in preparing and submitting its bid, including Addenda 1 and 2.¹⁰⁷

¹⁰⁴ Testimony of Jeff Jenkins; R SOA at 316-18.

¹⁰⁵ *Id.*

¹⁰⁶ An example of this is R SOA 375. This is the bid submission receipt for SPM. It identifies what EBSX file was used in submission of SPM's bid, and specifically, that there had been two "amendments" or addenda issued in doing so. The Region was clear in its testimony, however, that it never accepted SPM's bid submission receipt in lieu of the addenda acknowledgements as required by Addenda 1 and 2. Testimony of Jeff Jenkins.

¹⁰⁷ Testimony of Jeff Jenkins.

For the purpose of proving that a bidder had an addenda in its possession, the BidX program makes the addenda acknowledgement superfluous. While the Region never argued this during hearing, it is a conclusion that is reasonably drawn from the testimony describing the functionality of the BidX program.¹⁰⁸

Moreover, the timing of the issuance of the addenda is also important. This is not an instance where Addenda 1 and 2 were issued immediately prior to the deadline for submission of bids. Here, Addendum 1 was issued on April 6, 2021, and Addendum 2 was issued on April 13, 2021.¹⁰⁹ The deadline for submission of bids was 2:00 p.m., April 27, 2021.¹¹⁰ As such, both addenda were equally available to all bidders, including SPM, nearly two-weeks in advance of bids being due.

Finally, there was also a significant amount of testimony at hearing confirming that there was nothing within SPM's bid to suggest that it had failed to properly consider the addenda. SPM's bid contained prices for all pay items and had accounted for all work to be covered within the project, including the items specifically referenced by and addressed in Addenda 1 and 2.¹¹¹ The bid was also reviewed by the Region's project manager and project developer to determine whether it was reasonable or alternatively, mathematically unbalanced, or irregular. Based on that detailed review, it was determined that SPM's bid was reasonable, and not mathematically unbalanced or irregular.¹¹²

Based on the hearing evidence and testimony, the Region's waiver of SPM's failure to acknowledge Addenda 1 and 2 had *no* effect on SPM's bid whatsoever. There is absolutely nothing to suggest that SPM's failure to acknowledge Addenda 1 or 2 gave it *any* advantage, competitive or otherwise, over any other bidders on the project, including Jolt.

3. *Outcome*

This case involves an instance where Addenda 1 and 2 admittedly had a significant impact on the project's time, quality, quantity, cost of performance, and technical requirements. However, the Region's waiver of SPM's failure to acknowledge Addenda 1 and 2 had no effect on its bid and gave it no advantage over any other bidders on the project. Despite the Department's Policy and Procedure, which appears to emphasize the addenda's effect on the

¹⁰⁸ *Id.*

¹⁰⁹ R SOA 293-97.

¹¹⁰ *Id.* at 5.

¹¹¹ *Id.* at 334-36; Testimony of Jeff Jenkins.

¹¹² Testimony of Jeff Jenkins.

project itself, there is no reason to apply that policy in this instance. Doing so would elevate form over substance, something that the Alaska Supreme Court has refused to do in the context of procurement cases.¹¹³

In *Laidlaw Transit, Inc.* the Court held that “a variance from the requirements of an RFP will render a proposal nonresponsive only if that variance is material. A variance is considered material if it gives one bidder a substantial advantage over other bidders and thereby restricts or stifles competition.”¹¹⁴ It concluded that a winning bidder’s failure to sign an addendum to an RFP acknowledging its receipt, as bidders were instructed to do, did not give the bidder a substantial advantage over the other bidders. This was because the addendum language was already included within the RFP and all bidders were equally aware of the addendum.¹¹⁵

In *Laidlaw*, the Court also confirmed the discretionary power to waive certain RFP requirements to avoid their strict enforcement from undermining the bidding process.

