ALASKA LEGISLATURE COMMITTEE FILES, 2005-2006 8672

11631 HOUSE STATE AFFAIRS

Attachment 5D at Miller's Evaluation Notes; *See Attachment 5D* at [illegible] Evaluation Notes

22. The RFP asked whether the offeror is prepared to offer direct deposit of participant benefit reimbursement. RFP § 10.14(c). In its original proposal, Premera answered "no" to this question in the RFP. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. This caused Premera to lose points on this issue in its first proposal, receiving only 16 points from one evaluator (Gray) and 0 points from another (Miller) out of a possible 25 points. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department asked Premera, when it had already clearly answered "no" in its original proposal, to describe how Premera would meet the need for direct deposit. *Premera Response* at pg 33. In response to the State's suggestion that Premera change its position, Premera agreed that it would offer this service. Id. As a result, Premera received 9 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes; *See Attachment 5D* at Gray's Evaluation Notes.

23. The RFP asks the "offeror whether it agrees to allow fees within the greater of 10% or $10 of UCR without reduction?" RFP § 10.05(e). In its original proposal, Premera answered "no" to this section of the RFP. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. This caused Premera to lose points on this issue in its first proposal, receiving 0 points from two of the evaluators (Gray and Miller) out of a possible 20 points. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department explained to Premera that "the RFP required offerors' to agree to the UCR procedures" and asked Premera whether it could agree to this procedure although it originally answered that it could not. *Premera Response* at pg 1[illegible]. In response to the State's explanation and question Premera changed its position, Premera agreed to the State's demand. Id. As a result, Premera received 20 added points from evaluators (Gray and Miller) on this particular Performance Standard issue in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes; *See Attachment 5D* at Gray's Evaluation Notes.

24. The RFP asks to the offeror "[t]o what degree does the offeror agree that they shall reimburse the State for any overpayment error in excess of $50?"

RFP § 10.11(g)(1). In its original proposal, Premera "disagreed" with this element of the RFP. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. This caused Premera to lose points on this issue in its first proposal, receiving only 3 points from one evaluator (Gray) and 0 from another (Miller) out of a possible 5.5 points. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department asked the question a second time when Premera clearly "disagreed" with this element of the RFP. *Premera Response* at pg 27. In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand. Id. As a result, Premera received 2.5 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes; *See Attachment 5D* at Gray's Evaluation Notes.

25. The RFP asks whether "the offeror agrees to use a data processing system that is compatible with the State's system and that can produce ... reports [containing key statistics] ... in a timely fashion?" RFP § 10.02(A)(e). In its original proposal Premera could only produce annual reports containing key statistics. *See Attachment 5C* at Miller's Evaluation Notes. This caused Premera to lose points on this issue in its first proposal, receiving only 6 points from one evaluator (Gray) and 0 points from another (Miller) out of a possible 12 points. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department asked Premera to "clarify" that it could produce monthly reports that included key statistics. *Premera Response* at pg 2. In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand. Id. As a result, Premera received 6 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes; *See Attachment 5D* at Gray's Evaluation Notes.

26. The RFP asks:

> To what extent did the offeror agree that some or all of the work associated with this RFP would be performed in Alaska within six months of contract implementation?

> How well did the offeror adequately describe which functions Alaskans will perform and list the approximate number of positions? Did they also note where these positions would be located?"

RFP § 10.10(a) & (b). In its original proposal, Premera answered "Yes" without an explanation to the first question and gave an inadequate answer to the second question. *See Attachment 5C* at Miller's Evaluation Notes, *See Attachment 5C* at Gray's Evaluation Notes. This caused Premera to lose points on this issue in its original proposal, receiving only 67 points from one evaluator (Gray) and [illegible] from another (Miller) out of a possible 150 points. *See Attachment 5C* at Miller's Evaluation Notes; *See Attachment 5C* at Gray's Evaluation Notes. One evaluator (Miller) noted that Premera's answer was inadequate. *See Attachment 5C* at Miller's Evaluation Notes. To raise Premera's point total, the Department told Premera to "define the number of dedicated full time employees that will compose the team, defined by function and listed by location." *Premera Response* at pg 24. In response to the State's suggestion Premera added a chart describing: (1) the functions Alaskans will perform; (2) the number of positions; and (3) where positions would be located. Id. As a result, Premera received 50 additional points from one evaluator (Miller) and 83 from another (Gray) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes, *See Attachment 5D* at Gray's Evaluation Notes.

27. The RFP asks "[t]o what extent are third party subcontractors being used to satisfy parts of this RFP?" RFP § 10.01(a). In its original proposal, Premera did not include in its answer discussions regarding subcontractors PointShare, Subimo and CareMark. *Premera Response* at pg 1. This caused Premera to lose points on this issue in its original proposal, receiving 5 points from one evaluator (Gray) and 0 points from another (Miller) out of a possible 20 points. *See Attachment 5C* at Miller's Evaluation Notes, *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department told Premera to discuss its relationship with subcontractors PointShare, Subimo and CareMark. *Premera Response* at pg 1. In response to the State's suggestion, Premera filled in the issue. Id. at 1-2. As a result, Premera received 15 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes; *See Attachment 5D* at Gray's Evaluation Notes.

28. The RFP asks "[t]o what extent did the offeror offer other dedicated or customized services to the State?" RFP, 10.15(a)(n). In its original proposal, Premera did not offer any other services. *See Attachment 5C* at Miller's Evaluation Notes. One evaluator noted that "customization not addressed" and "no other services offered." *See Attachment 5C* at Miller's Evaluation Notes. This caused Premera to lose points on this issue in its first proposal, receiving 0 points from one evaluator (Miller) and 6 from another (Gray) out of a possible [illegible] points. *See Attachment 5C* at Miller's Evaluation Notes. *See Attachment 5C* at Gray's Evaluation Notes. To raise Premera's point total, the Department asked Premera, when it clearly did not offer any other services, to re-answer this question. *Premera Response* at pg 36. In response to the State's suggestion, Premera filled in the issue. Id. As a result, Premera received 6.5 added points from one evaluator (Gray) on this particular Performance Standard issue and additional points from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes. *See Attachment 5D* at Gray's Evaluation Notes.

28A. In their original response, Premera indicated that they would be charging a $5.51/person network access fee—a fee that would total about [illegible] million over the three-year contract period. On February 24, just four days before Premera was due to file its "best and final offer," the Division suggested to Premera that they find some way to categorize this cost other than as a "fee." Per-person charges tend to be very visible in cost calculations. Premera took the Division's cosmetic suggestion, eliminating all network access fees. As a result, Premera received 16 additional points from one evaluator (Gray) and 54 from another (Miller) on this particular Performance Standard section in its "best and final" proposal. *See Attachment 5D* at Miller's Evaluation Notes. *See Attachment 5D* at Gray's Evaluation Notes.

29. We also repeatedly requested that the State provide us with the evaluation notes of all evaluations. However, the State has only provided us with evaluation notes that appear incomplete and confusing. The evaluator notes that the state did provide us are appended as *Attachment 5(A)-(D)*.

30. These are the services that Aetna is currently providing to the State under the existing medical claims administrative contract.

* Medical
* Dental
* Vision – Managed and Indemnity
* Pharmacy – Retail Card, Mail Order, Specialty, Paper [illegible]
* Cobra Administration
* Individual Billing Administration
* Employee Assistance Programs (EAP)
* Flexible Spending Account Administration
* Managed Behavioral Health
* Long Term Care
* Preferred Provider Arrangements
* Centers of Excellence
* Medicare D Administration

31. Aetna is the nation's third largest medical carrier with [illegible] million medical lives, 13.1 million dental lives and has a significant presence in the nation's top 500 largest companies. Aetna is ready, willing and able to perform all current services without interruption if it is allowed to continue to perform under its existing contract pending the outcome of this protest and appeal.

32. As a company, Aetna is committed to insuring that the State's employees have uninterrupted services during the protest and appeal period. Should the ultimate outcome of the protest process be a re-bid or an extension of the existing Aetna contract, we will work with the State to develop a process to continue our existing fees and administration until the protest and appeal is resolved. Although the State by statute is required to re-bid some services every (5) years there is precedence to extend a contract for a period of time beyond (5) years if it is in the best interest of the State and its employees. For example, the current extension of the State's Life/Disability contract with Unum went beyond the statutorily (5) years and the present (1) year extension of its current contract with it's benefit consultants beyond (5) years.

33. On the other hand, if Aetna is not allowed to continue to perform under its existing contract pending the outcome of this appeal and protest, a significant amount of short-term harm will occur. The following is based upon an intimate knowledge of the State of Alaska's employee population and observations of 2 transitions by this population to new carrier platforms in the last 10 years – (Aetna to NYLCARE and NYLCARE to Aetna). In addition, it is also based upon

recent discussions with Municipal clients and potential new clients who were determining lead times of when to go to bid and the [illegible] [illegible] period. Lead times averaged 10 to 12 months.

34. The State of Alaska has a total membership of approximately 68,500, of this number 14,500 are active members and 54,000 are retired members residing in all 50 states and several foreign countries. Due to the high number of retirees, many State members are undergoing care for chronic diseases which involve constant interaction with the medical community and any change in benefit administrators must include intensive communication with the effected parties to insure that disruption of service to these ill State of Alaska members who are in course of treatment does not occur.

35. Additionally, because of the high retiree population, the State has almost 1,000,000 prescriptions filled annually. This significant utilization of prescription drugs requires by law some interaction with medical providers to obtain a prescription. The State must acknowledge that in many cases a new prescription and a subsequent office call and in some cases multiple office calls will be required to obtain a new prescription to be submitted to the new Administrator.

36. Presently, the State is undertaking a positive open enrollment process for its retiree population to insure that only eligible dependents are covered by the State's benefit plans. At present this is an un-completed task that will require huge man power commitment to complete. This process must be completed so that only truly eligible retiree members receive Identification Cards from a new Administrator.

37. The State has only limited ability to communicate to its retiree populations on the complexity of any transition to a new administrator. In a short period of time the State will be challenged to communicate significant number of changes and by the sheer volume of information it will appear confusing to this population.

38. Presently, it is also on State's docket to draft new benefit booklets for its retiree population. Again this will be significant manpower commitment by the State as it is planning a transition to a new Administrator. Significant questions will be asked of the State of Alaska by retirees who are mailed these booklets.

39. Lastly the State's Retirement and Benefits is also scheduled to bring a new retirement system online this summer. Even without a transition to a new carrier the division's resources have been stretched to the maximum.

40. There will also be hardship caused to Aetna from [illegible] including the following:

Closure of the Aetna Juneau Office
Closure of the Aetna Anchorage Office
Loss of Alaska jobs by both Aetna and Magellan
Overall potential loss of 40 jobs in just Aetna – some of these staff have 20 tenures in servicing the State of Alaska employees, many have at least 10 year tenures

41. It has been difficult to get qualified individuals to reside in Alaska and we don't want to lose the one's we have. Today there is also significant walk in traffic to both Aetna Alaska offices by retirees by virtue of the complexity of their bills and by legislative staff during session. Over time many deep personal relationships have been established between Aetna staff and the members [illegible] have served diligently. This transition will be very difficult for all [illegible] close personal ties to Alaska Care staff both in Juneau, Anchorage, and Seattle.

42. Aetna submitted a separate proposal for providing only pharmaceutical benefit management services. This type of stand-alone proposal was specifically requested in the RFP and was therefore responsive to the RFP. Although the RFP promised that these stand-alone proposals would be evaluated [illegible] the overall cost evaluation of providing the services covered by the RFP, [illegible] never conducted such an overall evaluation, and therefore had no basis for determining whether it would have been more economical to split the contract between one contractor for medical and other non-pharmaceutical services and another contractor for pharmaceutical services. Based on public information [illegible] available to us, and set out in Exhibit 1 to this Affidavit, it is apparent that the State would have saved approximately $3 million over the course of the contract by selecting Aetna's stand-alone pharmacy offer (the numbers in Exhibit 1 show higher pharmacy numbers for Aetna than for Premera). However, it is important to note that pharmacy numbers are reported as rebate numbers refundable to the State, so that the higher the rebate number, the lower the cost to the State.

