December 1, 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: Commissioner Tshibaka response to Procurement Presentation of Oct. 6, 2020

Executive Summary

None of the procurements of interest, including this one, are ripe for intervention and cure. That opportunity has passed; however, a timely review and examination may be instructive and yield an understanding of how the Procurement Code and Regulations might be updated to assure that the State of Alaska's future procurement activities are a point of pride for the people of this state and not a stain.

I. - Issue: Retention, availability, and swiftness of production of public records related to procurement activities and related decision-making

Multiple comprehensive public records requests have been made that include background records such as drafts of documents, notes, memos to the file, messaging, and other types of behind-the-scenes records. Many of those records have remained un-delivered or denied for arguably improper reasons, while others have been improperly destroyed, or delayed, making many aspects of the procurement system's processes, procedures and decisions invisible with regard to this procurement. After months of delay the Commissioner has now publicized her resistance to providing the requested records. The records delivery has now been set for more months into the future. Such drastic delays do not inspire confidence that all is well.

II. - Issue: Conflict of Interests

By naming herself as Project Manager of the AAPEX project the Commissioner created inherent conflicts of interest as she simultaneously undertook decisions and provided direction that placed her interests as a Project Manager in conflict with her statutory obligations to insure the State's procurement activities were properly conducted in a fair and impartial manner. Conflicts of interest were also placed

upon her subordinates as they contended with the procurement issues and the project management interests of the Commissioner at the same time.

III. - Issue: Denial and avoidance of due process in resolving protests and appeals regarding the work of the AAPEX project

The Commissioner made false factual statements with regard to the timing and factual conditions when formally awarding a contract in violation of law. In violating the law, the Commissioner disenfranchised a protestor's right to a fully valuable remedy should the protestor have ultimately prevailed. Legally required hearing processes were circumvented by denying matters of fact existed. These actions consistently favored one proposer and disfavored the only other proposer. At the same time there was toleration of the obvious conflict of interests in the having the Commissioner's direct subordinates render key decisions in matters that the Commissioner was personally and highly committed to advancing.

IV. - Issue: Potential favoritism toward potential offerors

Through the Commissioner's decisions and influence, a single proposer consistently received the benefit of illegal award decisions, illegal solicitation specifications, improper proposal examination, suppression of competing vendors, denial of extension of the solicitation period to enhance the severely limited population of competitors, and improper use of irrelevant specifications.

V. - Issue: Potential undue suppression of competition and favoritism towards specific participants

In her response, the Commissioner inadvertently admitted to knowingly withholding of the names of potentially qualified Proposers from being solicited. Improper specifications were used and maintained in the face of multiple competing vendors' requests to make them more relevant and less restrictive. Nevertheless, the original improper specifications and restrictions were utilized to eliminate competing vendors while favoring a single vendor's position in the competition.

VI. - Issue: The definition and use of "responsibility" versus "responsiveness" factors in the RFP preparation and evaluation process

The Commissioner improperly used illegal vendor responsibility requirements as a means to prevent consideration of all but a single bidder.

-End of Executive Summary-

Full Response

A full review appears justified in order to comprehensively investigate the facts of this procurement including full documentation, witness testimony, discovery, and subpoena authority. In the public interest, this and other recent procurements give weight to the proposition that a Special Committee on Procurement be convened to review procurement activities on a statewide basis with an eye towards updating and refining the existing Procurement Code and Regulations applicable to the Executive Branch.

The rest of this letter is focused on targeted full responses to the Commissioner's response of the presentation of October 6, regarding Request for Proposal (RFP) 2020 0200-4381 titled "Improvement of Shared IT and Back-office Service Functions".

Here are the issues of most importance, taken up and discussed one-by-one.

I. Issue: Retention, availability, and swiftness of production of public records related to procurement activities and related decision-making;

A. The Commissioner argues that "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." The Commissioner's assertion is simply not true.

B. Here is the Statutory citation which is applicable to all Executive Branch agencies (and others) regarding the definition of a public record:

1. A.S. 40.25.220 (3) "public records" means books, papers, files, accounts, writings, ***including drafts*** and memorializations of conversations, ***and other items***, regardless of format or physical characteristics, ***that are developed or received by a public agency***, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency; "public records" does not include proprietary software programs. (emphasis added)"

2. Bear in mind that the State Archives fall under the authority of the Commissioner of the Department of Administration. Should the Commissioner wish to make changes, the records retention schedule

for any Department is subject to the Commissioner's direction. In circumstances where the Commissioner is a party to a given set of records, there could arise a potential conflict of interest regarding records retention.

