

LEGAL SERVICES

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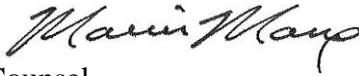
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Juneau, Alaska 99801-1182
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MEMORANDUM

October 1, 2020

SUBJECT: Eligibility criteria used in RFP (Work Order No. 32-LS0082)

TO: Representative Zack Fields
Attn: Tristan Walsh

FROM: Marie Marx 
Legislative Counsel

You have asked whether the National Governors Association Partners (NGA Partners) eligibility criteria used in a September 19, 2019 request for proposals (RFP) complies with the State Procurement Code (AS 36.30) (the Procurement Code). The short answer is this eligibility requirement may violate the Procurement Code if the Department of Administration (the Department) lacked a reasonable basis to determine that only a firm who is a member of the NGA Partners program or offers professional services, audit, assurance services, taxation, management consulting, advisory, actuarial, corporate finance and legal services without sub-contracting can perform the services set forth in the RFP. However, without specifics of the Department's basis for its determination, I am unable to evaluate how a reviewing court may view the reasonableness of the determination.

1. Background. On September 19, 2019, the Department issued Request For Proposals No. 2020-0200-4381, a fixed price contract with the work to be implemented in three phases. The RFP was titled "Improvement of Shared IT and Back-office Service Functions." Sec. 1.01 and sec. 3.01 of the RFP both state its purpose "is to seek out and engage a professional consulting firm with expertise in Information Technology consolidation and back-office support consolidation as Shared Services in the government sector." Sec. 1.01 also states that "[t]he State is seeking professional support for the development of a robust strategy plan and assistance with implementation to achieve consolidated services, cost savings, and customer satisfaction of IT and shared services functions within the Department of Administration." Sec. 3.01 contains similar language.

RFP sec. 1.04 establishes the following mandatory prior experience criteria:

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 (sic) 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.

Under sec. 1.04, an offeror's failure to meet these minimum prior experience requirements will cause their proposal to be considered non-responsive and the proposal will be rejected.

Sec. 3.02 of the RFP identifies the services to be consolidated under the contract as: 1) information technology, 2) centralized procurement, 3) travel administration, 4) finance and accounting (accounts payable and collections), 5) leasing, and 6) centralized mail and print services. RFP sec. 3.03 establishes the contractor's responsibilities under the three phases of the contract. Under phase one, the contractor must review the current state of shared services and IT consolidation. In phase two, the contractor develops a plan to improve shared services and complete IT consolidation. Phase three "will include activities for the awarded firm to perform or require the State to conduct for successful implementation of their consolidation and back-office Shared Services improvements. This Phase will be implemented based upon the outcome of Phases 1 and 2 listed above." Sec. 3.01 similarly provides "The State expects the Offeror to give a detailed response for all Phases in this RFP but reserves the right to utilize Phase three based upon the outcome of proposed Phases one and two."

Sec. 4.04 further explains the prior experience criteria and requires offerors to provide comprehensive narrative statements that demonstrate the consultant's overall prior experience and qualifications, including:

2. Offeror must confirm if their firm is a member of the National Governor's (sic) Association Partners (NGA Partners) or, offeror must explain in detail how their firm offers professional services, audit, assurance services, taxation, management consulting, advisory, actuarial, corporate finance and legal services without sub-contracting.

2. NGA Partners requirement. One of the RFP's eligibility criteria is that the offeror's firm either must be a member of NGA Partners or offer all of the listed services in-house and without subcontracting. NGA Partners states its mission is to:

[E]mpower solutions to public policy challenges between governors and the private sector, while promoting bipartisanship and thoughtful, diverse leadership. We believe state-based innovation and inclusion drive meaningful change across the nation. We are dedicated to sharing emerging trends and bolstering communication and collaboration. NGA Partners have unique opportunities to demonstrate their commitment to governors and support their leadership in solving the challenges facing state government.¹

¹ National Governors Association, About, NGA Partners, available at <https://www.nga.org/about/ngapartners> (last visited Sept. 30, 2020).

The NGA Partners website lists four levels of partner membership: Platinum, Gold, Silver, and Bronze.² Platinum members include companies such as Amazon, AT&T, and Walmart, Gold members include Lyft, Uber and Target, Silver members include Bank of America, Google, and Netflix, and Bronze members include HP Inc., KPMG, the American Beverage Association, and the American Gas Association.