43. It must be noted that a significant part of the RFP in question contained a great deal of variability in scoring by individual scorers for the non - cost 60% portion they reviewed. This variability or statistical bias can be observed by the different scorers totals. For this reason the need to have the same reviewers is statistically important so that all scores reflect the same bias in their totals. It is also important that all bids have the same number of reviewers, if not, the weighting of a different number of scores will distort the outcome of the scoring process

Further your affiant sayeth naught

Dated this 8 day of March, 2006, at Juneau, Alaska

Mike Wiggins

SUBSCRIBED AND SWORN to before me this 8th day of March, 2006.

Notary Public in and for Alaska
My commission expires [illegible]

Rebates Integrated Pharmacy Rx Premera - Compared to Aetna Integrated RX Rebates Under Section 9

Exhibit 1

Aetna proposed rebates

Note information contained in Aetna Section 9 Response

	Year 1 2006	Year 2 2007	Year 3 2008	
Retail rebate g'tee	$ 4.53	$ 5.03	$ 4.77	
MOD rebate g'tee	$ 15.05	$ 16.70	$ 15.86	
Basis	Per valid Script	Per rebateable Script	Per rebateable Script	
Estimated annual retail scripts	770,418	707,871	707,871	
Estimated annual MOD scripts	95,220	87,490	87,490	
Estimated annual retail rebates	$ 3,489,994	$ 3,560,591	$ 3,376,545	$ 10,427,129
Estimated annual MOD rebates	$ 1,433,061	$ 1,461,083	$ 1,387,591	$ 4,281,735
Estimated total rebates	$ 4,923,055	$ 5,021,674	$ 4,764,136	**$ 14,708,865**

Premera proposed rebates

Note Information contained in Premera's Integrated Medical Response

	Year 1 2006	Year 2 2007	Year 3 2008	
Retail rebate g'tee	$ 3.08	$ 3.40	$ 3.50	
MOD rebate g'tee	$ 9.77	$ 10.66	$ 10.98	
Basis	Per Script	Per Script	Per Script	
Estimated annual retail scripts	854,400	854,400	854,400	
Estimated annual MOD scripts	105,600	105,600	105,600	
Estimated annual retail rebates	$ 2,631,552	$ 2,904,960	$ 2,990,400	$ 8,526,912
Estimated annual MOD rebates	$ 1,031,712	$ 1,125,696	$ 1,159,488	$ 3,316,896
Estimated total rebates	$ 3,663,264	$ 4,030,656	$ 4,149,888	**$ 11,843,808**

SUPPLEMENTAL AFFIDAVIT OF MIKE WIGGINS

STATE OF Washington

COUNTY OF King

I, MIKE WIGGINS, being first duly sworn, do depose and say that

1. This affidavit supplements the information contained in paragraph 28 of my March 8, 2006 affidavit;

2. The network access fees discussed in that paragraph totaled approximately $6 million over the course of the contract;

3. At the Division's request, Premera stopped referring to these charges as "network access fees," and labeled them instead as claim charges. Because network access fees are included in the reported "cost" of the project, while client charges are not, this had the effect of appearing to reduce Premera's bid by $6 million, when, in reality, that $6 million had actually just been moved to another category where it would not show up as a project cost;

4. The methodology and information I used to reach this conclusion is appended to this Supplemental Affidavit as Attachment 1.

Further your affiant sayeth not.

DATED this 10th day of March, 2006 at 10:57 Am, Seattle, WA

Mike Wiggins
Mike Wiggins

SUBSCRIBED AND SWORN to before me this 10th day of March, 2006.

[signature]
Notary Public in and for Washington
My commission expires January 21, 2007

Progression of Premera offer to the State of Alaska

As of February 14, 2006		
3 year Fees	$	30,951,035
3 year Network access fee	$	6,880,513
3 year Fix Rebate guarantee	$	(9,000,000)
3 year network savings retained by Premera @ 12%	$	4,779,925
Total cost to State of Alaska	$	33,611,473

As of February 28, 2006		
3 year Fees	$	30,951,035
3 year Network access fee	$	-
3 year Fix Rebate guarantee	$	(9,000,000)
3 year network savings retained by Premera @ 30%	$	11,949,813
Total cost to State of Alaska	$	33,900,849

PREMERA

The following network savings guarantee replaces the answer provided for Section 10.11, page 25 in the Best and Final Offer Clarification Questions – State of Alaska submitted on February 13, 2006.

Please explain the network discount guarantee arrangement as mentioned on page 37 of Premera's proposal

Premera Blue Cross Blue Shield of Alaska will guarantee network savings of $100.00 per employee per month resulting from the use of Premera's Alaska and Washington networks and the national Blue Cross Blue Shield BlueCard network program. The following table represents aggregate network savings outside of the state of Alaska

Aggregate Network Discounts (outside of Alaska)			
Arizona	California	Oregon	Washington
57%	52%	39%	39%

Network savings in excess of $100.00 per employee per month will be shared between the State of Alaska and Premera Blue Cross Blue Shield of Alaska. The State of Alaska will retain [illegible]% of the amounts over $100.00 per employee per month. Premera Blue Cross Blue Shield of Alaska will retain 30%. In the event that the savings are less than $100.00 per employee per month, Premera Blue Cross Blue Shield of Alaska will reimburse the State of Alaska 30% of the difference between the savings amount per employee per month and $100.00 per employee per month.

Approach

Premera Blue Cross Blue Shield of Alaska will produce a quarterly report identifying billed charges for in-network medical claims compared to the in-network provider allowable charges. The difference between these two charges is savings. The savings are turned into per employee per month savings over the quarter by dividing by the number of employees covered over the three-month period. The report will be produced 30 days after the end of each quarter and the quarterly results will be settled 45 days after the quarter ends. The final amounts due, if any, will be reconciled and due 90 days after the close of the policy year.

An Independent Licensee of the Blue Cross Blue Shield Association

Please itemize the following components of your service fee for year 1:
(This is for informational purposes only)

Service	Per Active Employee	[illegible]
Precertification and Utilization Review	$5.16	$3.78
Large Case Management	Included in Precertification	Included in Precertification
COBRA Continuation Administration	$0.39	$0.26
High Risk Maternity	Included in Precertification	Included in Precertification
Wellness/Patient Education	Included in Precertification	Included in Precertification
EAP/Managed Mental Health	$3.20	$2.69
Pharmacy Network/Administration	No charge	No charge
Vision Network/Administration	No charge	Not applicable

Note (1): In the event of termination of administration services, an administration fee of 4% of claims paid after the date of termination will be made.

Note (2): A $12 per month billing fee will be applied to bill any self-paying retirees.

included in fees?

February 27, 2006

Mr. Walt Harvey
Contracting Manager
Department of Administration
Division of General Services
333 Willoughby Avenue, 7th Floor State Office Building
Juneau, AK 99811-0203

Dear Mr. Harvey

Thank you again for the opportunity to provide additional clarification and our "Best and Final" offer. I am personally pleased to reaffirm our commitment to the State of Alaska. I believe Premera Blue Cross Blue Shield of Alaska is uniquely qualified to deliver the lowest net cost while providing outstanding service to the State of Alaska and its members.

The highlights of Premera Blue Cross Blue Shield of Alaska's proposal to the State include:

- <u>Significant Claims Savings:</u>
  The State of Alaska will achieve at least **$45 million in net additional claims savings in the next three years** (before health cost inflation) through the use of the Blue Cross Blue Shield networks. These savings are over and above the savings now achieved using your current administrator's network, and after sharing any upside performance with Premera. To support this claim, we have reduced our administrative fees by 10%, eliminated our pharmacy fees and network access fees, plus placed additional amounts at risk for claims discount performance. In other words, the State will not pay unless Premera Blue Cross Blue Shield of Alaska delivers the network claims savings. Meeting our savings commitments was a big element to our success with Microsoft and Weyerhaeuser; both clients will be happy to validate this achievement.

- <u>No Surprises:</u>
  The State of Alaska will have the security of an all-inclusive fee arrangement, other than for clearly identified optional services. This includes removal of the pharmacy administration fee proposed when the State requested receipt of full pharmacy rebates, as well as removal of the separately billed charge for use of the national BlueCard network. Additionally, we have now included 65 hours of training provided by Compsych, the EAP vendor partner.

- <u>Guaranteed Results:</u>
  In addition to waiving our pharmacy administration fee, we are now guaranteeing a minimum of **$3 million in annual pharmacy rebates**. Moreover, the State can also share our confidence in our ability to meet our commitments as we are **doubling** the dollars at risk in our other Performance Guarantees in each category.

dedicated customer service representatives. These representatives serve current Premera Blue Cross Blue Shield of Alaska members.

The original bid noted a customer service staff of five located in Alaska. The five included the two marketing liaisons and one customer service representative noted above, in addition to the two new Marketing Liaisons dedicated to the State of Alaska. These three staff were noted because they can provide back-up to the dedicated State of Alaska staff.

All other State of Alaska customer service and claims staff will be located in Mountlake Terrace, WA. However, if customer service volumes in Anchorage or Juneau indicate a need for additional staff, Premera Blue Cross Blue Shield of Alaska will add appropriate staff to the meet the volume.

3) Pages 30 and 31 of 47; answer to 10.13 d);

Provide in dollars the BlueCard access fees and administration fees expected to be charged annually by the State of Alaska for use of the Blues network for our population? Is there a cap on these fees?

As outlined in the Performance Guarantee section of the RFP, there is an access fee charge for the use of the BlueCard network. The access fee is charged as a claim charge. The guaranteed access fee is $5.51 per employee per month. As the fee is guaranteed as a per employee per month charge, the cap is $5.51 times the number of employees per month times 12 months.

The access fee works with the network savings guarantee as follows:

Premera Blue Cross Blue Shield of Alaska will guarantee network savings of $100.00 per employee per month resulting from the use of Premera's Alaska and Washington networks and the national Blue Cross Blue Shield BlueCard network program. The following table represents aggregate network savings outside of the state of Alaska.

Network savings in excess of $100.00 per employee per month will be shared between the State of Alaska and Premera Blue Cross Blue Shield of Alaska. The State of Alaska will retain 88% of the amounts over $100.00 per employee per month; Premera Blue Cross Blue Shield of Alaska will retain 12%. In the event that the savings are less than $100.00 per employee per month, Premera Blue Cross Blue Shield of Alaska will reimburse the State of Alaska 24% of the difference between the savings amount per employee per month and 100.00 per employee per month.

Approach

Premera Blue Cross Blue Shield of Alaska will produce a quarterly report identifying billed charges for in-network medical claims compared to the in-network provider allowable charges. The difference between these two charges, minus the **BlueCard access fees**, is savings. The savings are turned into per employee per month savings over the quarter by dividing by the number of employees covered over the 3 month period. The report will be produced 30 days after the end of each quarter and the quarterly results will be settled 45 days after the quarter ends. The final amounts due, if any, will be reconciled and due 90 days after the close of the policy year.

4) Page 33 of 47; answer to 10.14 a).

The State of Alaska plans produce over 100,000 claims per month, not including pharmacy. PBC reflects that 90% of claims from our population will be auto adjudicated. Currently, based on December 2005 volume: 116,119 claims; the actual auto adjudication rate experienced was 40%, with 60% of claims manually processed, which is the typical percentage experienced over time. Please describe the rationale that PBC used to conclude that 90% of all State of Alaska claims per month will be auto adjudicated. PBC must confirm that it can process in excess of 100,000 claims per month regardless of the adjudication ratio.

Premera Blue Cross Blue Shield of Alaska is very confident that it can process in excess of 100,000 claims per month regardless of the adjudication rate.

The following definitions and calculations provide further clarification as to the process for determining the appropriate number of claims processors for the State of Alaska.

Assume 100,000 claims per month received for processing

- 10,000 claims will require manual entry and adjudication
- 90,000 claims will be electronically entered into the system – either through EDI or Optical Character Recognition (OCR)
  - 45,000 of these claims will be pended for manual review and adjudication
  - 45,000 of these claims will be paid through the system with no manual intervention

RECEIVED

MAR 28 2006

DEPARTMENT OF ADMINISTRATION
COMMISSIONER'S OFFICE

LAW OFFICES OF
SIMPSON, TILLINGHAST & SORENSEN, P.C.