3. The State Archive's currently posted retention requirement for Department of Administration procurement records says this: "***Includes all documents*** (emphasis added) relating to the issuance of a bid including: negotiated bid abstract, bid savings report, purchase requisition/order, request for alternate procurement and contract award." Drafts are not excluded.

4. The retention schedule requires all documents to be retained until the contract is awarded, plus 6 years. Drafts are not excluded.

C. Further, in responding to public records requests related to this procurement effort, attorneys for the Department of Law acknowledged at least 3 retained drafts of the RFP, named the persons who had edited them, and provided a copy of one of the edited drafts with comments made by a reviewer. Clearly, drafts of RFP documents are retained documents.

D. Nevertheless, the Commissioner now asserts that drafts are not retained. Consequently, the procurement officer responsible for this particular solicitation has advised that the requested drafts were not required to be retained and have been deleted from the public records of this procurement.

E. Records that were requested under the Public Records Act and which had previously been produced, examined, segregated as deliberative, and withheld by the Department of Law are now described as not required to be retained and are apparently no longer in existence.

F. Although the records were required to be retained, certain drafts that were key to the development of this RFP were purposely destroyed. The Commissioner, in her response, has falsely stated that those drafts were not required to be retained. Additionally, promises were made to perform a "back-end" document search for copies that may exist elsewhere in the system, but there has been no follow-up on those promises.

G. Certain other copies of the records requested under a FOIA request have taken approximately 8 months to produce. These requests were not so consuming that they required 8 months of work to produce. It is apparent the full records request has been ignored, for reasons unknown.

H. Procurement public records production has not always been so problematic. In years prior to the current administration, all procurement documents were permanently retained in the procurement file, even down to sticky notes if they pertained to the procurement. All drafts were meticulously retained, notes of conversations and meetings were retained, notes of telephone calls were mandatory and retained, all inputs whether oral or written were memorialized and retained. Any record related to the procurement file was instantly made available to any requesting party. State attorneys were only rarely consulted, usually for a determination on whether some portion of a bidder's offer should not be allowed to be made public because it contained some sort of private business information that should not be shared with competitors. This regimen appears to no longer be in effect, and the public interest in fair, open, and honest, expenditures of public funds suffers as a result.

I. Slow production of records prevents timely public examination of an ongoing procurement or contract performance issue.

J. By failing to keep and maintain the trail of records of who is responsible for the contents of all procurement documents, who made what decisions, internal debate, and finalization of documents related to a given procurement action and/or decision, the Commissioner purposely obscures the clarity needed to determine whether there may have been improper conduct or violations of law in a given procurement.

K. Lack of timely response to records requests and destruction of documents key to the development of a procurement effectively suppresses and negates a vendor's rights of timely examination of public records and undermines the vendor's protest rights and remedies under the Procurement Code.

1. Failure to provide to a protestor all requested forms and versions of all potentially relevant documents within the window of the 10-day statutory protest period denies due process to a protesting party.

2. Record production must be immediate in order to maintain the rights of a protestor; the constraints of the 10-day protest period after issuance of the Notice of Intent to Award demand immediate production of requested records so the vendor is not prevented from formulating a timely protest before an improper award is made.

II. Issue: Conflict of Interests;

A. To be clear, based on what is known at this time about the evidence and facts, there is nothing suggesting any violations of the State's Executive Ethics Act. Nothing known suggests that the Commissioner took action to benefit a personal or financial interest she may have. However, appearances of conflicts of interests can take many forms, from creating imbalances between statutory duties and optional duties, to simply a telling friend of an upcoming opportunity and purposely not telling other known competitors of that same opportunity.

B. The Commissioner personally took on the role of Project Manager; this role and the Commissioner's duties as the head of the State's Procurement system are inherently in conflict. As Project Manager there may be circumstances that arise, as in the case of this procurement, that places the Commissioner in direct and meaningful conflict with her role as the head of the State's procurement system.

C. An example is the Commissioner personally sitting on the Proposal Evaluation Committee along with her subordinates as evaluators.

D. The Commissioner personally wrote critical parts of the RFP and personally interpreted her own writings.

E. The Commissioner construed ambiguous terms of the Prior Experience Section of the RFP and conditions in her own favor as Project Manager. This violates a tenet of contract law that ambiguity is to be construed against the author; in this instance the author was the State.

III. Issue: Denial and avoidance of due process in resolving protests and appeals regarding the work of the AAPEX project;

A. Although the Commissioner writes at some length about how a protestor alleging ambiguity must file a protest at least 10 days prior to the closing date of the RFP circulation period, that position is irrelevant in this case.

