



THE STATE
of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Administration

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November 16, 2020

The Honorable Zack Fields
House State Affairs Committee
Alaska State Capitol
Juneau, Alaska 99801

The Honorable Jonathan Kreiss-Tomkins
House State Affairs Committee
Alaska State Capitol
Juneau, Alaska 99801

Re: Barry Jackson Procurement Presentation, October 6, 2020

Dear Co-Chair Fields and Co-Chair Kreiss-Tomkins:

I would like to take this opportunity to respond to the presentation made by Barry Jackson to the House Committee on State Affairs on October 6, 2020, alleging certain improprieties in the procurement process related to Request for Proposal (RFP) 2020-0200-4381 (Improvement of Shared IT and Back-office Service Functions). While Mr. Jackson made numerous claims, they culminate in one overarching allegation: The Department of Administration (DOA) steered a contract process to preclude competition so there could only be one responsive bidder that qualified for the contract. However, as demonstrated below, at least six other firms qualified for the contract and could have bid on it.

Background

The DOA, and other State agencies, have received a number of public records requests from Mr. Jackson as an affiliate of blogger Dermot Cole, and various news organizations, focusing on the State's use of alternative procurement methods provided for in AS 36.30.300-320. Certain high-profile procurements have attracted media attention, but it is worth noting that alternate procurement methods such as small procurements, single source procurements, and emergency procurements are expressly authorized under the Procurement Code.

Many of Mr. Jackson's statements about the purpose of state procurement to promote fair and open competition, are, of course, true. However, the Procurement Code provides for multiple procurement methods to address a variety of circumstances. The

Code balances the interests of fair and open competition, with ensuring that the procuring agency, and in turn, the public’s needs are met and that the State obtains the best value with the public funds. The Code provides an avenue for redress in the event a procuring agency errs either in its selection of a procurement method, drafting solicitation specifications, or evaluation of bids or proposals.¹ In addition, the Chief Procurement Officer, procurement officers, and procuring agencies are constantly evaluating their forms and procedures in an effort to improve policies and procedures.

Mr. Jackson did not present evidence of any impropriety or violation of the procurement code; however, the instances he described, when viewed in isolation, have the potential for creating false conclusions. It is against this backdrop that I respond to the specific allegations that Mr. Jackson made in his presentation.

Mr. Jackson’s allegations and RFP 2020-0200-4281

Much of Mr. Jackson’s focus relates to specific issues with the RFP 2020-0200-4381, solicitation for Improvement of Shared IT and Back-office Functions, issued on September 19, 2019, by the DOA Shared Services of Alaska (SSOA). The RFP sought a professional consultant to assist the State in consolidating its information technology services and back office support (also known as the Alaska Administrative Productivity and Excellence (AAPEX) contract).

BDO and Alvarez & Marsal Public Sector Services, LLC were the only two offerors to submit proposals. After initial review, the procurement officer found BDO’s proposal non-responsive for failing to establish that it met the minimum requirements. Thus, only Alvarez & Marsal’s proposal was forwarded to the proposal evaluation committee (PEC) and scored. A notice of intent to Award to Alvarez & Marsal was issued on October 17, 2019.

It is important to note that although BDO filed a protest, it did not protest any of the issues Mr. Jackson highlighted in his presentation. BDO’s protest was limited to the issue of whether it actually met the minimum experience requirements. Because BDO did not establish it qualified on the face of its proposal, the procurement officer denied the protest. The DOA Deputy Commissioner upheld the decision as a matter of law under AS 36.30.610(b) because the protestor did not raise an issue of genuine fact.²

I turn now to the issues presented by Mr. Jackson to the committee on slide number two of his presentation containing the following allegations related to the RFP: (1) unduly restrictive, irrelevant, and illegal specifications which had the effect of

¹ AS 36.30.560-615.

² The Deputy Commissioner acted pursuant to AS 36.30.610(b) which provides that the commissioner (or designee) “may issue a decision on [an] appeal without hearing if the appeal involves questions of law without genuine issues of fact.”

suppressing competition; (2) failure to preserve critical public records; and (3) execution of the contract violated due process and without statutorily required licensing.

