



THE STATE
of **ALASKA**
GOVERNOR MICHAEL J. DUNLEAVY

Department of Administration

KELLY TSHIBAKA, COMMISSIONER

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December 4, 2019

Ms. Joy Merriner
Assurance Office Managing Partner
BDO USA, LLP
3601 C Street, Suite 600
Anchorage, AK 99503

Re: Final Decision on Protest Appeal for RFP 2020-0200-4381 – Improvement of Shared IT and Back-office Service Functions

Dear Ms. Merriner:

I am writing on behalf of Commissioner Tshibaka in response to BDO USA, LLP (BDO)'s November 8, 2019 protest appeal to the Department of Administration (DOA) of the contracting officer's determination that BDO's proposal under RFP 2020-0200-4381 was non-responsive. Because this appeal concerns only a matter of law and the material facts are not in dispute, I have decided to issue a decision on this appeal without a hearing in accordance with AS 36.30.610(b).¹ For the reasons set forth below, the contracting officer's decision is upheld.

Factual and Procedural Background

This protest appeal arises from a Request for Proposals (RFP) issued on September 19, 2019 by the Department of Administration, Shared Services of Alaska, seeking a professional consultant to assist the state in consolidating its information technology services and back office support. BDO and Alvarez & Marsal Public Sector Services, LLC were the only two offerors to submit proposals. After initial review, the contracting officer found BDO's proposal non-responsive for failing to establish that it met the minimum requirements. 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.

Analysis

A contracting officer may not award a contract to an offeror who submits a proposal that is not "responsive."² 2 AAC 12.990(a)(9) defines "non-responsive" as "a bid or proposal that does not conform in all material aspects to the solicitation."

¹ See *Turbo North Aviation v. Department of Public Safety*, OAH No. 05-0658-PRO (January 17, 2006)

² *Id.* AS 36.30.250(a).

Here, section 1.04 of the RFP clearly states:

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)

BDO does not identify in their proposal that they are an NGA member. And while BDO does list many of the services required, it failed to specifically list legal services.

Not every requirement in an RFP is material. But an agency may expressly establish minimum requirements that must be satisfied for a proposal to be considered responsive.³ An agency has discretion to accept proposals that vary from the non-material requirements of an RFP. *See, e.g., Gunderson v. University of Alaska, Fairbanks*, 922 P.2d 229, 235-36 (Alaska 1996) (proposal met functional needs, although it was not in compliance with the design specification; *cf.* 2 AAC 12.080).

The requirements for being an NGA member, or offering the above services in-house, including legal services, are clearly material aspects that affect responsiveness because the RFP expressed these requirements as mandatory requirements that offeror must demonstrate in its proposal or their proposal "***will be rejected***" (emphasis added). When evaluating mandatory minimum experience requirements, the contracting officer is required to limit its evaluation of responsiveness to the four corners of the proposal. In this case, BDO's proposal failed to clearly define its ability to meet these material aspects of the solicitation.

Accordingly, the procurement officer could not assume that BDO was an NGA member or provides in-house legal services and had to determine that the BDO proposal was nonresponsive on the face of the proposal. BDO in its protest appeal does not dispute that the proposal failed to directly state that it offers legal services. Instead, BDO argues that although its proposal did not explicitly state that it provided legal services, this could be inferred since legal services would normally be included under the service of business advisory, and that the proposal as a whole, which demonstrates competence in all areas of shared services, should be read to include implied legal services.⁴ In keeping with a contracting officer's obligation to treat all offerors equally and evaluate the proposals as submitted, the contracting officer would have provided BDO with an

³ "The determination by a public agency of the responsiveness of a [proposal] is within the agency's discretion..." citing: *Chris Berg, Inc. v. State, Department of Transportation and Public Facilities*, 680 P.2d 93, 94 (Alaska 1984). *See, e.g., Kendrick Business Services/InterMedia JV*, at 2-4 (Dept. of Administration No. 97-06, October 2, 1997).

⁴ Protest Appeal at p. 1.

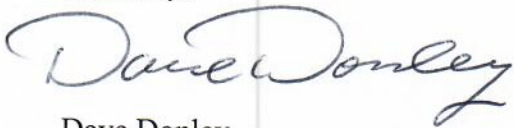
unfair competitive advantage⁵ if BDO's proposal were treated differently and BDO was not required to confirm it met the minimum requirements.

In conclusion, a procurement officer is bound to consider the proposals in a fair and objective manner when determining responsiveness. The contracting officer had no option other than to find the BDO proposal as nonresponsive.

This is the final administrative decision in this matter. You have 30 days to appeal this decision to the Superior Court in accordance with AS 36.30.685(a) and the Alaska Rules of Appellate Procedure.

Thank you for your understanding. I hope that BDO continues to participate in future State of Alaska solicitations.

Sincerely,

A handwritten signature in blue ink that reads "Dave Donley". The signature is fluid and cursive, with the first name "Dave" and last name "Donley" clearly legible.

Dave Donley
Deputy Commissioner
Department of Administration

cc: Mindy Birk, Contracting Officer III, Department of Administration

⁵ "A variance is material "if it gives the [proposer] a substantial advantage over other [proposers], and thereby restricts or stifles competition." *Id.*, quoting, 10 E. McQuillin, *The Law of Municipal Corporations*, Sec. 29.65, at 397 (3rd ed. 1966). *See, e.g., Kendrick Business Services/InterMedia JV*, at 2-4 (Dept. of Administration No. 97-06, October 2, 1997).