1. The Protest and the Protest Appeal were both solely denied on the basis that the two words "legal Services" were not contained in the BDO response to the Prior Experience Section of the RFP.
2. The question of whether "advisory services" could be construed to include "legal services" was never addressed. That "issue of fact" was ignored and never considered by the Commissioner.
3. In ignoring any "issue of fact", the Commissioner adroitly avoided the necessity of having the Appeal of the Protest Denial heard by an administrative hearing judge. An independent hearing would have:
    a) subjected her staff and herself to possible testimony under oath regarding this procurement,
    b) involved potential investigation of the records of the procurement,
    c) potentially discovered the irrelevant and illegal basis (no prior written approval from the Attorney General) for the presence of "legal services" as one of the required responsibility requirements,
    d) potential for examination of the relevance of many of the other required "in-house" services.

B. By executing the contract with Alvarez & Marsal during the 10-day protest period, the Commissioner eliminated the possibility that BDO could receive the value potential of the contract if they were to be successful in their protest. The relevant statute is here:

1. "AS 36.30.365. Notice of intent to award a contract. **At least 10 days before the formal award of a contract** that is not for construction, and at least five days before the award of a construction contract, under this chapter, except for a contract awarded under AS 36.30.300-36.30.320, **the procurement officer shall provide to each bidder or offeror notice of intent to award a contract.** The notice must conform to regulations adopted by the commissioner. (emphasis added)"

2. Under Statute, once the contract was formally awarded to Alvarez & Marsal, even if BDO were to prevail at any stage of the protest process, the only remedy available to BDO is reimbursement of their proposal preparation costs. The illegally early formal contract award by the Commissioner completely removed the incentive for BDO to carry their protest beyond the initial actions of Protest, followed by Appeal of the Protest Denial.

3. Even if successful, the cost of pursuing the protest process is not included in the reimbursement of the protestor's bid preparation costs. As a result of pursuing a protest deeper into the process, for the protesting vendor the protest costs eat into the potential reimbursement of proposal preparation costs, potentially rendering the reimbursement of proposal preparation costs as valueless because the cost of pursuing the protest exceeds the value of the proposal preparation costs.

4. This suppression of incentive to protest is one of the reasons that the Statute (AS 36.30.365) requires Notice of Intent to award a contract at least 10 days before the formal award of a contract. In this case, the Notice of Intent to Award the contract to Alvarez & Marsal was issued on Thursday, October 17th, 2019. The actual Alvarez & Marsal contract was formally awarded on Wednesday, October 23, 2019, only 6 calendar days later. Even worse, **the contract with Alvarez & Marsal was formally awarded prior to BDO's protest submittal,** which was delivered on Friday, October 25, 2019, the 8th calendar day after the Notice of Intent to Award. The formal award to Alvarez & Marsal had been made 2 days earlier, when it was a direct and knowing illegal action, and it was executed at a moment in time when BDO had not yet submitted its Protest.

5. This is the Commissioner's false statement in her response regarding the early formal award of the contract to Alvarez & Marsal: "Accordingly, DOA moved forward with contract award **while the protest appeal was pending**" (emphasis added). That statement in the Commissioner's response is a direct false statement to the House State Affairs Committee. On the day the contract with Alvarez & Marsal was formally awarded, the State possessed neither the BDO Protest nor the BDO Protest Appeal, since the former had not yet been submitted and the latter was not yet in existence.

6. In the Commissioner's response, she obfuscates her falsehood by detailing the requirements for delaying an award based upon a protest's likelihood of success, or alternatively, for not being contrary to the best interests of the State. Her redirection of attention away from the actual timeline was a diversion away from the true chronology of events. **The Commissioner's response statement was false because the BDO protest was not submitted until 2 days <u>after</u> the illegally early formal award of the contract to Alvarez & Marsal.**

7. By taking the step of formally awarding the contract to Alvarez & Marsal illegally early, the Commissioner removed the due process rights of BDO to a valuable remedy should their protest be upheld.

8. While it is not known as a fact, good business practice suggest a billion-dollar company like BDO to have weighed the cost of pursuing the next available step in the protest process, Court litigation, against the value of the reimbursement of their proposal preparation costs. It would not be out of the ordinary that BDO by this time knew that success in pursuit of their protest rights would yield no value whatsoever even if they won.