1. Unduly restrictive, irrelevant, and illegal specifications

Mr. Jackson argued that the requirement for minimum prior experience qualifications contained irrelevant and illegal requirements.

Section 1.04 of the RFP established the minimum prior experience qualifications:

Offerors must have experience in strategy, planning, and implementation of large-scale government shared services or Information Technology consolidations. All Offerors must be a member of the National Governor’s Association Partners (NGA Partners), or a firm that offers all the following services in-house (without sub-contracting): professional services, audit, assurance services, taxation, management consulting, advisory, actuarial, corporate finance and legal services. Offerors must have been in business as a company in good standing for at least 25 years.

An offeror’s failure to meet these minimum prior experience requirements will cause their proposal to be considered non-responsive and their proposal will be rejected. (Emphasis added).

a. Were the RFP specifications unduly restrictive?

The fact that only one of two offerors qualified for an RFP is not conclusive evidence that an RFP contained unduly restrictive requirements (which are prohibited under AS 36.30.060).

It is a well-settled tenet of both Alaska and federal procurement law that all objections to the terms of a solicitation must be raised prior to the due date for proposals. AS 36.30.565(a) states that a protest alleging an “impropriety or ambiguity” in a solicitation must be filed at least ten days before the proposals are due. Federal procurement regulations contain a similar requirement.³ This timeliness requirement promotes the important goals of fairness and efficiency in public procurements.⁴

³ 4 C.F.R. § 21.2(a)(1)(1990).

⁴ *In the Matter of Electronic Data Systems*, No. 02.23 (Department. of Administration, December 27, 2002) (quoting from *Appeal of Scientific Fishery Systems, Inc.*, No. 98-08, at 2-7 (Department of Administration, July 26,1999)) Timely protests concerning specifications provide a procurement officer with the opportunity to correct an erroneous or defective RFP before the submission of proposals. Excusing untimeliness could enable an unsuccessful

One of the primary purposes for requiring protests regarding the terms of a solicitation be submitted 10 days in advance of the deadline for proposals is to provide time for corrective action if it is needed.⁵ Generally, a solicitation that is challenged as unduly restrictive will be upheld if the specification is reasonably necessary to meet the agency's needs. Agencies enjoy broad discretion in specifying their needs.⁶ Specifications are unduly restrictive when they are not reasonably necessary to satisfy the *agency's* actual needs.⁷ When a protestor asserts that specifications are unduly restrictive, the initial burden is on the agency to make a *prima facie* case that the specifications were reasonably necessary.⁸ If the agency meets that burden, the protestor must show that the agency was clearly mistaken.⁹ Again, while Mr. Jackson has alleged the specifications were unduly restrictive, neither the Offeror, nor any other potential bidder, challenged the specifications. It also should be noted that neither Mr. Jackson nor the Committee has asked the DOA what its needs were and why it established the minimum qualifications for the contract the way it did.

It is not enough for an interested party to disagree with the determination by an agency as to the necessity of the requirements. A difference of opinion is not enough to raise a serious and substantial question about the reasonableness of the requirements. Both Alaska Procurement decisions and federal comptroller general decisions on the subject of "unduly restrictive requirements" rest on the question of whether the agency is able to offer a reasonable explanation for the challenged specification and show that the challenged restriction is reasonably necessary to meet its needs.¹⁰ Agencies enjoy broad discretion in specifying their needs:

Government procurement officials, who are familiar with the conditions under which supplies, equipment, or services have been used in the past, and how they are to be used in the future, are generally in the best position to know the government's actual needs, and therefore, are best able to draft appropriate

proposer to obtain a second opportunity in the selection process and may substantially disrupt the procurement process. For these reasons, the requirement of timely filing of protests based on defective solicitations is an important one: it avoids unnecessary expense, disruption and delay in the procurement of goods and services.