Under the circumstances presented here, rigid enforcement of this requirement would have elevated form over substance, frustrating the district's and the regulation's clear intent to create a competitive bidding process for pupil transportation. . . . Here, strict enforcement of the RFP's requirement to acknowledge each addendum would have undermined the competitive bidding process by placing the district in the position it sought to avoid, that of having no opportunity to compare multiple responsive bids.¹¹⁶

Refusing to apply the Department’s Policy and Procedure in this instance is also warranted because the Department’s Policy and Procedure also does not appear to have been adopted into regulation. The Alaska Supreme Court addressed a similar issue in *Jerrel v. State, Department of Natural Resources*.¹¹⁷ That case involved a properly adopted DNR regulation that allowed the Division of Land and Water Management to “require that . . . livestock be tagged, dyed, or otherwise marked.”¹¹⁸ Additionally, and without seeking to create any official regulation, the Division also created a bright-line rule “that [the] mark must be plainly distinguishable from a distance of 20 feet.”¹¹⁹ The Alaska Supreme Court determined that this bright-line standard was a regulation. Specifically, it concluded that it was a “standard of general application” because it “affects the public or is used by the agency in dealing with the

¹¹³ See generally, *Laidlaw Transit, Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018 (Alaska 2005).

¹¹⁴ *Id.* at 1032 (internal citations and quotation marks omitted).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1033.

¹¹⁷ 999 P.2d 138 (Alaska 2000).

¹¹⁸ 11 AAC 60.070.

¹¹⁹ *Jerrel*, 999 P.2d. at 140.

public.”¹²⁰ The Court concluded that because DNR had failed to promulgate the standard in accordance with the Administrative Procedures Act, the informal policy that it developed was unenforceable and invalid.¹²¹

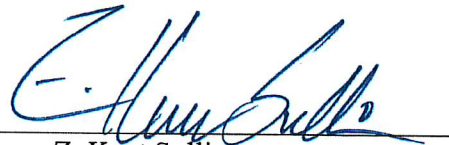
Similarly, here, the Department’s Policy and Procedure has not been formally adopted by regulation. The absence of regulatory authority would make it difficult for the Region to enforce the policy against a bidder when the Region has actual knowledge that a bidder has the addendum in its possession. Under *Quality Foods*, this could mean that the agency would not have discretion to find SPM nonresponsive.

Assuming that this is a discretionary decision, however, this is an appropriate case to defer to the procurement officer’s exercise of discretion. First, given the absence of regulatory authority to make a signed acknowledgement mandatory when the acknowledgment is merely a matter of form, not substance, the exercise of discretion to waive the acknowledgment was well advised. Second, the procurement officer is in an appropriate position to determine whether the facts relating to the documentation in the BidX program meet the underlying need of the agency for certainty regarding receipt of the addenda. Third, waiving the addenda promotes the competitive process. Fourth, as was found in *Quality Foods*, the procurement was conducted in a fair and even-handed manner. Accordingly, the decision of the procurement officer that SPM’s bid was responsive is upheld.

IV. Conclusion

SPM’s failure to acknowledge the addenda in this instance did not, and could not, affect the substance of its low bid in any way. As *Chris Berg*, *Quality Foods* and *Laidlaw Transit, Inc.*, all confirm, on these facts, there is simply no basis or ability to reject the discretion properly exercised by the Region in waiving the addenda acknowledgment requirement as a minor informality. Accordingly, the Region’s decision denying Jolt’s bid protest is AFFIRMED.

DATED this 19th day of January 2022



Z. Kent Sullivan
Administrative Law Judge

¹²⁰ *Id.* at 143.

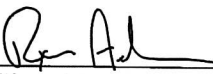
¹²¹ *Id.* at 144.

Adoption

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

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 4th day of March, 2019. 2022

By: 
Signature
Ryan Anderson
Name
Commissioner, DOT&PF
Title

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:

William Bankston + Douglas Kuret - by mail/email

Morgan Griffin, AAF + Dept of Law - by email

CC: Hilary Porter - by mail

CC: Tara Harmon + Suzanne Uchimi - by email

Signature  Date 3-7-2022