9. Additionally, the contract with Alvarez and Marsal was illegally executed on October 23, 2019 for a second reason. **It was also executed in violation of AS 36.30.210 (e) which states in part: "The offeror shall have a valid Alaska business license at the time the contract is awarded."** Alvarez & Marsal did not have an Alaska Business License until November 21, 2019, nearly a month after the contract was formally awarded and executed by Commissioner Tshibaka.

a) How important is this fact in the greater scheme of things related to this procurement? Probably not very legally significant; however, it does serve to illustrate the extreme pressure to proceed that was placed on Commissioner Tshibaka's subordinates to "get the deal done" with Alvarez & Marsal.

b) Procurement officers know very well the need for an Alaska Business License when formally executing contracts. Under normal processing policy, a contract will not be formally executed until an appropriate Alaska Business License is confirmed.

c) It is worth noting that the assigned procurement officer for this contracting effort did not sign the formal contract, and that the actual contract form was missing the Alaska Business License Number. Was that a coincidence or not?

10. The Commissioner's action in executing an illegally early formal award to Alvarez & Marsal, and doing it before even receiving BDO's protest, locked in Alvarez & Marsal for this contract and made it all but impossible for BDO to gain the award. Once again Alvarez & Marsal has been the recipient of actions by the Commissioner that solely and illegally favored their firm.

C. The Commissioner, who is the self-appointed Project Manager of the AAPEX project, falsely claimed in her response that, regarding the Appeal of the Protest Denial, there were no matters of fact in dispute, only matters of Law. In resolving the BDO Protest by taking this position, her direct subordinate, the Deputy Commissioner was able to avoid referring the Protest and Appeal to the Office of Administrative Hearings to be heard by an administrative law judge.

D. The ignored issues of fact included the following:

1. Is "advisory services" a term of sufficient ambiguity to include the conduct of "legal services"? Under the common tenets of contract law, ambiguity is to be construed against the author; in this case, the author is the State of Alaska and more specifically Commissioner Tshibaka. The term "advisory services" as used in the Prior Experience Section of the RFP is without definition of any sort and is obviously broad and ambiguous. The term was not further discussed or defined to expand or constrict what might or might not be considered an "advisory service" anywhere in the RFP, period.

2. So, would BDO have prevailed if this issue of fact, which they raised in their Protest and Protest Appeal, had been heard by an administrative law judge? It can't be known, as the issue was ignored as an issue of fact, allowing the protest process to be concluded by the Deputy Commissioner of Administration without being referred to the Office of Administrative Hearings. It's worth noting that the Deputy Commissioner had a direct and obvious conflict of interest as a directly appointed subordinate of the Project Manager of the AAPEX project, Commissioner Tshibaka. The appearance of impropriety again arises.

3. Were "in-house legal services" connected to anything in the RFP work performance description? In her response the Commissioner admitted that no legal services were defined in the work performance portions of the RFP, nor were any actually utilized from Alvarez & Marsal, the awarded contractor. Had this issue of fact gone before an administrative law judge with the factual response testimony now available from Commissioner Tshibaka, it is not unreasonable to conclude that BDO would have prevailed. This point goes directly to suppression of competition by Commissioner Tshibaka.

4. To what degree were any of the enumerated required services connected to any of the work of the RFP? The Commissioner failed to rebut any of the questions raised regarding the questionable need for the oddly targeted in-house services, nor the ambiguity or applicability of those services to the conduct of the work of the RFP. Once again, this issue goes to the suppression of competition.

5. Commissioner Tshibaka, in her response, admitted to knowing at the time of the solicitation that the inclusion of "legal services" would need approval from the AG, yet she included it anyway without the AG's approval.

6. The Commissioner in her response also noted that she understood that contracting for legal services required "prior approval" from the AG (as was pointed out in the subject presentation before the Committee), and as such revealed that the requirement was, knowingly, illegally present in the RFP.

7. The Commissioner then subsequently rejected BDO's offer for not specifically stating that "in-house legal services" were being offered. The Commissioner did not address this fact in her response. Clearly from her response, the Commissioner intentionally enforced her "in-house legal services" requirement knowing that including it was a violation of law and regulation. **Her rejection of BDO for failure to clearly offer those illegally stipulated services is a specific, active, and knowing, suppression of competition**.

8. And finally, in her response, the Commissioner admitted that Alvarez & Marsal, the winning vendor, was never asked to utilize their "in-house legal services" in support of this contract. Bear in mind that the Commissioner established those services as a "minimum requirement" of the RFP; the procurement officer subsequently used the lack of an explicit statement from BDO that they were offering "in-house legal services" as a basis for rejection of that offer; further, the Deputy Commissioner assigned to review the Appeal of the Protest Denial maintained the rejection of BDO for not meeting this same false "minimum requirement" of the RFP.

9. In her response, the Commissioner openly admits that the provision of "in house legal services" was not actually a minimum requirement. The Commissioner states in her response that such services were not intended to be utilized in the work defined by the

initial 3 phases of the project and would only be needed should the contract be amended and extended beyond those 3 initial phases.