ONE SEALASKA PLAZA, SUITE 300 JUNEAU, ALASKA 99801
TELEPHONE: 907-586-1400 FAX: 907-586-3065

HAND DELIVERED

March 28, 2006

The Honorable Scott Norstrand
Commissioner of Administration
Alaska Department of Administration
10th Floor, State Office Building
Juneau, Alaska 99811-0200

Re: Appeal of Denial of Protest of Intent to Award in RFP No. 2007-0200-5946
OUR FILE NO.: 1467.1

Dear Commissioner Nordstrand:

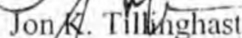
Enclosed, pursuant to AS 36.30.590, is the Appeal of Aetna Life Insurance Company and Aetna ("Aetna") of the procurement officer's denial of Aetna's protest in the above-captioned matter. The appeal and supporting documentation include all of the material required by that statute.

Aetna would respectfully request that your office immediately transfer this appeal to the Office of Administrative Hearings under AS 44.64.060. Given that you have already announced your recusal from this matter, Aetna does not believe there is any purpose served by retaining the file at the Department of Administration, and the parties to this proceeding will have need of current access to a hearing officer to establish procedures for resolution of the merits of this case.

The purpose of this letter is also to advise you that, pursuant to my telephone conversation with Asst. Attorney General Margie Vandor, the procurement office is being simultaneously served with this appeal by service on Ms. Vandor.

Sincerely,

SIMPSON, TILLINGHAST, SORENSEN
& LONGENBAUGH



Jon K. Tillinghast

E. BUDD SIMPSON · JON K. TILLINGHAST · STEPHEN F. SORENSEN
L. MERRILL LOWDEN · JAMES J. SHEEHAN · RONALD W. LORENSEN (OF COUNSEL)

RECEIVED
MAR 28 2006
DEPARTMENT OF ADMINISTRATION
COMMISSIONER'S OFFICE

BEFORE THE ALASKA DEPARTMENT OF ADMINISTRATION

In the Matter of:
AETNA LIFE INSURANCE
and AETNA

APPEAL OF DENIAL OF CONTRACT PROTEST (AS 36.30.590)

DGC RFP No. 2007-0200-5946
Dept. of Administration Case No. 07-____

I. Introduction

Pursuant to AS 36.30.590, Aetna and Aetna Life Insurance Company ("Aetna") respectfully appeal the Department of Administration, Division of General Service's (the "Division's") March 21, 2006 denial of Aetna's March 10, 2006 Protest of a February 28, 2006 Final Notice of Intent to Award a Contract pursuant to the above-referenced Request for Proposal ("RFP") to Premera Blue Cross (the *"Protest Decision"*). A copy of the Protest Decision is appended to this memorandum as *Attachment 10.*

II. Background

On December 22, 2005, Aetna submitted a complete, responsive and responsible proposal to provide medical and pharmaceutical claim management services to the State of Alaska pursuant to the above-referenced RFP. *Wiggins Aff.*, ¶11. After shipping the complete bid, Mr. Wiggins telephoned then-procurement officer Victor Leamer, and Mr. Leamer confirmed to Mr. Wiggins that Aetna's application had been timely received. *Fourth Wiggins Aff.*, ¶4.

Having heard nothing in response for nearly two months, Aetna finally received a form Notice of Intent to Award the contract to Premera on February 18, 2006. *Id.* at

SIMPSON, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

¶13. A subsequent phone call to Mr. Walt Harvey, the employee who had replaced Mr. Lcamer as procurement officer, disclosed that the Division had lost the meat of Aetna's proposal, consisting of some four boxes of binders in which were contained a critical portion of Aetna's overall proposal. *Id.* Over those two intervening months, the Division had never simply contacted Aetna (who, through itself and its affiliates, had been providing these services to the State for the past 24 years), and asked why there was such a gaping omission in its bid. Rather, the Division simply declared Aetna "nonresponsive" for failure to submit a complete bid. *Id.* [1]

The initial award to Premera was therefore, and in essence, predicated on the erroneous conclusion that Premera was the sole responsive bidder.

The Division initially scored Premera's proposal under the RFP's point system around January 20, awarding it 1489.5 points for the more subjective, technical elements of the RFP (called here the "Non-Cost Factors"), which counted the most (50%) in proposal evaluation. *See Section VI post; See also Chart I (attached directly to this memorandum); See Attachment 3(c)*

Shortly thereafter, the Division began extensive private communications with Premera aimed at improving its offer. These included 21 pages of questions on Premera's proposals for various Non-Cost Factors in the RFP, each question being designed to solicit a more beneficial answer. *Attachment 4(a).* Premera answered those questions in a 49-page reply on February 13, 2006. *Attachment 4(b) at 7-56. See, generally, Section VIII. post.*

[1] In rejecting Aetna's protest, the procurement officer claimed that it would have been improper to contact Aetna, as the receipt of late bids is prohibited. *Attachment 10* at 3. The purpose of such a query, however would not have been to solicit a late bid. Rather, it would have been to enquire

SIMPSON, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

Aetna, of course, knew nothing of any of this.

As a result of Premera's answers (and even though Premera ostensibly had no competition at this point, Aetna's proposal still being lost), the Division rescored Premera's proposal on February 16-17, 2006; *Attachment 5(d); Attachment 11 (email response from Walt Harvey).* The Division's extensive work with Premera had succeeded in increasing Premera's point total for the Non-Cost factors by 629 points—to 2119 points. *Attachment 5(d) at 1-2; Chart 1.*

One day after this re-scoring, the Division issued its initial Notice of Intent to Award, and Aetna placed its phone call to the Division. After considerable pleading by Aetna that it had timely delivered a comprehensive and complete proposal, the Division looked again, and found all of the missing boxes in a store room after a mere hour's search. *Id.* at ¶14.

The State promptly rescinded the Notice of Intent, and commenced another evaluation process that is the subject of this protest. *Id. at ¶17.* This process is explained in: (i) ¶17 of the *Mike Wiggins Affidavit*; (ii) a confirming memorandum found at *Attachment* 2; (iii) the *Fifth Affidavit of Mike Wiggins;* and (iv) the *Affidavits of Mike Robinson and Reed Stoops*, all of whom were participants in a phone conference that resulted in the agreement contained at *Attachment 2.* The essence of that agreement is as follows:

Because of vacation plans, the same full evaluation team that had scored Premera could not be reformed to evaluate Aetna's newly-found bid. To accommodate a quick resolution of the matter, Aetna agreed that the Division could "reconstitute" the original

---

into the inarguably odd fact that the huge middle of the incumbent contractor's bid was nowhere to be found.

SIMPSON, TILLINGHAST & SORENSEN
O. [illegible] laska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

evaluation team so that it "consist[ed] of three members, two of whom were on the original [evaluation committee] that scored Premera's proposal." *Attachment 2* at ¶1. This "reconstituted" team would first perform a threshold evaluation of Aetna's newly-discovered bid to determine whether that bid was "reasonably susceptible for award." *Id.* [2] By "reconstituting" the team in this manner, Aetna was assured that the scores of the "reconstituted" committee would be as comparable as possible to the scores of the original committee, since 2/3 of the scores of the "reconstituted" committee would come from individuals who had actually also scored Premera. *Robinson Aff.* ¶7; *Stoops Aff.*, ¶6; *Fifth Wiggins Aff.*, ¶7. [3]

Unfortunately, the Division breached the agreement, and appointed only *one* person who had actually scored Premera to the "reconstituted" committee. Neither of the other two members of the "reconstituted" committee had scored Premera on either of the two Premera scorings. *Section VII, post; see also Chart I and pp. 1-2 of Attachments 5(a)-(d).* [4]

There was then a second undisclosed breach of the agreement. After the "reconstituted" committee completed its initial scoring of Aetna, and if Aetna's proposal passed its threshold evaluation (which it did [*Wiggins Aff.*, ¶18]), the agreement

---

[2] Under Alaska's procurement code, the Procurement Officer is allowed to discuss first proposals, on an even-handed basis, with all bidders who are "reasonably susceptible of being selected for award," and this for the purpose of ultimately soliciting a "best and final offer" from this final pool of bidders. AS 36.30.240. This initial process does not constitute a scoring of one proposor against another, but rather a look at the intrinsic strengths and weaknesses of a proposal, so as to see whether, if improved, it might plausibly become the "best and final offer."

[3] It is worth noting that Aetna would have been well within its rights to demand that the Division comply with 2 AAC 12.260(a), and have its "found" proposal evaluated by exactly the same "committee" that had evaluated Premera's bid. Aetna was being collegial here. But as we shall shortly see, no good deed goes unpunished.

[4] Aetna had no knowledge of the Division's breach at the time, and thus no opportunity to correct it.

SI... ..S, TILLINGHAST & SORENSEN
O... ..laska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

provided that each party would have the opportunity to submit a best and final offer. In conjunction with that best and final offer, the Division would contact both parties to obtain new responses on Non-Cost Factor issues that were of concern to the Division. *Attachment 2,*, ¶3. Once those offers, and the parties answers' to the Division's questions, were submitted, the agreement provided that "both proposals will be scored," and a winner would be selected. *Id.* at ¶4.

It was Aetna's understanding that this paragraph meant that the entire "proposal" (both cost and Non-Cost Factor components) would be evaluated. *Robinson Aff,* ¶10. This was very important to Aetna, since this last scoring would be the only opportunity when both proposals would be re-scored by single, identical review committee--the so-called "reconstitute[illegible] committee. *Id.*

Indeed, until the Division responded to Aetna's protest on March 21, 2006 (*see Section V, post*), Aetna had assumed that a Premera scoring tally entitled "*2nd Score After Best and Final, Premera*" and found at *Attachment 5(d)* was the promised scoring of Premera's last proposal by the "reconstituted" committee. It was not until service of the Division's response to Aetna's protest that Aetna learned that, contrary to ¶4 of the agreement, there had been no rescoring of Premera's Non-Cost Factors by the "reconstituted" committee. Rather, the rescoring found at *Attachment 5(d)* was actually the rescoring of Premera's proposal that had been done on February 17—before Aetna's "lost" proposal had been found. *Attachment 10 at 8-10; Attachment 11.*

Apparently, the only things done with the parties' final proposals under the agreement were a comparison of the new cost bids, and a brief revisiting of three Non-Cost topics in Aetna's final proposal. *Attachment 10* at 9. It was on that basis that the

SIMPSON, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

Procurement Officer issued his February 28 Notice of Intent to award the contract to Premera.

And so, at the time the final Notice of Intent Award had been issued, Aetna's and Premera's final proposals have never been scored by either an identical review committee, nor even by separate committees that had more than one common member between them.

And yet despite all the disadvantages thrown Aetna's way in this unfortunate process, when all was said and done, out of a 5000-point evaluation process, Premera was able to top Aetna by only 141 points.

III. Aetna's Protest

Aetna's protest is appended as *Attachment 9* to this Appeal. In a nutshell, Aetna claimed that the procurement:

- violated state statute (AS 36.30.240) and regulation (2 AAC 12.290(a)), and created an appearance of impropriety that undermined the integrity of the competitive bidding process, because, while the Department held prolonged and extensive discussions with Premera to produce its "best and final offer," the counterpart discussions with Aetna were only perfunctory. Because state law requires that all proposors be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals" (AS 36.30.240(a)), and "[t]he opportunity for confidential discussions, if held, must be extended to all offerors submitting proposals deemed reasonably susceptible for award" (2 AAC 12.290(a)), Aetna contended that the procurement was illegal and subverted the

SIMPSON, TILLINGHAST & SORENSEN
Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-300

competitive process. It also contended that this process actually affected the outcome of the evaluation; and

c For the "best and final offer" evaluation, the Division used separate evaluation teams to evaluate the two bidders, with only one member of these three-member teams being in common. Because many of the factors on which the evaluation was based were subjective, and hinged on personal idiosyncrasy, the absence of common evaluators rendered the evaluation useless for determining which proposal was "most advantageous to the state" as required by AS 36.30.250(a), and impaired, if not destroyed altogether, the integrity of the competitive bidding process. [5]/ Aetna also asserted that this procedure clearly affected outcome of the procurement. Nor did the process comply with 2 AAC 12.260(a), which only authorizes the Division to score RFP's through a single "evaluation committee."

IV. Aetna's Request for a Stay of Award

Contemporaneous with its protest, Aetna filed a request with the Procurement Officer, pursuant to AS 36.30.575, to stay award of the contract pending disposition of Aetna's protest and any subsequent administrative appeal. *Attachment 9 at Cover Letter.* The Department never ruled on that request before simply going ahead, and signing the contract. Without notice of any kind to Aetna, the Department executed the contract on March 13, 2006.