⁵ *Id.*

⁶ *Appeal of Scientific Fishery Systems, Inc.*, No. 98.08 (Department of Administration, July 26, 1999).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Appeal of Scientific Fishery Systems, Inc.*, No. 98.08 (Department of Administration, July 26, 1999).

specifications. *Gel Sys., Inc.*, B-234283, May 8, 1989, 89-1 CPD ¶ 433. Although an agency is required to specify its needs in a manner designed to achieve full and open competition, and is required to include restrictive provisions or conditions only to the extent necessary to satisfy its needs, without a showing that competition is restricted, agencies are permitted to determine how best to accommodate their needs... and we will not substitute our judgment for that of the agency.¹¹

In this instance, DOA included the “NGA Partner” membership option in the specifications for purposes of quality assurance and procurement efficiency - the “NGA Partner” designation serves as an independent third-party determination of an offeror’s experience and qualifications. NGA views “Partner” status as a seal of approval evidencing that a company has demonstrated a track record of performing quality work for state governments. The NGA utilizes a vetting process for companies before they become partners that puts companies through extra layers of screening. For example, NGA ensures the company is neither partisan, nor a lobbyist, nor a legal or advocacy group. NGA also validates that a company has a demonstrated success record with respect to policy work, and that it can successfully partner with state governments. Only after a company has successfully completed NGA’s rigorous vetting process is NGA willing to associate its name with the company through use of an endorsement.

Finally, it is also important to note the distinction between the number of proposals submitted versus the potential number of vendors who could have submitted a proposal because they met the qualifications in the RFP. The following six other NGA Partners would have qualified for the project if they had submitted an offer: KPMG, Accenture, Ernst & Young, Deloitte, McKinsey & Company, and Maximus. It is important to note that these are firms with expertise in organizational design, consolidations, and restructuring, which was the focus of this contract. However, they are not specialists in IT hardware, software and web development, which was the focus of

¹¹ *AT&T Corp.*, Comp. Gen. Dec. B-270841, 96-1 CPD ¶237 (emphasis added) (citing *Mine Safety Appliances Co.*, B-242379.2; B-242379.3, Nov. 27, 1991, 91-2 CPD ¶ 506, *Simula, Inc.*, B-251749, Feb. 1, 1993, 93-1 CPD ¶ 86; *Purification Envtl.*, B-259280, Mar. 14, 1995, 95-1 CPD 142. . AT&T involved three solicitations by the Defense Information Systems Agency (DISA) for the components of a defense telecommunications network. AT&T Corp. filed a protest arguing that the solicitations were unduly restrictive and requested that the agency amend the solicitations to allow offerors to submit a single integrated proposal responding to all three requirements. The comptroller general denied the protest finding (1) most of what AT&T complained about amounted to an assertion that the agency’s requirements would be better met by other means; (2) the agency acted within its discretion to impose risks on the offerors; and (3) to the extent that the agency’s approach may be restrictive of competition, the agency justified the restrictions as necessary to meet its minimum needs. *AT&T Corp.*, Comp. Gen. Dec. B-270841, 96-1 CPD ¶237.

Mr. Jackson’s scrutiny. This might explain why Mr. Jackson overlooked the six other NGA firms that qualified for the contract.

Additional potential vendors also could have qualified for the contract by meeting the alternative qualification factors: “a firm that offers all the following services in-house (without sub-contracting): professional services, audit, assurance services, taxation, management consulting, advisory, actuarial, corporate finance and legal services.” It is unknown how many other firms may have qualified under this factor rather than the NGA factor.

Again, no prospective or actual offeror challenged the specifications used in this procurement. DOA did not steer this contract process so only one firm could qualify for it; at least six other firms qualified for this contract through one of the two ways to qualify.

b. Was it illegal to include a requirement for in-house legal services?

Although the DOA has general procurement authority for most goods and services in the State, one of the exceptions is the procurement of legal services, which is reserved for the Attorney General. Under AS 36.30.015(d), “[a]n agency may not contract for the services of legal counsel without the approval of the attorney general.” An informal Attorney General Opinion has also implied this requirement even in instances where the legal services were incidental to other services,¹² and where the procurement was exempt from the Procurement Code.¹³

The initial phase of the contract only provided for: (1) assessment of the current state of shared services and IT consolidation, (2) development of a plan to improve shared services and complete IT consolidation, and (3) implementation of actions necessary to successfully achieve outcomes and consolidations. Because legal services were not contemplated in the initial phase of the contract, the DOA did not seek Attorney General approval during this initial contract phase. If, during the course of the contract, it would have become necessary to amend the contract to include legal services from the vendor, the DOA would have requested prior approval from the Attorney General before doing so. In the end, the Department of Law was able to provide the necessary legal support for the AAPEX project.