10. The Commissioner states in her response that "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."

11. So, in reality, the Commissioner did not contemplate utilizing "in-house legal services" in the contract and that requirement was knowingly and falsely present as a "minimum requirement" of the Prior Experience section of the RFP. Yet she knowingly used it as the sole basis for rejecting the lowest-priced offer without any further consideration of the offer, preventing the BDO offer from ever being formally seen by the Proposal Evaluation Committee.

a) And finally, the Commissioner admitted that she never made use of Alvarez & Marsal's "in-house legal services" during the contract term.

b) Even then, in her response, she stated "In the end, the Department of Law was able to provide the necessary legal support for the AAPEX project." What does that mean? Was there ever any legal support related to the scope and conduct of the Alvarez & Marsal contract that was actually provided by the Department of Law?

12. This chain of facts is a clear and obvious admission that the Commissioner, as Project Manager, eliminated a competitor through likely illegal measures. That competitor could possibly have out-scored Alvarez and Marsal by virtue of obtaining the full 20% of the scoring points for having the lowest price. Her actions precluded BDO from advancing to the evaluation stage of the award process and acquiring any points toward a possible award.

13. Finally, this knowing discrimination towards and suppression of potential competitors to Alvarez & Marsal is consistent when it is considered that the Commissioner also personally refused to extend the deadline for receipt of offers so that another potential offeror could expressly obtain an NGA Partner membership and become eligible to automatically advance to the evaluation stage of the award process.

14. And here's an ironic fact complicating the Commissioner's response: BDO performed the 2019 audit of the National Governor's Association. This fact was noted on the NGA website. It would not be unreasonable to surmise that BDO likely knows the actual role and qualifications necessary for a firm to be an NGA Partner better than anyone. In any case, as an auditing firm, ethical considerations likely would have prevented them from becoming an NGA Partner, at least in 2019, the year the RFP was issued and awarded.

IV. Issue: Potential favoritism toward potential offerors;

A. To be clear, the only mandatory statutory requirement for solicitation of RFP offers is that the solicitation must be posted online. This solicitation met that requirement. However, the statute also says that solicitations can be made by other means, if practicable. So, in this case, was it practicable to solicit RFP offers by other means. In this case the answer is "yes"; we know that because as described below, the State did solicit offers by means other than the online posting.

B. Commissioner Tshibaka, by her admission in her response, knew of at least 6 NGA firms that were qualified to participate in the solicitation. She listed them in her response: KPMG, Accenture, Ernst & Young, Deloitte, McKinsey & Company, and Maximus.

C. However, at the outset of the RFP circulation period neither the CPO, nor the assigned procurement officer knew of any NGA Partner firms, whether qualified or not. How do we know this? We know from public records obtained so far, that the CPO found it practicable to solicit offers by other than the online publication. We also know that the Commissioner knew of at least 6 "qualified" NGA Partner firms from her own admission. However, there is no available record that any of the 6 firms the Commissioner knew were "qualified" were ever solicited. The Commissioner's failed to encourage any solicitation of the 6 firms she knew of during the same period (or any other period) that the CPO found it "practicable" to solicit for the names of other potential offerors. The Commissioner's failing allowed her to knowingly limit the pool of competitors, in direct contravention of her duty to encourage competition.

1. The RFP was posted online on September 19, 2019 at an unknown time of day.

2. On Monday September 23, 2019, the 2nd business day after the online posting of the RFP, at 8:50 pm in the evening the then-(Acting) CPO, Linda Polk, solicited the National Association of State

Procurement Officials (NASPO) in order to find any potential vendors to compete for this RFP.

3. In this email, sent in the late evening (signaling the extraordinary effort CPO Polk had undertaken to identify any potential respondents to solicit), Polk said the following:

a) "The State of Alaska is in the process of soliciting for a consulting firm to plan and implement a statewide consolidation of each of the following services, which are currently decentralized: IT, procurement, accounting, and travel services. **We are currently unaware of any firms that offer this service and are wondering if anyone out there has gone through a consolidation of services in your State using a consultant** (emphasis added). If so, I would appreciate if you could send me the name of the firm your State used. I'm trying to get a list of firms (consultants) to whom I can send our solicitation link."

b) On Tuesday, September 24, 2019 (the 3rd business day after the online posting of the RFP) at 6:30 am in the morning, Shane Witten, a NASPO official, offered 1 firm name. That firm name was not among the list of NGA Partner firms the Commissioner has admitted to knowing were qualified to perform the work of this RFP. The firm Witten identified was GEP Worldwide and the contact name he gave was John Carter. GEP Worldwide did not register interest in the RFP and does not appear on the Vendor Registry for this solicitation. Nor are they listed as an NGA Partner on the NGA web site.