[5] / A third issue raised in the protest—*i.e.*, that the Division failed to separately score an Aetna proposal to provide pharmaceutical claim services only (an alternative specifically called for the RFP), is not being appealed, and does not receive further discussion in this Appeal.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

V. The Procurement Officer's Response to Aetna's Protest; Identification of Erroneous Factual Findings and Resultantly Erroneous Legal Conclusions

On March 21, 2006, the procurement officer rejected Aetna's protest. *Attachment 10.* The procurement officer's principal findings and conclusions were as follows:

- The Division had complied with the parties' agreement, and had evaluated Aetna's proposal using a three-person review team comprised of two persons who had actually scored Premera's first proposal;
- The communications between the Division and Aetna, on the one hand, and Premera, on the other, were essentially equal;
- Any difference in communications between the Division and Aetna, on the one hand, and Premera, on the other hand, did not create an appearance of impropriety; [6]
- Neither the use of different evaluation teams nor the disparity in treatment between proposors affected the outcome of the procurement; and
- The Division acted in good faith.

From these factual findings, the procurement officer drew the ultimate legal conclusion that Aetna's protest was without merit. As required by AS 36.30.590(b)(2), Aetna respectfully submits that each of the above-described factual findings was erroneous, and that if any of those findings is reversed, Aetna will be entitled to appropriate relief as a matter of law.

[6] "Whether an appearance of impropriety exists is a factual question..." *In the Matter of J&S Services, Inc.*, Alaska Dept. of Administration Case No. 02.01 (Sept. 16, 2002) ("*J&S Services*") at 5.

SIMPSON, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX: (907) 586-3065

VI. The Nature of the Contract Being Awarded

To evaluate Aetna's claims, a brief background on the contract at issue here is warranted.

The services for which the RFP solicited proposals were to provide a wide range of medical and pharmacy insurance claim management services to the State. *Request for Proposals*, §1.03. [7] Those services have been provided economically and efficiently by Aetna itself, or through its affiliates, for some 24 years. *Wiggins Aff.*, ¶4. The State of Alaska self-insures both its medical and pharmaceutical claims; however, it still needs an agent to evaluate and process those claims. *Third Wiggins Aff.*, ¶5; *RFP*, §6.06. The agent charges a per-employee and per-retiree fee for providing those administrative services, and its proposal consists, in part, on the proposed amount of those fees. *Id.; RFP at Section 7.23.*

However, because many factors other than cost bore on the State's choice of suppliers (factors such as expertise, system compatibility, ability to serve clientele, and the like), a "Request for Proposal" format was utilized, rather than a Request for Sealed Bids. Under the RFP, cost accounted for only 40% of the total bid evaluation; all the other relevant factors (loosely called "Non-Cost Factors") were in the technical portion of the RFP, and were collectively allocated 50% of the total scoring. *RFP*, §10. [8] As to those Non-Cost Factors, each individual evaluator awarded points based upon that evaluator's personal judgment as to how the proposor dealt with each Non-Cost Factor.

[7] The lengthy RFP for this contract has not been appended as an exhibit to this Appeal because of its bulk. It is on file with the Procurement Officer, and Aetna would respectfully request that it be made part of this Appeal record by reference.

[8] The remaining 10% was allocated for preference points.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

When the so-called "best and final" proposals were opened, the <u>cost</u> of the two responsive proposals appeared virtually identical. On the cost side, Premera was awarded 2000 points for having the lowest cost bid, while Aetna was awarded 1930 points for having a cost bid that was only marginally higher than Premera's. *Attachment 10* at 7.. However, Premera's cost bid was understated (and in fact materially higher than Aetna's) because some large costs that should have been included as part of Premera's administrative fees were in fact disclosed only in other, more subjective portions of Premera's proposal that are not added into the cost component of the proposal. *See, generally, Affidavit of Matt McGuinness.*

VII. The Department Violated AS 36.30.250(a) and 2 AAC 12.260(a) by Using Different Evaluation Teams to Score the Two Applicants, Making it Impossible to Determine Which Proposal was "Most Advantageous to the State." The Division Erred in Finding that: (a); Aetna Had Agreed to this Process; and (b) any Error did not Affect the Outcome of the Procurement.

A. *In the absence of any agreement, the use of different evaluation teams to score different proposals is unlawful, and in this case affected the outcome of the procurement.* In its decision on Aetna's protest (*Attachment* 10), the Division does not contend that, absent some special agreement, it is permissible to use two different evaluation committees to score two different proposals under an RFP. After all, 2 AAC 12.260(a) only authorizes the Division to review RFPs through an "evaluation committee," *singular*, and for good reason.

S[illegible] N, TILLINGHAST & SORENSEN
O[illegible] [illegible]laska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

The ultimate goal of the competitive bidding process—the one on which its "integrity" turns—is to provide "the opportunity to *compare* multiple responsible bids." *Laidlaw Transit Inc. v. Anchorage School District*, 118 P.3rd 1018, 1033 (Alaska 2005); *emphasis added*. Any error that undermines the State's ability to meaningfully compare competing proposals deprives the public and the courts of any basis to assess the legality of the agency's choice.

In this case, the points for Non-Cost Factors were awarded based on an evaluation of largely qualitative (as opposed to quantitative) factors, ranging from the suitability of appeals procedures to transition and training concerns. *Wiggins Aff.*, ¶43. Points were awarded based on how individual evaluators reacted to the proposor's approach to a long list of subjective issues—responses that would translate into very different point totals among different evaluators, depending on each evaluator's individual background, grading policies and priorities.

The evaluators' separate final scores for the subjective, 50% Non-Cost Evaluation illustrate how idiosyncratic this scoring process really was:

Evaluator	Evaluated	Score
Miller	Aetna	2440
	Premera	2160
Gray	Premera Only	2207
Porter	Aetna Only	2120
Williams	Premera Only	1990
Shier	Aetna Only	1585

SIM N, TILLINGHAST & SORENSEN
On laska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

Attachment 5(b) and (d) at 1-2. The Division then took the average of each evaluator's scores (*i.e.*, Aetna's score was based on the average of Miller's, Porter's and Shier's evaluation; while, Premera's was based on the average of Miller's, Gray's and Williams' evaluation), and (because of the near-identity of the cost score), the proposor with the highest average evaluation won. [9]

It is also apparent that compromising the rating process by using non-comparable, idiosyncratic scoring affected the outcome. For example: (I) the only evaluator who evaluated both applications, Ms. Miller, rated Aetna significantly higher than Premera; while (ii) one of the evaluators who scored only Aetna (Shier) gave Aetna aberrationally low scores (535 points lower than Porter), and 855 points lower than Miller. Given that Premera ultimately received only 141 more points than Aetna, it is apparent that point swings of up to 855 points that were due entirely to the use of different evaluators plainly affected the procurement's outcome.

B. *Aetna did not agree to this procedure.* The Division's only defense to its unusual procedure here is that Aetna agreed to it. *Attachment 10* at 5-9. Aetna agreed to a process, but it did not agree to this process.

As discussed in *Section II, ante*, the parties' February 24, 2006 agreement provided that both Aetna's and Premera's final proposals would be reviewed by a so-called "reconstituted" Procurement Evaluation Committee (or "PEC") that would:

> *...consist[illegible] of three members, two of whom were on the original PEC that scored Premera's proposal in the initial evaluation process.*

---

[9] *Attachment 5(b) at 2 (Aetna "best and final" summary sheet); Attachment 5(d) at 2 (Premera "best and final" summary sheet).*

SIMP[illegible]N, TILLINGHAST & SORENSEN
On[illegible] [illegible]aska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

Attachment 2, ¶1; *emphasis added*. The members "who scored Premera's" proposal," on the one hand, and the members of the "reconstituted" committee who scored Aetna's proposal, can be found in summary fashion on *Chart 1* to this memorandum, and more directly on the scoring tally sheets for both Aetna and Premera at pp. 1-2 of *Attachments 5(a)-5(d)*.

From those documents, one can see that there was, in fact, only <u>*one*</u> member of the "reconstituted" team, and not two as the agreement requires, who had also "scored Premera's proposal." That lone individual was Freda Miller.

The Division's answer is that Mr. Pat Shier was also a member of the evaluation team that "scored Premera's proposal." *Attachment 10* at 5-6. That is not true. The evaluation team score sheets for Premeras' first and second proposals are found, respectively, at pages 1-2 of *Attachments 5(c) and 5(d)*. The reader will see that Mr. Shier's name has been <u>*crossed off*</u> the list of evaluators on both score sheets, and not a single Premera scoring sheet contains any score from Mr. Shier.

The Division's explanation is that Mr. Shier did begin to score Premera's first proposal. But Shier abruptly ceased his partial scoring just over half-way through the scoring factors; left his half-done worksheet incomplete; was resultantly <u>*scratched off*</u> the Premera evaluation team; and was never heard from again on any Premera proposal, first or second. [10]

The reason that Aetna insisted that a majority of the reconstituted team be comprised of employees who had "scored Premera's proposal" was to ensure

---

[10] / Shier's partial scoring of Premera's first proposal is found at *Attachment 5(c), pp. 114-136*. The remaining items that Shier did not score can be found (in the evaluation sheets of a different reviewer) at *Attachment 5(c), pp. 159-170*.

Simpson, Tillinghast & Sorensen
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 Fax (907) 586-3065

comparability of Aetna's and Premera's scores. *Robinson Aff.*, ¶7; *Fifth Wiggins Aff.*, ¶ 7; *Stoops Aff.*, ¶6. Premera's first and second scores were not affected in the slightest by Shier, and so an Aetna score that include scoring by Shier would be less comparable, not more. As Mr. Robinson, who attended the negotiations and signed the agreement for Aetna, explains:

> *It never occurred to us, and it was never mentioned, that one of the two "original" PEC members would be a member that did not score Premera. Such an individual would have been of no value in reconstituting a comparable-as-possible review team, and we would never have accepted such a major change in the agreement.*

Robinson Aff., ¶7.

It is frivolous for the Division to maintain that Mr. Shier was a member of the evaluation committee "that scored Premera's proposal." The allegation, in fact, is the best illustration of the Division's bad faith in this entire procurement process.

Finally, the Division breached its promise that "both [final] proposals will be scored" by the "reconstituted evaluation committee." *Attachment 2*, ¶4. Instead, the Division simply looked at the new cost component of the proposals and three minor items in Aetna's new proposal. *Attachment 10* at 8-9.

Mr. Harvey explained that it is a "longstanding practice" to review only the cost component of final proposals, unless changes to other components of the proposal had been made. But the parties' agreement here had little to do with "longstanding practice"—it was, in many respects, a very unique arrangement. The obvious rationale for not rescoring unchanged portions of a final proposal is that the *same evaluation committee* had already scored the unchanged portions. But here, there was a new, "reconstituted" evaluation committee, and a comprehensive review of both parties' final

SIMPSON, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

proposals gave the Division its only chance to have both parties' proposals scored, from top to bottom, by the same people.

The importance of this level playing field was why Aetna took the agreement at its word, and properly assumed that "proposal" meant the entire proposal, and not just a portion of the "proposal" that represented only 40% of the scoring weight (*i.e.* the cost component). *Robinson Aff.*, ¶10. [11] The Division's failure to follow the plain wording of the agreement here makes it doubly difficult for the Division to justify its conduct on the basis of that agreement.

VIII. The Division Violated AS 36.30.240 and 2 AAC 12.290, and Created an Appearance of Impropriety that Actually Affected the Outcome of the Procurement, By Engaging in Prolonged and Complex Negotiations With Premera, But Only Perfunctory Correspondence With Aetna, Before Soliciting "Best and Final Offers." The Division Erred in Finding that: (a) the Communications with Aetna and Premera Were Equivalent; (b) any Difference did not Raise an Appearance of Impropriety or Influence the Outcome of the Procurement

"The appearance of impropriety and impropriety in fact are sufficient to void procurement contracts." *Paul Wholesale v. State*, 908 P.2nd 994, 1000 (Alaska 1995); *Dick Fisher Development No. 2 v. Department of Administration*, 838 P.2nd 263, 269

[11] Aetna's interpretation of ¶4 of the agreement is consistent with Section 7.26 of the Agreement, which makes it clear the the "proposal" includes the offeror's responses to all of the sections of the RFP, including, but not limited to, the cost section.