The NGA Partners program helps fund the NGA Center for Best Practices, a 501(c)(3) corporation that "helps governors and their key policy staff develop and implement innovative solutions to governance and policy challenges in their states."³ The NGA Partners website does not provide information about how to become a NGA Partner, so it is unclear what is required to join the organization or what the four levels of membership represent.

From the lists of NGA Partners and other information provided on the website, the organization does not appear to be for a particular profession or for an organization that specializes in the RFP's listed services. NGA Partners' purpose appears to be to assist governors and the private sector exchange information and discuss issues affecting business and government, and to help fund the NGA Center for Best Practices. Although this is tangentially related to performing governmental work, it is unclear how a contractor's NGA Partners membership is connected to the services being sought in the RFP or how it is sufficiently related to make organization membership an alternative mandatory requirement.

The purposes of competitive bidding are "to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the [state] receives the best work or supplies at the most reasonable prices practicable."⁴ The Procurement Code and its regulations specifically prohibit the use of specifications or contract terms and conditions that are unduly restrictive.⁵ Additionally, AS 36.30.880 requires all parties involved in the negotiation, performance, or administration of state contracts to act in good faith.

Courts apply a reasonable basis standard in reviewing an agency's application of its own procurement code.⁶ Under this standard, a court would evaluate whether the Department

² *Id.*

³ National Governors Association, About, FAQ, available at <https://www.nga.org/about/faq> (last visited Sept. 30, 2020).

⁴ *McBirney & Assocs. v. State*, 753 P.2d 1132, 1135 - 36 (Alaska 1988) (quoting *Gostovich v. City of West Richland*, 75 Wash.2d 583, 452 P.2d 737, 740 (1969)).

⁵ AS 36.30.060(c); 2 AAC 12.090; 2 AAC 12.790.

⁶ *See, e.g., Laborers Local No. 942 v. Lampkin*, 956 P.2d 422, 432 n. 11 (Alaska 1998). While whether an agency had a reasonable basis for its action does not necessarily eliminate the significance of an alleged impropriety, *see, e.g., Paul Wholesale*,

had a reasonable basis to determine that only a firm who is a member of the NGA Partners program or offers professional services, audit, assurance services, taxation, management consulting, advisory, actuarial, corporate finance and legal services without sub-contracting can perform the services set forth in the RFP.⁷ As discussed above, it is unclear how a contractor's NGA Partners membership is connected to the services sought in the RFP. It is my understanding that the Department has not yet proffered a basis for its determination that only a firm who is a member of the NGA Partners program or offers professional services, audit, assurance services, taxation, management consulting, advisory, actuarial, corporate finance and legal services without sub-contracting can perform the services set forth in the RFP. Without specifics of the Department's basis for its determination, I am unable to evaluate how a reviewing court may view its reasonableness.

Please let me know if I may be of further assistance.

MYM:lme

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B.V./HOLS Trading, GmbH, J.V. v. State, Dep't of Transp. & Pub. Facilities, 908 P.2d 994, 1001 (Alaska 1995), the materials provided with the legal memorandum request do not appear to suggest impropriety or the appearance of impropriety. *See, e.g., Laidlaw Transit, Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1037 (Alaska 2005) (disappointed bidder failed to allege any specific instance of covert negotiations or collusion between district and successful bidder First Student; court found no specific description or offer of evidence in the record supporting disappointed bidder's claim that district "never had any intent to award a contract to any proposer other than First Student, regardless of which proposer was the lowest price responsive and responsible proposer").

⁷ *See, e.g., AG Op. 883-94-0143* (June 14, 1994) ("Under AS 36.30.060(c), specifications for procurement of services under competitive sealed bids or proposals 'must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive.' Unless the Alaska Commission on Postsecondary Education makes an independent determination that only a "firm of national reputation in the student loan industry" can perform the cost/benefit analysis, adherence to the restriction in the appropriation may run afoul of AS 36.30.060(c)."). The state's procurement regulations contain more limiting language than found in AS 36.30.060(c) and prohibit the use of contractual terms that have the effect of exclusively requiring a proprietary service or a procurement from a sole source. While it is possible the prior experience eligibility requirements at issue may be construed as having the effect of exclusively requiring a proprietary supply, service, or construction item or procurement from a single source, such a construction is unlikely. *See, e.g., Lampkin*, 956 P.2d at 435 ("Even assuming that the [project labor agreement as a bid specification] affected competition as Lampkin asserts, it cannot be construed as limiting bidding to any particular contractor.")