c) Also on Tuesday, September 24, 2019 at 6:11 am in the morning, an hour that again is another indication of the extraordinary effort being focused on this procurement, the assigned procurement officer, Mindy Birk, created the Excel Spreadsheet that would serve as the Vendor Registry for this RFP. The first name on that Vendor Registry is Alvarez & Marsal. Subsequently, the entries on that Registry, as listed in chronological order, were Gartner Consulting, followed by BDO, and finally the listing for Asante Alliance.

d) We know the Registry is in chronological order because other documents related to the solicitation make it clear that BDO was already a participant at the time Asante Alliance

arrived on the scene, some 14 days into the solicitation period. Asante Alliance arrived late enough in the solicitation period that they requested an extension of the solicitation period so they could join the NGA Partners group in order to be considered.

e) Prior to the entry of Asante Alliance on the scene, BDO had already suggested more sensible alternate wording for the Prior Experience Section that would have opened the door somewhat to ease the task of becoming a qualified offeror.

f) There is no known evidence that Gartner Consulting elected to participate in this solicitation in any way, beyond registering to receive a copy of the solicitation.

g) None of the 6 firms the Commissioner alleges were known to be qualified for the work of this RFP are listed on this Registry.

(1) It's important to take note that the Commissioner claims in her response that she used certain criteria to determine that there were at least 6 NGA Partner members that were, in her view, qualified to do the work of the RFP.

(2) However, in the RFP there were no such criteria attached to the NGA Partner option. The RFP only minimally required an NGA offeror:

(a) to have performed a large-scale IT consolidation; and

(b) to have been in business in good standing for at least 25 years: and

(c) to be an NGA Partner

(3) The RFP required nothing else of NGA Partner offerors in order to become qualified and advance to the competitive points-scoring evaluation process.

(4) That's why the Presentation before the House State Affairs Committee listed a number of "ridiculous" candidate NGA Partner firms that could likely pass the Prior Experience Section's requirements without having

to have any of the "in-house" business capabilities required of non-NGA Partner firms.

Any NGA Partner firm could simply advance to evaluation and scoring, while non-NGA firms were held to a completely different standard of stipulated company "in-house services". The "ridiculous" firms mentioned in the Committee presentation that likely could meet the Commissioner's NGA Partner requirement included Walmart, Toyota, Hyundai, Land O' Lakes dairy, Bombardier, and Johnson and Johnson.

h) There are no other known public records that confirm that any of the Commissioner's six "qualified" NGA Partner firms were ever contacted or solicited by the State of Alaska regarding this RFP. There are no public records that any of the 6 named firms, of their own volition, contacted the State of Alaska regarding this RFP. As a result, it can reasonably be concluded that the Commissioner made a false statement in her response that "… at least six other firms qualified for this contract through one of two ways to qualify."

i) Unfortunately for the Commissioner's position in her response, a firm can't "qualify" for a specific RFP unless it actually submits a proposal. In her response the Commissioner is claiming that she knows her named NGA Partner firms were qualified. The trouble with that argument is that those NGA Partner firms didn't make an offer. This argument would be laughable if it wasn't so sad for the State of Alaska and its citizens.

j) Without doubt, and by her own admission, the Commissioner knew there were at least 6 additional vendors out there that were "qualified" in her eyes. All the Commissioner had to do (and did do) to suppress that potential competition was to refuse to solicit those 6 known "qualified" vendors.

k) Even though the Commissioner knew who those 6 potentially qualified vendors were, there is no public record that she ever asked her procurement staff to solicit "the 6". Additionally, there is no record of a pre-publication conference call at which one or more of "the 6" might have introduced

themselves as interested parties and yet subsequently decided not to obtain a copy of the RFP nor make an offer.

l) Worse than that, the Commissioner knew her staff was not able to generate reasonable competition and yet did nothing to make "the 6" presumably qualified vendors known to them. How do we know that? In addition to her subordinate Chief Procurement Officer soliciting a national governmental procurement organization for potential vendors, public records reveal that the Commissioner participated in making decisions responding to the questions put forward by at least 2 of the 3 known participating vendors. She clearly knew there were only 3 participating vendors in the mid-term and final days of the solicitation period and yet did nothing to inform her staff of "the 6" other qualified vendors known to her.

m) The takeaway of this evidence is that the career procurement officials did not know of any additional firms, beyond the 4 that were registered, that could be potential respondents to the RFP, even several days into the solicitation period. However, the Commissioner, by her own admission, did know of at least 6 other firms that she believed were qualified to meet the requirements of the Prior Experience Section of the RFP, and said nothing. There is no evidence that the names of "the 6" were ever conveyed to the career procurement professionals so they could be solicited. Instead the Commissioner kept those names to herself, suppressing what she knew would be almost guaranteed competition to Alvarez & Marsal, due to their roles as NGA Partners.

n) By virtue of the State of Alaska's Procurement Code, the Commissioner of the Department of Administration is the statutorily empowered topmost authority overseeing the State's Executive Branch procurement functions. (The one exception is the Commissioner of Transportation who is equally empowered to oversee transportation and construction procurement activities.)