SIMPSON, TILLINGHAST & SORENSEN
One Sealaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

(Alaska 1992); *In the Matter of J&S Services, Inc.*, Alaska Dept. of Administration Case No. 02.01 (Sept. 16, 2002) ("*J&S Services*") at 5.

1 The appearance-of-impropriety rule was applied in *Paul Wholesale*, 753 P.2nd
2
3 1132 In that case, DOT&PF cancelled all parties' rights in a procurement that had
4 already resulted in a contract award to two different bidders because of certain alleged *ex*
5 *parte* communications between one party and DOT&PF. In upholding DOT&PF's
6 cancellation, the Supreme Court reaffirmed its holding in *Dick Fisher* that the appearance
7 of impropriety was enough to void a procurement. Further, it held that "subjective bad
8 faith," or actual "bias" on the part of the agency, is not required. Bad faith was only one
9 relevant factor; equally important was "the amount of agency discretion and whether the
10
11 agency violated the relevant law." *Id.* at 1002.

12 Similarly, in *J&S Services*, the hearing officer ruled that extensive *ex parte*
13 communications between a member of the evaluation committee and one proposer
14 created a "substantial and material appearance of impropriety." *Id.* at 7.

15
16 In assessing whether apparent impropriety warrants relief, one relevant
17 consideration is whether the impropriety violated specific statutes and regulations written
18 to avoid that impropriety. *Paul Wholesale*, 908 P.2nd at 1002; *J.S. Services*, *ante* at 7;
19 *Keco Industries v. United States*, 492 F.2nd 1200, 1203 (Ct. Cl. 566 (1974). Here, there
20 exist specific statutory and regulatory prohibitions on precisely the kind of one-sided, *ex*
21 *parte* communications in which Premera and the Division engaged.

22 Under AS 36.30.240 and 2 AAC 12.290, the Division may discuss proposals with
23 proposers who are "reasonably susceptible of being selected for award" in order to flush
24
25
26

SIM[illegible], TILLINGHAST & SORENSEN
On[illegible] [illegible]aska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

out proposal details; and, those discussions can lead to changes in the proposer's so-called "best and final offer." [12]

This authority, however, is subject to a caveat—that all such proposers "shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals" (AS 36.30.240(a)), and that "[t]he opportunity for confidential discussions, if held, must be extended to all offerors submitting proposals deemed reasonably susceptible for award." 2 AAC 12.290(a).

Ostensibly under these laws, the Division held extensive discussions with Premera which had the effect of giving Premera detailed advice on how to:

- retract portions of their proposal which, absent a retraction, would leave Premera's proposal unresponsive to the RFP;

---

[12] In addition, 2 AAC 12.285 permits the Division to communicate with an offeror and ask clarifying questions to eliminate confusion concerning the contents of a proposal, but the questions may not result in a substantive change in the proposal. 2 AAC 12.285 does not avail the Division here. Section 12.285 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 to clarify uncertainties or eliminate confusion concerning the contents of a proposal which does not result in a material or substantive change to the proposal.

Emphasis added. The extensive discussions between the Division and Premera from 2/12/06 to 2/14/06, concerning Non-Cost Factors, resulted in a near 50% increase in Premera's point total from 1489.5 to 2119. *Chart 1; Attachment 5(c) at 1-2, Attachment 5(d) at 1-2.* The additional points were the product of Premera's significantly changing its answers to many RFP questions. *See Attachment 4(b) at 7 et seq.* And, further discussions between the Division and Premera, on 2/24/06, enabled Premera to lower its Best and Final proposal by more than $6.88 million in costs. *Wiggins Aff. ¶¶ 2-11; McGuinness Aff. ¶¶ 10-23.* All of these changes to Premera's proposal were obviously material and substantive, and therefore beyond the scope of 2 AAC 12.285. Moreover, that regulation authorizes only "clarifying" questions. The questions asked by the Division here were not "clarifications," but rather suggestions by the Division to Premera to change its proposal. *See text, post.*

S… …N, TILLINGHAST & SORENSEN
… …laska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

- insert items required to be included in the RFP, but originally omitted by Premera; and
- suggest available contract administration measures that could result in lower cost, or increased evaluator attractiveness, and hence higher point scores.

Wiggins Aff. ¶¶ 21-29; Attachments 4(a) and 4(b). Premera accepted virtually every suggestion given by the Division, and as a direct result: (1) Premera's gross point total from its Non-Cost factor evaluation rose by 629 points from its original proposal; and (2) Premera was able to move $6.88 million in real, direct costs to the State into a category that was not counted as a proposed "cost," resulting, in turn, in a $6.88 million understatement of its Best and Final cost bid. *Compare Attachments 5(c) and 5(d); Wiggins 3rd Aff. ¶¶ 2-11; McGuinness Aff. ¶¶ 10-23; Attachment 4(b) at 58; Attachment 4(c) at 1.*

On February 7, 2006, the Division began extensive private communications with Premera aimed at improving its offer. [13] On February 12-14, the Division and Premera exchanged 62 pages of "clarification" questions and answers on Premera's proposals for various Non-Cost Factors in the RFP, each question being aimed at soliciting a more beneficial answer. *Attachment 4(a) at 2-19; 4(b) at 7-56.* At the conclusion of these communications, the Division rescored Premera's heavily-revised proposal and, as a direct result of the Division's efforts to make Premera's proposal more attractive, Premera's proposal gained 629 points in the Non-Cost Factor category—a near 50%

[13] / Email messages document at least three private conversations between the procurement officer and Premera officials (on February 7, 9 and 15). *See Attachments 4(a) at 1 & 20-21 and 4(b) at 6.*

SIMPSON, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

increase in Premera's point total. *See Chart 1; Compare Attachments 5(c) and 5(d), pp. 1.2.*

Aetna was never offered any similar opportunity, leaving Aetna so far behind the competitive curve that even Department of Administration Commissioner Nordstrand was forced to admit to the Alaska Legislature that the playing field was "[n]ot entirely level" because the answers Premera resubmitted to the Division on February 14, 2006 were the equivalent of a "second offer." *Attachment 12 at 24.*

The second round of questions occurred on February 24, 2006, during the evaluation process called for by the parties' agreement, when the Division asked questions of both Aetna and Premera pursuant to paragraph 3 of that agreement. *Attachment 2.* Here, the different treatment that the Division gave Aetna and Premera was substantive. Aetna, on the one hand, was given only three pages of minor, technical suggestions that ultimately resulted in awarding a mere 21 extra points to Aetna (*Wiggins Aff., ¶ 19; Attachment 3*). Conversely, the Division's communications to Premera gave Premera a clear road map as to how to reclassify $6.88 million of its proposed costs to a category that would not appear in the "cost" section of the bid, and thereby artificially lower Premera's cost bid by that same $6.88 million. *Third Wiggins Aff., ¶¶ 2-11; see also McGuinness Aff. ¶¶ 10-23; see also text, post.*

And so, while Premera benefited from the Division's extensive communications by an 629 additional points and was also able to decrease its cost proposal by more than $6.88 million in its final bid, Aetna's perfunctory dialogue with the Division yielded it only 21 additional points. *Compare Attachments 5(a) and 5(b) with Attachment 5(c) and 5(d).*

SIMPSON, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX: (907) 586-3065

The relative impact of those questions on the scoring process was as follows:

COMPANY	EXTENT OF BIDDER QUESTIONING	ADDITIONAL POINTS FROM ANSWERS COST BID IMPACT
Premera	62 pages of questions and answers, several private conversations	629 points $6.88 million cost bid reduction
Aetna	3 pages of questions	21 points No cost bid impact

The extra points granted to Premera were doubly significant:

- *First*, in the initial grading of the two proposers (the grading of the initial proposals, before the Division's extensive assistance to Premera), Aetna won the Non-Cost Scoring portion (*i.e.* the 50% of the bid that reflects proposal quality) by 541 points. *Compare Attachments 5(a) and 5(c)*; while
- *Second*, even after its extensive assistance from the Division, Premera was able to beat Aetna's Non-Cost score by only 71 points. *Compare Attachments 5(b) and 5(d).* It is apparent, then, that without these extensive suggestions from the Division, Premera would not have won the Non-Cost Scoring on the final "best and final" round. The summary of all of these scores is contained in *Chart 1*, which is appended to this appeal.

As a result, the impropriety plainly affected the outcome of the solicitation—another factor counseling for relief. *Keko*, 492 F.2nd at 1203; *J&S Services, ante* at 6.

Because of the potential for abuse in private bidder/agency conversations, courts are insistent on all qualified proposers in an RFP being given the "same opportunity" in curing proposal shortcomings. *Gunderson v. University of Alaska, Fairbanks*, 922 P.2nd

ST…N, TILLINGHAST & SORENSEN
O… laska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

229, 235 (Alaska 1996). "Fair" contract solicitation, and demanding that no proposer "receive[] an unfair competitive advantage," are critical to ensuring that the best possible offer emerges from the bidding process. *McBirney & Associates v. State*, 753 P.2nd 1132, 1135 (Alaska 1988).

Hence, Aetna was entitled to equal treatment in post-opening discussions with the Division. Indeed, because of the obvious potential for abuse in statutes giving bidding agencies the authority to engage in private conversations with qualified RFP proposers, courts have been especially alert in demanding equality in the substance of those communications, and not just in form.

Here, the danger of apparent inequality emerges from the Division's own wording in its questions to Premera. Time-and-time again, the Division asks Premera to "clarify" a point that needed no clarification. In one class of cases, for example, Premera's original offer unequivocally rejected a condition of the RFP. The Division, instead of simply asking Premera to reverse its position, asked it to "clarify" that it would accept the condition, despite the fact that its original proposal made it clear that it would not. Capable of taking a hint, Premera routinely agreed to "clarify" that it would, after all, abide by the RFP, which resulted in material and substantive changes to Premera's proposal.

Mr. Mike Wiggins offers several examples of this in his affidavit (*id.* at ¶¶21-29; *Wiggins 3rd Aff. ¶¶ 2-11*), including the following:

> *The RFP asks the offeror to agree that it will answer 85% of all telephone calls within 30 seconds in any given month, or face penalties. RFP, §10.11(a)(1). In its original proposal, Premera "disagreed" with this element of the RFP. ... This caused Premera to lose points on this issue in its first proposal, receiving only 2 points from one evaluator (Gray) and 0 from another (Williams) out of a possible 5 points. ... To raise Premera's*

SIMPSON, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

> *point total, the Department asked Premera to "clarify" that it would answer 85% of all calls on a monthly basis, despite what it said in its proposal ... In response to the State's suggestion that Premera change its position, Premera agreed to the State's demand. ... As a result, Premera received 3.5 added points from one evaluator (Gray) and ... additional points from another (Miller) in its "best and final" proposal."*

Id. at ¶21. In a similar vein: (1) Premera clearly declined to offer direct deposit in its original offer, but was convinced by the Division to change its mind (*id.* at ¶22); and (2) the Division asked Premera to "agree" to a service that it had unequivocally not agreed to provide in it proposal. *Id.* at ¶23. Additional "clarifications" that in fact resulted in significant point increases and cost decreases are given as examples at ¶¶23-29 of Mr. Wiggins' affidavit, and *Attachments 4(a) and 4(b)* are rife with them.

Wiggins and Mr. Matt McGuinness also discuss in their affidavits how the Division suggested the re-packaging of nearly $6.88 million of "Network Access Fees," which effectively helped lower Premera's Best and Final cost proposal by at least that amount. *Third Wiggins Aff., ¶¶ 2-11; see also McGuinness Aff. ¶¶ 10-23.* Premera's initial bid was understated by a significant amount, since its $34 million bid did not include $6.88 million in "Network Access Fees." *Wiggins Aff., ¶ 10.* Premera accomplished this by calling these fees "claim charges," which are not included in the cost portion of the bid. *Id.* [14] The Division advised Premera, in "clarification" questions dated February 24, 2006, that these "Network Access Fees" were not "claim charges" and needed to be billed in a different manner. *Attachment 4(b) at 2 & 57.* Premera informed the procurement officer, in its February 28, 2006 Best and Final

---

[14] The "cost" of the proposal to the State (which, again, is worth 40% of the total proposal) is supposed to be disclosed in response to Section 7.23 of the RFP. In all fairness, all costs being charged to the State as a result of the proposal should be included in the response to Section 7.23. The point of this narrative is that, in Premera's case, they were not.