¹² 1984 Inf. Op. Att’y Gen. (May 24, 366-016-85) (informing the Postsecondary Education Commission that legal services as part of its default collections procurement should be handled separately through the Department of Law).

¹³ 1988 Inf. Op. Att’y Gen. (Aug. 29; 663-89-0048) (finding statutory and common law duties of the attorney general make it clear that hiring of attorneys to provide legal services on behalf of the state is subject to approval of the Department of Law).

2. Failure to preserve critical public records

Mr. Jackson alleges that the procuring agency’s failure to preserve all drafts of the procurement was improper. The Procurement Code contains several provisions describing the procurement records that should be kept and made available to the public. Drafts are generally not subject to the records retention schedule or kept within the procurement file.

3. Allegations that contract award violated due process and did not comply with statute.

The final allegations of Mr. Jackson center on how the protest by BDO was handled and the timing of the contract award. Unlike federal procurement law which provides for an automatic stay of contract award upon receipt of a protest; under Alaska law, the default is that the agency moves forward with contract award.¹⁴ In order to overcome the presumption in favor of contract award, the procurement officer must make affirmative findings that (1) a reasonable probability exists that the protest will be sustained; or (2) a stay of award will not be contrary to the best interests of the state.¹⁵ In this case, the procurement officer did not make these findings. Accordingly, DOA moved forward with contract award while the protest appeal was pending.

In addition, Mr. Jackson faults the Office of the Commissioner for retaining the protest appeal and making a final decision under AS 36.30.610(b) instead of referring the matter to the Office of Administrative Hearings for a hearing. Under Alaska's procurement code, a protest appeal can be decided in a number of ways, ranging from rejection of the appeal by adoption of the procurement officer's protest decision, without any kind of hearing, to conducting an evidentiary hearing at which new evidence is presented.¹⁶ In administrative adjudications, the right to a hearing does not require development of facts in an evidentiary hearing when no factual dispute exists. For protest appeals specifically, the law provides that a decision can be issued without holding an evidentiary hearing "if the appeal involves questions of law without genuine issues of fact."¹⁷ Even if the matter is referred to OAH, it may not necessarily be set for hearing. A protest appeal in which the existing record provides all of the facts needed to resolve the legal issues is especially suitable for summary adjudication.

Here, the issue on appeal was whether the procurement officer should have interpreted “advisory services” to mean “in-house legal services” to meet the minimum

¹⁴ AS 36.30.575.

¹⁵ *Id.*

¹⁶ *Turbo North Aviation v. Department of Public Safety*, OAH No. 05-0658-PRO (January 17, 2006).

¹⁷ AS 36.30.610(b).

qualifications requirement. This was not a dispute of fact, but rather how the law and requirements of the RFP should apply to the facts. If BDO believed it was denied due process, it could have appealed the final decision under AS 36.30.685. BDO did not appeal.

Conclusion

While I appreciate Mr. Jackson’s right to express his opinion to the Committee based on his experience as a procurement officer for the State 21 years ago, as the Commissioner of DOA, I must apply the facts of this procurement against the Procurement Code. The foregoing clearly demonstrates that the DOA did comply in all material respects with the requirements of the Procurement Code in conducting this procurement. DOA competed this contract in such a way that multiple firms qualified for and could have bid on it.

In closing, the hardworking professionals who conducted this procurement are committed to protecting the public’s interests and maintaining the highest level of integrity. They dedicate themselves to conducting procurements in accordance with the law and are daily responding to the COVID-19 pandemic.

Sincerely,



Kelly Tshibaka
Commissioner

cc: Representative Grier Hopkins
Representative Andi Story
Representative Steve Thompson
Representative Sarah Vance
Representative Laddie Shaw