As the ultimate authority over Executive Branch procurement functions, Commissioner Tshibaka is legally obligated to enforce the State Procurement Code. Among those statutory obligations are these:

(1) “AS 36.30.060. (c) Specifications must promote overall economy for the purposes intended and encourage competition”

(2) “AS 36.30.880 Requirement of good faith. All parties involved in the negotiation, performance, or administration of state contracts shall act in good faith.”

(3) Commissioner Tshibaka cannot claim she did not know of the list of “the 6” NGA Partners whom she admitted in her response that she examined and knew to be qualified to participate in this procurement. In failing to pass on these 6 NGA Partners names to her subordinate procurement staff for solicitation, she directly, specifically, and knowingly suppressed competition.

o) If that wasn’t enough, in her self-appointed role as the AAPEX Project Manager, it was in her interest to pass along “the 6” NGA Partners to her subordinates in order to increase the potential for competitive offers and reduced costs in her project. Instead she hid her knowledge and held back the names of “the 6” NGA Partners by not advising her subordinates of their existence and qualifications.

(1) Review of the BDO offer by the Proposal Evaluation Committee held the potential for a savings of nearly a half million dollars to her project budget, as well as to the people of the State of Alaska. Yet that competitive offer was suppressed and rejected on the basis of a knowingly illegal responsibility requirement, “in-house legal services”.

p) Since Alvarez & Marsal was the earliest respondent to the solicitation, and given the shortage of other offerors, and given the Commissioner’s knowledge of at least 6 other firms that could compete with Alvarez & Marsal, it can be reasonably concluded that the Commissioner’s withholding of “the 6” names was at best negligent.

V. Issue: Potential undue suppression of competition and favoritism towards specific participants;

A. Only one company that was an NGA Partner, actually registered, and attempted to participate in the RFP – Alvarez & Marsal.

1. One other company, Asante Alliance, requested a time extension for the solicitation period of the RFP so they could explicitly obtain NGA Partner status and participate in the RFP solicitation.

2. Commissioner Tshibaka personally, explicitly, and quickly denied Asante Alliance their request for a time extension, thereby suppressing a competitor to Alvarez & Marsal on the basis of NGA membership. This was her personal decision, backed by an email chain in the public record.

3. In failing to solicit "the 6" other NGA-qualified firms to participate in this RFP, she knowingly suppressed the possible participation of multiple firms that could have been competitors to the only other NGA-qualified firm: Alvarez & Marsal. This was her personal decision, as evidenced by her own admission in her response letter that she knew "the 6" firms were NGA members and that they could do the work of the RFP.

4. The Commissioner, in her response, admitted to knowing at the time of the solicitation that the inclusion of "legal services" would need prior approval from the AG, yet she included it as a minimum requirement anyway without the AG's prior approval.

5. The Commissioner then subsequently rejected BDO's offer solely for not specifically stating that "in-house legal services" were being offered.

6. She has also admitted that the "in-house legal services" of Alvarez & Marsal were never utilized, according to the Commissioner's response.

7. Bear in mind that the Commissioner established the group of required in-house services as a minimum requirement of the RFP; the procurement officer used the lack of an explicit statement that BDO was offering "in-house legal services" as a basis for rejection of that competing offer to Alvarez & Marsal.

8. Further, the Deputy Commissioner assigned to review the Appeal of the Protest Denial also maintained the rejection of BDO solely for not meeting the "minimum requirement" of the RFP to provide "in-house legal services". This denial left Alvarez & Marsal as the first and only competitor.

9. In her response, the Commissioner openly admits that the provision of "in house legal services" was not actually in reality a minimum requirement. The Commissioner states in her response that such services were not intended to be utilized in the work defined by the initial contract terms and might only be needed should the contract be amended to extend beyond the initial phases of work.

10. The Commissioner states in her response that "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."

11. So, in reality, the Commissioner did not contemplate utilizing "in-house legal services" in the work of the solicited contract and that requirement was knowingly and falsely present as a "minimum requirement" of the Prior Experience section of the RFP. Nevertheless, the Commissioner used it as the sole basis for rejecting an offer that was known to be priced lower than the Alvarez & Marsal offer. The Proposal Evaluation Committee was prevented from even officially viewing the BDO offer.