SIM[illegible]ON, TILLINGHAST & SORENSEN
On[illegible]aska Plaza, Suite 300
Junea[illegible], Alaska 99801
(907) 586-1400 FAX: (907) 586-3065

Response, that these fees were "eliminated." *Attachment 4(b) at 57.* Those fees, however, were not "eliminated." Rather, Premera merely removed "Network Access Fees" from the category of claim charges, but recouped the amount of those formerly-called "Network Access Fees" ($6.88 million) by increasing the cost associated with a Non-Cost Factor. *McGuinness Aff.* ¶ *19.* The net result was to bury $6.88 million in real, direct costs to the state in a Non-Cost Factor portion of the proposal, artificially reducing the cost proposal itself by that same amount. *Id.* And, none of this would have been possible without the guidance that had been supplied by the Division over the month of February.

In *Dynacs Engineering Company v. United States*, 48 Fed.Cl. 124 (2000), the government made a disproportionate effort to enhance one RFP proposer's bid, offering it multiple opportunities to cure deficiencies and working with the favored bidder to cure nine shortcomings while pointing out only two deficiencies in the other bidder's proposal. The government tried to justify this substantive inequality by claiming that it had made some effort to work with both bidders. The court disagreed, holding that, in RFP discussions, the equality of treatment among proposers must be "meaningful," and both sides must be given the "same opportunity" to address weaknesses. A bidding agency cannot get by with "not telling [one bidder] about its continuing weaknesses, [while continuing to inform the other bidder] about each of [its] weaknesses until [that other bidder] got it right." 48 Fed.Cl. at 130. The disparity in both the frequency and substance of the communications among the two bidders in our case, and the vastly different results that the two sets of "discussions " achieved, proved that precisely the same inequity occurred here.

SIMPSON, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

To the same effect is *Dubinsky v. United States*, 43 Fed. Cl. 243 (1999), *appeal dismissed* 215 F.3rd 1350 (Fed. Cir. 1999), where the government also used the device of common discussions with potentially successful proposers to improve one bidder's proposal, while giving *pro forma* attention to the other. Without substantive equality in the discussions between proposers, the court held, "discussions with offerors readily would be subject to abuse, merely becoming a cover for an agency's discussions with the offeror it has selected to receive the contract prior to the formal selection decision." *Id.* at 263-4; *see also Paramax Systems Corp. v. CAE-Link Corp., 1993 WL 485205 (Com. Gen.) (October 27, 1993)*; (where bidders "were not treated equally since they were not given the same opportunity...to participate in discussions and to amend their cost/price proposals after BAFO [Best and Final Offer]," Comptroller General recommended a new round of BAFO's and, if necessary, cancellation of the originally-successful contract).

By selling Aetna short in the negotiation process, the big loser could well have been the Alaska public. Could the Division have gotten the best deal for Alaskans by engaging in the same discussions with Aetna that it had undertaken with Premera? As the court in *McBirney* stressed, we've no idea, because equality of treatment never occurred, and we thus do not know what kind of alternative proposal might have emerged from a similarly intensive effort with Aetna. 753 P.2nd at 1138.

Arguably, the genesis of the unequal treatment may have arisen from the Division's misplacement of Aetna's bid. From that point, and until the mistake was discovered, the Division considered Premera the only qualified bidder, and one might expect a government agency to communicate exclusively with the only bidder who (as the Division thought at the time) was qualified for the contract. That spin gives the

S[illegible], TILLINGHAST & SORENSEN
[illegible] laska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

Division every benefit of the doubt. But even if that were the case, the Division's ultimate failure came in its refusal to give Aetna's proposal the same individual assistance once the Division learned that Aetna was a qualified bidder whose bid was "susceptible for award." As Commission Norstrand acknowledged, by that time the playing field was "not entirely level," but the Division did nothing to level it. *Attachment 12 at 24*. It was incumbent on the Division to level that playing field, by helping Aetna improve its proposal to the same extent as it already had with Premera. The Division, in a word, cannot excuse such clear inequality of treatment by its own mistake; particularly when the Division later had every opportunity to rectify that mistake. The plain fact remains that the contract was awarded based on a process that treated the two proposors with patent inequality—a fact that proves not only a material statutory and regulatory violation, but as well a "serious[] impair[ment] of the purpose of the competitive bidding statutes" that warrants voiding the contract. *Earthmovers of Fairbanks, Inc. v. State*, 765 P.2nd 1360, 1369 (Alaska 1989).

IX. The Appropriate Remedy Here is to: (a) Re-Score the Parties' Previously-Submitted Final Proposals in their Entirety, Using a Three-Person Team Comprised of Uninvolved, Qualified and Unbiased Personnel Assisted by a Mutually-Agreeable Consultant With Expertise in Evaluating Health Claim Management Service Proposals; (b) Have the Evaluation Team include Total Costs (as Defined in this Section) in the Cost Proposal Required by Section 7.23 of the RFP; and (c) Cancel Premera's Existing Contract, and Award

S[illegible] N, TILLINGHAST & SORENSEN
On[illegible] [illegible]aska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

the Contract to Aetna, if the new Evaluation Committee Finds Aetna's Final Proposal to be Most Advantageous to the State

1 The deciding officer's discretion to grant relief in this case is defined by AS
2 36.30.585, which broadly authorizes the grant of "an appropriate remedy." §585(a).
3 Subsection (b) of that section guides the deciding officer in determining what remedy is
4 appropriate:

> *In determining an appropriate remedy, the procurement officer shall consider the circumstances surrounding the solicitation or procurement including the seriousness of the procurement deficiencies, the degree of prejudice to other interested parties or to the integrity of the procurement system, the good faith of the parties, the extent to which the procurement has been accomplished, costs to the agency and other impacts on the agency of a proposed remedy, and the urgency of the procurement to the welfare of the state.*

These remedies can include "award of bid or proposal preparation costs; termination of an existing contract;.. re-evaluation...[and other appropriate relief]." *In the Matter of Bachner Company Inc. and Bowers Investment Company*, Ak. Dept. of Administration Case No. 03.10 (Feb. 10, 2004) at 7 ("*Bachner*"); *J&S Services, ante* at 5. To the extent that the basis for the remedy is impropriety in the procurement, the deciding officer should also consider the factors set out in *Keko*, 492 F.2nd at 1203. *J&S Services, ante* at 6.

Aetna's proposed remedy requests the deciding officer to direct the Division to appoint a three-person uninterested, [15]/ qualified and unbiased review team that includes a mutually-agreeable consultant (as the State has used in the past) to re-score the parties'

[15] / As used in these Sections IX and X, "uninterested" means team members who have had no involvement in any evaluation process related to this procurement, nor any other substantive involvement in the procurement. None of the new team members should be made aware of any prior evaluation scores.

SI N. TILLINGHAST & SORENSEN
On Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

last proposals [16] in their entirety; and, if the evaluation team determines that Aetna's proposal is the most advantageous to the state (using the RFP's point system), (i) cancel the contract awarded March 13, 2006 to Premera; and (ii) award the contract to Aetna. [17]

Before re-evaluation, the evaluation team should modify the parties' proposals in one respect only: the price offer made under Section 7.23 of the RFP should include <u>total costs</u> to the state. [18] As explained in *Section VIII, ante,* and in the *Third Affidavit of Mike Wiggins* and the *Affidavit of Matt McGuinness*, by including "total costs," the cost portion of the bid would capture (among other cost items) network savings sharing arrangements. These sharing arrangements represent a true, direct cost to the state, because they deny the State a portion of these otherwise important savings (in a nutshell, putting money in the contractor's pocket that would otherwise go into the state's pocket—here to the tune of \$6.88 million). *Id.* [19] By not including those savings sharing arrangements as a

---

[16] The parties' last proposals are comprised of their RFP responses; all of their answers to the various questions propounded by the Division that have heretofore been disclosed to the parties and included in the *Attachments* to this Appeal; and the so-called Best and Final Offer submitted on February 28, 2006.

[17] This proposed remedy is premised on the assumption that this Appeal can be resolved on an expedited basis. If the appeal is not expedited, or it is not expedited sufficiently, then Aetna reserves the right to request alternative relief, and to seek such stays and interim relief as circumstances may warrant.

[18] As used in these Sections IX and X, "total costs" include program administration fees, pharmacy rebate sharing arrangements, network savings sharing arrangements, run out fees in the event of termination, banking arrangements, and other terms that affect cost . Pharmacy rebates are being included because it is common practice to offset administration fees with rebate sharing guarantees. This approach is referenced as a preferred approach in the RFP under 3.08 "Proposed Payment Arrangements".

[19] In fact, Premera was able not only to effectively obscure the \$6.88 million in "Network Access Fees" discussed throughout this memorandum, but also to add additional costs to the State that were not disclosed in the cost section of Premera's proposal, such that the total amount of undisclosed costs ultimately totaled \$13.74 million (using reasonable underwriting assumptions). *Id.*

S[illegible]N, TILLINGHAST & SORENSEN
[illegible] Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX: (907) 586-3065

"cost," the proposor's bid understates the cost to the state of the proposal by the corresponding amount. [20]

Aetna submits that, taken as a whole and fairly balanced, the factors set out in §585 support such a remedy. For example:

- The initial factor listed in §585—the "seriousness of the procurement deficiencies," and the "degree of prejudice to…the integrity of the procurement system" plainly argue for re-evaluation and (if necessary) cancellation of the existing contract.

  The extent to which the Division's statutory and regulatory violations have undermined the purpose of Alaska's competitive bidding laws has been extensively discussed *ante*. The extensive, one-sided contacts held with one bidder have undermined the purpose of AS 36.30.240 and 2 AAC 12.290, which is to guard against the potential for abuse inherent in pre-award conversations with proposors by placing strict limits of equality in dealings with all qualified proposors. And, as the court stressed in *McBirney v. State*, 753 P.2nd 1132, the failure of the Division to work just as intensely with Aetna as it did with Premera to improve its proposal frustrated the central purpose of our competitive bidding system—to obtain the deal "most advantageous to the state" (AS 36.30.250(a))—

[20] / It should be noted that the relief requested here is considerably less favorable to Aetna than the relief originally requested in the Protest. *Attachment 9* at 16-17. That is because one of the material factors for shaping relief under AS 36.30.585 has changed since the protest was submitted—*i.e.*, the status of the procurement. The ultimate standard for relief under §585 is "appropriateness," which is plainly a function of current realities. But if the Division can erect some arbitrary barrier to this Appeal's request, then the relief sought in the Protest is incorporated herein by reference. Of course, the deciding officer is not limited, in fashioning relief, to that set out in the parties' papers.

SP…ON, TILLINGHAST & SORENSEN
… Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

by focusing on just one proposor, while short-shrifting a competitor who might, in fact, have been able to offer a superior alternative.

Additionally, it is self-evident that the use of different evaluation teams for the two different proposors horribly undermines the competitive system. Such a system is not, in fact, "competitive" at all, but a whimsical game of chance.

Finally, and as this memorandum has shown, both irregularities affected the outcome of the procurement.