12. Finally, this knowing discrimination towards and suppression of at least BDO and possibly 6 more potential competitors to Alvarez & Marsal is consistent when it is considered that the Commissioner also refused to extend the deadline for receipt of offers so that Asante Alliance could expressly obtain an NGA Partner membership and become eligible to automatically advance to the evaluation stage of the award process.

VI. Issue: The definition and use of "responsibility" versus "responsiveness" factors in the RFP preparation and evaluation process.

A. Prior Experience is a responsibility issue and is curable at any time prior to award of a contract. Responsibility is the answer to the question: "How can we be certain you have the financial, experiential, equipment, and human resource capabilities to complete the work as described?" Since responsible execution of a project can take many forms and be accomplished

with many resources, it is a moving target which can be cured until the execution of the contract. As a responsibility issue the need for BDO to clarify whether they actually did or did not offer "in-house legal services" could have been resolved at any time prior to execution of a contract. Instead this issue was improperly treated as a responsiveness matter.

B. Responsiveness is an issue of meeting the explicit work performance requirements of the specified undertaking. It is the answer to the question: "How are you going to do the work"? Offerors can be rejected for not clearly demonstrating how they will perform the work as specified in the solicitation.

C. The Commissioner's Prior Experience Section language misuses responsibility requirements and translates them artificially into responsiveness requirements. She then uses a bidder's unclear submittal regarding responsibility (failure to clearly mention the words "legal services") to improperly exclude the offeror from any further consideration. The proper resolution would have been to allow the offeror to enter the evaluation process and allow any question regarding legal services to be resolved (or not) during the points scoring interviews and submittals.

D. The Commissioner was authorized to clarify BDO's proposal.

1. Regulation "2 AAC 12.285. Clarification of offers" says: "In order to determine if a proposal is reasonably susceptible for award, communications by the procurement officer or the procurement evaluation committee are permitted with an offeror for clarification of uncertainties or elimination of confusion concerning the contents of a proposal that does not result in a material or substantive change to the proposal. The evaluation by the procurement officer or the procurement evaluation committee may be adjusted as a result of a clarification under this section."

2. Instead of using the right to clarify whether BDO really did offer "in-house legal services", **services that were known to not actually be needed for this RFP's contract work**, the Commissioner knowingly rejected the BDO offer and eliminated the potential for a nearly half-million dollar saving over the price of the Alvarez & Marsal proposal.

Additional Considerations

Given these knowing and deliberate actions, the Commissioner could be found to be subject to the legal remedies stipulated in the Procurement Code for such behavior by a State official. Here are the appropriate citations from the Procurement Code:

- **Sec. 36.30.930. Civil and criminal penalties.**
  The following penalties apply to violations of this chapter:
  (1) a person who contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction in a manner the person knows to be contrary to the requirements of this chapter or the regulations adopted under this chapter is liable for all costs and damages to the state arising out of the violation;
  (2) a person who intentionally or knowingly contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction under a scheme or artifice to avoid the requirements of this chapter is guilty of a class C felony.
- In this case, at a minimum, the damages should include the difference in the price of the rejected offer of BDO and the price paid to Alvarez & Marsal – roughly $400,000.

It must be asked whether the Commissioner had ever had any prior dealings or contacts with Alvarez & Marsal, including during her time at the United States Postal Service as the Chief Data Officer in the USPS Office of the Inspector General located in Washington D.C.

- The period of Commissioner Tshibaka's service at the USPS coincidentally covered the period that Alvarez & Marsal conducted a nation-wide examination of USPS business systems, including the USPS data systems.
- The Alvarez & Marsal project for the USPS was also headquartered in Washington D.C., and explicitly focused in part on data systems at the headquarters offices of the USPS.

This coincidence should be worthy of investigation, given the concerning facts of this procurement.

For context, please keep in mind that the matters discussed in this response took place long before the outbreak of the COVID 19 pandemic was known to exist anywhere in the world. The Request for Proposals was not driven by the pandemic at the time of the decision to spend $5 million on a consultant contract. This new contract and its related matters took place in the early days (September) of the 2020

fiscal year budget cycle and were fast-tracked as the Commissioner's signature government reorganization project known as AAPEX.

The closing statement is simply this: read and understand the Commissioner's response for what it is… an inadvertent admission of conduct which significantly violates the Procurement Code and Regulations, at a minimum by blatantly favoring a single offeror through suppression of known potential offerors, and by illegally excluding at least one other offeror from due consideration.

Barry Jackson

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c.c.
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Representative Andi Story
Representative Steve Thompson
Representative Sarah Vance
Representative Laddie Shaw