- With respect to "the extent to which the procurement has been accomplished," and the "degree of prejudice to other interested parties," the contract has been signed, but only on March 13, 2006. The contract performance period does not begin until July 1, 2006. *RFP, Section 1.02.* In the interim, Premera will be expending funds in preparation for assuming the state's program in July. As of some point *after* July 1, 2006, these start-up funds will eventually approximate $614,000. *See Affidavit of Robert Moore;* ¶5. However:
  - A portion of these expenditures will be incurred after contract commencement on July 1, 2006. *Id.* at ¶7;
  - The funds will be incurred only incrementally over the next three months (that is, the number today does not approach $614,000). The earlier the merits of this appeal can be resolved, the fewer start-up funds at stake. *Id.* at ¶5; and

SI ON, TILLINGHAST & SORENSEN
laska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

- Even the entire $614,000 is considerably less than the $2.48 million that the state would save by accepting Aetna's proposal, [21] / and a fraction of the $30 million-plus contract price

Thus, this is not a case where a building has already been constructed (*Bachner)* or a jet completely retrofitted to meet unique state specifications (*J&S Services*). It is, rather, a case where contract performance has not even commenced, and mobilization costs are, to this point, a small fraction of ultimate contract cost. [22]/

- o The Division did not, in Aetna's judgment, proceed "in good faith" here—another factor relevant under both §585(b) and *Keko*. To the extent that the Division's extensive *ex parte* contacts arose from the Division's original loss of Aetna's bid documents, there is no good faith that emerges from that ostensible "mistake." Four entire boxes were "lost." And they were not lost very well, since the Division was able to find them within an hour of Aetna's notification that the materials had, in fact, been timely filed. An agency acting in good faith would have surely questioned why the State's long-time existing contractor had "omitted" the bulk of its bid, and either spent the requisite hour to find the documents much earlier, or simply contacted Aetna. Further, once the materials

---

[21] / *McGuinness Aff.*

[22] / If the contract is ultimately awarded to Aetna, Premera's damages, if any, would be governed by *Earthmovers of Fairbanks, Inc. v. State*, 765 P.2nd 1360 (Alaska 1988). Under *Earthmovers*: (i) if Premera's original contract is void because "the defect in the award seriously impair[ed] the purpose of the competitive bidding statutes" (*id.* at 1369), then Premera would be due no damages under the contract, but could receive reimbursement of those out-of-pocket expenses that the factfinder determined fair; and (ii) if the contract is not void, it would be cancelable under Appendix A, Article 5 of the contract (*Attachment 13*), which provides for termination for the Division's convenience, and allows Premera to recover only "for services rendered before the effective date of termination." While this is not the appropriate forum to resolve Premera's damages (and in fact the issue is not yet even ripe, since Premera's contract has not yet been canceled), the extent of those conceivably-available damages does warrant note.

SI... ON, TILLINGHAST & SORENSEN
... Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

were found, the Division undertook no effort to level the now-stilted playing field before finally awarding the contract—a playing field even the agency's commissioner admits was "not entirely level." *Attachment 12* at 24.

With respect to the different evaluation teams, the Division's unilateral and undisclosed conversion of an agreement to use *one* different evaluator for an initial threshold review of Aetna's original bid into a process that used a *majority* of different evaluators for the two companies' final proposals does not reflect good faith.

And finally, the Division's contention now that Patrick Shier was a member of the evaluation team that "scored Premera's proposal" is a naked manifestation of bad faith.

- The "costs to the agency and other impacts on the agency of [Aetna's] proposed remedy, and the urgency of the procurement to the welfare of the state" weigh in Aetna's favor. As just discussed *ante,* those costs, if any, are at this juncture relatively minor, since the contract has just been awarded; performance does not commence until July 1, 2006, and currently-ongoing mobilization costs are an order of magnitude less than the longer-term sums at stake here.
- Nor is the procurement urgent. The services solicited under the procurement have been satisfactorily provided by Aetna and its affiliates for 24 years, and, even if it became necessary to extend the start-up date under the new contract past July 1, 2006, Aetna stands ready to continue to provide those services at the

ST[illegible]ON, TILLINGHAST & SORENSEN
[illegible] Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

existing contract price until a fair procurement process can be completed. *Attachment 9 at Cover Letter, p. 2; Wiggins Aff., ¶¶ 30-31.* [23]/

- Finally, and with respect to the remaining *Keko* factors: (1) Premera's offer was not "clearly superior" (*cf. J&S Services, ante* at 7), but in fact likely inferior in cost and quality than Aetna's [24]/; and (2) as we have seen in Section VIII, *ante*, the Division's impropriety in its grossly disproportionate communications with Premera violated specific statutory and regulatory prohibitions designed to avoid the precise misconduct that occurred here, and in a way that affected the outcome of the solicitation.

- Finally, failure to grant Aetna's remedy would cause extraordinary disruption to the State's provision of health care coverage to its employees and retirees. The switching of health care claim management inevitably leads to confusion and delays in obtaining payment for or reimbursement of health care expenses, and invariably causes extreme hardship on the insured—and in particular, retirees, who are dependent on prescription drug coverage. *See Wiggins Aff.*, ¶¶31-41.

[23] / In any event, an extension beyond July 1 is probably not necessary. Because there is currently no stay in effect, Premera is beginning the mobilization process to assume control of the programs at issue—a process described in the *Affidavit of Robert Moore*. That process will continue, unless and until an expedited evaluation of new final proposals from Aetna and Premera concludes that Aetna's proposal is the one most advantageous to the state. Should Aetna prevail, its current infrastructure to continue providing these same services would have remained intact. *Wiggins Aff., ¶¶ 30-31*. And, the re-evaluation process requested in this Appeal should not be time-consuming. Bear in mind, in this regard, that it took the Division only *four days* from its February 24 "agreement" to reconstitute the evaluation committee, solicit and review new best and final offers and responses to the Division's substantive questions, and issue a new Notice of Intent.

[24] / *See McGuinness Aff.*

S[illegible]ON, TILLINGHAST & SORENSEN
[illegible] Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

On balance, then, Aetna's proposed remedy best serves the public interest; is clearly the remedy that best protects the purposes of Alaska's competitive bidding laws; and at this point will pose no great hardship on other parties.

X. Conclusion and Request for Relief

For the foregoing reasons, Aetna respectfully requests that the deciding officer:

(1) direct the Division that the previously-submitted proposals be scored on an expedited basis by an uninterested, qualified and unbiased three-person evaluation team that includes one consultant with demonstrated expertise in medical claim benefit management and acceptable to the Division, Premera and Aetna. If the parties cannot agree on a consultant, the deciding officer should choose the consultant from among the parties' nominees. The evaluation committee shall amend the submitted proposals to include total costs (as defined in this memorandum) in the parties' response to RFP Section 7.23. The process required by this subsection should be completed in no more than seven days;

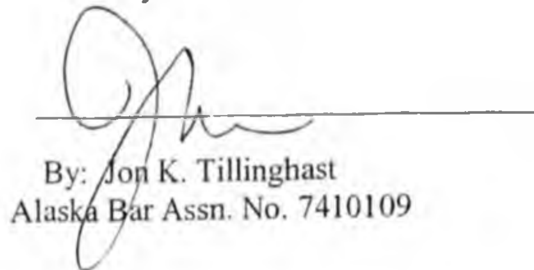
(2) direct the Division that, if Aetna's proposal is found to be most advantageous to the state (on the basis of the point system set out in the RFP), award the contract to Aetna and cancel the contract awarded to Premera on March 13, 2006. The award and, if necessary, the contract cancellation, should be issued in final form, without any further Notice of Intent to Award, within one week of entry of the final decision in this appeal; and

SI[illegible]ON, TILLINGHAST & SORENSEN
[illegible] Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX: (907) 586-3065

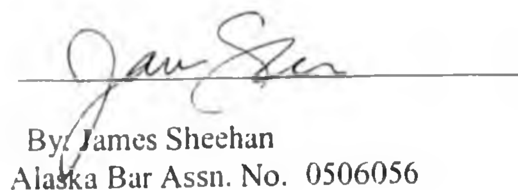
(3) award Aetna such other relief as the deciding officer finds warranted under AS 36.30.585.

DATED: March 28, 2006

SIMPSON, TILLINGHAST & SORENSEN
Attorneys for Aetna



By: Jon K. Tillinghast
Alaska Bar Assn. No. 7410109



By: James Sheehan
Alaska Bar Assn. No. 0506056

SIMPSON, TILLINGHAST & SORENSEN
One Alaska Plaza, Suite 300
Juneau, Alaska 99801
(907) 586-1400 FAX (907) 586-3065

AETNA'S FIRST EVALUATION SCORES

Evaluators:	Miller	Shier	Porter	Average
Total Evaluator Scores From Aetna's First Evaluation	2415	1570	2105	2030.0

PREMERA'S FIRST EVALUATION SCORES

Evaluators:	Gray	Jarrell	Miller	Williams	Average
Total Evaluator Scores From Premera's First Evaluation	1692	1290.5	1156	1810	1489.5

AETNA'S SECOND EVALUATION SCORES

Evaluators:	Miller	Shier	Porter	Average
Total Evaluator Scores From Aetna's Second Evaluation	2440	1585	2120	2048.3

PREMERA'S SECOND EVALUATION SCORES

Evaluators:	Gray	Miller	Williams	Average
Total Evaluator Scores From Premera's Second Evaluation	2207	2160	1990	2119.0

CHART 1

PREMERA'S FIRST EVALUATION SCORES

Technical Proposal	Gray	Jarrell	Miller	Williams	Average
10.01	40	55	25	75	40.0
10.02	81	67.5	83.5	80	77.3
10.03	50	25	25	45	33.3
10.04	26.5	14	4	20	14.8
10.05	40	55	40	60	45.0
10.06	62	85	51	125	66.0
10.07	166.5	91	127	190	128.2
10.08	127.5	85	87	120	99.8
10.09	80	32.5	11	90	41.2
10.10	67	60	50	100	59.0
10.11	75	42.5	63.5	75	60.3
10.12	84	45	54	85	61.0
10.13	191	155	171	200	172.3
10.14	135	90	72	125	99.0
10.15	104	50	62.5	65	72.2
10.16	79	90	40	100	69.7
10.17	91	85	51	70	75.7
10.18	69	70	46.5	90	61.8
10.19	80.5	65	67	70	70.8
10.20	43	28	25	25	32.0
Total	1692	1290.5	1156	1810	1379.5

PREMERA'S SECOND EVALUATION SCORES

Technical Proposal	Gray	Miller	Williams	Average
10.01	80	75	75	76.7
10.02	128	125	100	117.7
10.03	50	45	45	46.7
10.04	50	45	35	43.3
10.05	90	100	70	86.7
10.06	122	125	125	124.0
10.07	176.5	200	190	188.8
10.08	142.5	125	120	129.2
10.09	92	100	90	94.0
10.10	150	100	100	116.7
10.11	88.5	80	80	82.8
10.12	86	100	90	92.0
10.13	207	225	200	210.7
10.14	145	100	130	125.0
10.15	133.5	100	130	121.2
10.16	150	125	100	125.0
10.17	115	140	90	115.0
10.18	75	100	90	88.3
10.19	83	100	90	91.0
10.20	43	50	40	44.3
Total	2207	2160	1990	2119.0

AETNA'S FIRST EVALUATION SCORES

Technical Proposal	Miller	Shier	Porter	Average
10.01	100	55	100	85.0
10.02	125	80	75	93.3
10.03	50	30	50	43.3
10.04	35	25	40	33.3
10.05	100	70	75	81.7
10.06	150	85	150	128.3
10.07	200	120	165	161.7
10.08	150	85	140	125.0
10.09	100	70	100	90.0
10.10	150	75	120	115.0
10.11	90	50	95	78.3
10.12	100	70	90	86.7
10.13	225	200	225	216.7
10.14	140	85	120	115.0
10.15	150	90	90	110.0
10.16	150	95	135	126.7
10.17	150	120	135	135.0
10.18	100	60	60	73.3
10.19	100	80	90	90.0
10.20	50	25	50	41.7
Total	2415	1570	2105	2030.0

AETNA'S SECOND EVALUATION SCORES

Technical Proposal	Miller	Shier	Porter	Average
10.01	100	55	100	85.0
10.02	125	80	75	93.3
10.03	50	30	50	43.3
10.04	50	35	40	41.7
10.05	100	70	75	81.7
10.06	150	85	150	128.3
10.07	200	120	165	161.7
10.08	150	85	140	125.0
10.09	100	70	100	90.0
10.10	150	75	120	115.0
10.11	90	50	100	80.0
10.12	100	70	90	86.7
10.13	225	200	225	216.7
10.14	150	95	130	125.0
10.15	150	90	90	110.0
10.16	150	95	135	126.7
10.17	150	120	135	135.0
10.18	100	60	60	73.3
10.19	100	75	90	88.3
10.20	50	25	50	41.7
Total	2440	1585	2120	2048.3

Constance Hartle

From: Englehart, Tom J. [TJEnglehart@magellanhealth.com]

Sent: Tuesday, March 21, 2006 11:06 AM

To: Sen. Con Bunde

Subject: Aetna protest of State Employees & Retirees Medical Plan Administration award

Hello, Senator Bunde:

I represent a 26 year old Alaskan company, Magellan Health Services, based in Anchorage, which currently provides employee assistance and managed mental health services to State of Alaska employees and retirees. We have served the State for the past thirteen years as a subcontractor to Aetna Healthcare which currently administers the overall benefit plan (medical, dental, vision, etc.).

As you are aware, in the recent bidding process for the State's health plan administration contract that goes into effect 7/1/2006, there were substantial inequities and "irregularities". As a result of this seriously flawed process, the State signed a contract with Premera Blue Cross/Blue Shield in the past week, replacing Aetna. I am writing to respectfully request that you question the Department of Administration about the details of this flawed RFP process and support Aetna's effort to have the contract with Premera cancelled.

Aetna is exercising its right to protest this award on the following bases:

- Two different teams of evaluators graded the Aetna and Premera non-cost proposals
- The State appeared to coach Premera to improve its evaluation score without offering the same opportunity to Aetna
- The State failed to evaluate at all Aetna's separate Pharmacy Claims Management proposal that could save the State $3M

A number of other anomalies also occurred in the RFP process, including the "misplacement" of a major portion of Aetna's original proposal that led to an initial rejection of the Aetna proposal as "non-responsive" to the RFP. These portions of Aetna's proposal were later "found" and evaluated by the aforementioned different teams.

I understand that the State's award and Aetna's protest will be addressed at your Thursday Labor and Commerce Committee meeting. A proposed fair resolution to the situation is to extend the current Aetna contract and seek a re-bid at a later date under a more equitable process for evaluation of the proposals.

If the current decision stands, we at Magellan stand to lose a number of jobs in our Anchorage and Wasilla offices. We are fully aware that business is won and lost through competitive processes, but we do not feel that the process in this case was equitable to all the bidding parties. The Premera package includes employee assistance services from a company based in Chicago that has no physical presence in Alaska or Alaskan employees.

I will call your office in the next day or so to respond to any questions you may have about this issue. Thank you for your consideration.

Tom Englehart
General Manager
Magellan Health Services
Alaska Care Management Center
907-273-9232 Direct
907-563-6340 Fax
800-478-2812, Ext 9232
tjenglehart@magellanhealth.com

OVERVIEW AK. COASTAL MGMT PLAN, 2/29/05

Let's call the meeting to order

Let the record reflect that it is 8:00 a.m. on Thursday, February 24th 2005.

Present are:

Representative Elkins

Representative Ramras

Representative Gruenberg

Representative Gatto

Representative Gardner

And myself Representative Seaton

Representative Lynn is on an excused absence traveling to Japan

At this time I would like to remind everyone to turn off their cell phones as this overview is being recorded by House Records.

Today we will hear an overview of the Alaska Coastal Management Plan revision in order to more fully understand where the state and the districts are at in the process.

Here with us today are Commissioner Tom Irwin of DNR, Bill Jeffress and Randy Bates of the Division of Project Management and Permitting in DNR, as well as representatives from six coastal districts, both present in the audience and on line.

Please remember that there are seven parties waiting to testify, so try to keep your comments from running over time.

The next committee will meet on Tuesday, March 1st. This meeting is adjourned. It is 10:00

HOUSE STATE AFFAIRS COMMITTEE

STATE CAPITOL, ROOM 102
465-4963

COMMITTEE MEMBERS

Rep. Paul Seaton, Chairman
Room 102
465-2689

Rep. Carl Gatto
Vice-Chair
Room 411
465-3743

Rep. Bob Lynn
Room 415
465-4931

Rep. Jim Elkins
Room 416
465-3424

Rep. Jay Ramras
Room 104
465-3004

Rep. Berta Gardner
Room 422
465-4932

Rep. Max Gruenberg
Room 112
465- 4940

Testifier List

State

1. Commissioner Tom Irwin, Department of Natural Resources
2. Bill Jeffress, Director, Division of Project Management and Permitting, Department of Natural Resources
3. Randy Bates, Deputy Director, Division of Project Management and Permitting, Department of Natural Resources

(On line to testify are John Katz, Director of State/Federal Relations and Special Counsel in the office of the Governor, and Bruce Anders, Assistant A.G.

Districts

4. Tom Lohman, North Slope Borough
5. Peter Freer, City and Borough of Juneau
6. Glen Alsworth, Mayor, Lake and Peninsula Borough
7. Dan Bevington, former Coastal District Coordinator for the Kenai Peninsula Borough
8. John Oscar, Program Director, Cenaliulriit (SENA-LEE-OOL-RETE) Coastal Resource Service Area. 38 vi
9. Thede Tobish, Coastal District Coordinator, Municipality of Anchorage Planning Department + telecon
10. Karol Kolehmainen, Program Director, Aleutians West Coastal Resource Service Area

amended plan not just reviewed.

Inconsistency coastal to effect not just designated area.

41

22 deleted

19

Web posted Tuesday, February 22, 2005

Rough times face coastal m· ıagement
Bills seek to extend deadline for districts to update plans

By HAL SPENCE
Peninsula Clarion

Two bills introduced in the Alaska House and Senate last week seek to provide coastal communities more time to revise their district coastal management plans that currently are due in March.

That's a deadline they are unlikely to meet.

Current law requires coastal municipalities, including the Kenai Peninsula Borough, to submit draft management plan revisions to the Alaska Department of Natural Resources by next month.

That would leave enough time for the drafts to be reviewed, a 21-day public comment period held, and revisions adopted before a July 1, 2005 deadline established by HB 191, a bill that became law in 2003 that created a new coastal management program and established the Coastal Program Evaluation Council.

HB 191 called for updating local coastal plans to conform to the new state program, and the Kenai Peninsula's 15-year-old management plan was no exception. But local districts had to await certain state actions before they could launch their own revision efforts.

The borough was finally able to begin rewriting its local district plan last fall. In September, the Kenai Peninsula Borough Assembly accepted a $50,000 grant from the Alaska Department of Community and Economic Development and appropriated a $10,000 match from borough funds to cover the costs of the wholesale update of the borough document.

That left just seven months to meet the March deadline.

Dan Bevington, then the borough's coastal management coordinator, called the March deadline ambitious and unrealistic, yet he warned that future funding for the borough's coastal management program could be put in jeopardy if the borough failed to meet it. Bevington has since resigned his job with the borough.

Now, House Bill 146, offered by Rep. Beth Kerttula, D-Juneau, and Senate Bill 102, submitted by Senate Majority Leader Gary Stevens, R-Kodiak, would give communities wrestling to update their out-of-date coastal management plans a reprieve by extending the July 1, 2005, deadline as far out as July 1, 2006.

As local districts pursue that work, the Department of Natural Resources has been trying to make its proposed amendments to the Alaska Coastal Management Program fit provisions of federal coastal management regulations. In September, state officials submitted proposed amendments to the Office of Ocean and Coastal

Resource Management (part of the National Oceanic and Atmospheric Administration), which must, in turn, determine that the proposed state revisions are consistent with the National Environmental Policy Act.

In November, the state was informed its submission was not sufficient for the OCRM to make a finding of preliminary approval. The state submitted a revised amendment Dec. 16.

On Jan. 28, OCRM Director Eldon Hout outlined several issues still to be resolved to ensure compatibility between the state and federal programs and the environmental policy act and said the federal agency still could not issue a finding of preliminary approval.

He noted that failure to meet the July 1 deadline set by HB 191 would leave Alaska with no enforceable statewide coastal management standards, and only the existing, already approved district plans in force.

Hout recommended that the state continue to rely on existing Alaska Coastal Management Plan regulations and that the Legislature remove or extend the July 1 deadline established by HB 101. The bills introduced by Kerttula and Stevens seek to do just that.

Meanwhile, officials from the local districts have expressed concerns that new state regulations, if adopted, would serve to limit the local voice in coastal-management decisions.

Among the ideas included in the yet-to-be-approved state amendments is a concept called "flow from," that would limit the policies local district management plans could enforce. That is, district policies could only "flow from" a list of uses, activities and impacts within the state standards. For example, since state policy standards govern the placement of structures and discharge of dredged material into "coastal waters," a local district plan could not dictate where dredge material might be discharged on shore.

In another example, the proposed state amendments would leave local plans unable to address matters already regulated or authorized by state or federal law without first demonstrating a local concern under specific state statutes.

Thus, districts would have to analyze each intended district enforceable policy "to ensure not only that it 'flows from' an enumerated state standard, but also ascertain whether the matter is already regulated or authorized by state or federal law."

In 2003, backers argued that the new state law was intended to retain the benefits of federal coastal management law while eliminating duplication and complexities contained in the existing state program. Bob Shavelson, director of Cook Inlet Keeper, an environmental group dedicated to protecting the Cook Inlet watershed, had a different opinion.

He said the current difficulties state and local district officials face in writing approvable coastal management policies stem directly from HB 191 itself, which was

an attempt, he said, to "pull the teeth" out of a program "most people see as successful."

That bill, Shavelson said, was "hastily rammed through" by an administration seeking to eliminate local input into coastal management planning that it perceived to be an impediment to future resource development and resource revenue streams.

"The federal law (the Coastal Zone Management Act of 1972) was always envisioned as a local, state and federal partnership," Shavelson said. "Congress recognized you could not have effective coastal management without meaningful participation from local districts."

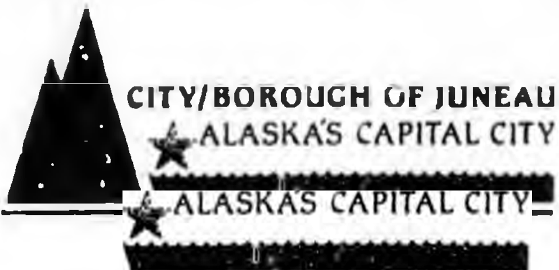
Sen. Gary Stevens said his bill, along with that of Kerttula, recognized that coastal districts simply need more time.

"The local communities were having too much trouble getting their own plans written," he said.

The same thing applies at the state level, he added.

Stevens said he tried to amend the state law last year in an attempt to extend the deadline, but was unsuccessful. Asked if he thought lawmakers were ready to approve a deadline change now, all he would say was, "I hope they are this time."

RECEIVED
JAN 25 2005
PERMIT CENTER / CDC



OFFICE OF THE MANAGER
Telephone: (907) 586-5240; Fax: (907) 586-5385
Rod_Swope@ci.juneau.ak.us

January 25, 2005

The Honorable Beth Kerttula
Alaska State Representative
Alaska State Capitol, Room 430
Juneau, AK 99801-1182

Dear ~~Representative~~ Beth Kerttula:

I am writing with regard to the Alaska Coastal Management Program (ACMP) revision process, and to urge your support for an extension to the June 30, 2005, deadline for a mandatory rewrite of the Juneau Coastal Management Program (JCMP). As former Commissioner of the Department of Natural Resources (DNR) and a former appointee to the Alaska Coastal Policy Council, I am very familiar with the Coastal Management Program and the benefits and importance it affords to communities.

The JCMP was prepared over a several-year period during the 1980s, with extensive public and agency involvement and included enforceable policies in areas such as coastal development, habitat, transportation and utilities, recreation, energy facilities, mining, fish and seafood processing, timber harvesting, and the unique Juneau Wetlands Management Plan. The Juneau Wetlands Management Plan was added as a tool to provide a specific and predictable review process for applicants. At this point, it is unclear whether communities may have enforceable policies of any kind. The role of communities in the statewide program has been significantly reduced, and the "due deference" granted to communities through enforceable policies may be virtually eliminated. The only option left would be to attempt to assert deference on a case-by-case basis using state standards. Success in this effort would be highly unlikely.

Even at this stage, with a Public Review Draft of the plan due by March 1, DNR still has not provided final guidance on the regulations. DNR's occasional teleconferences with communities have given different, and often contradictory, guidance on the regulations. At this late date it is still unclear how, or if, a community can write policies that may be approved by DNR. In fact, DNR staff has suggested that communities should prepare plans that do not have policies at all, but expanded resource inventories and analyses instead. Without a policy basis, however, the plans would lack specific guidance and be impossible to implement.

As a home rule government, Juneau has broad powers, and is one of a handful of Alaska municipalities with a sophisticated and well-developed planning authority. We can use this authority in lieu of the ACMP, but would exercise it without the benefits of the ACMP, including one-stop permit shopping for the applicant; institutional coordination that, in effect, makes partners out of the different levels of government; ongoing, programmatic communication; pooling of agency knowledge and expertise; joint problem-solving; and due deference to local enforceable policies. Separating local standards from the state program means that an applicant must go through two separate, uncoordinated permit review processes, with the potential for conflicting permit conditions. Specifically, if the current Juneau Coastal Management Program must be removed from the statewide program (because none of its policies meet the new regulatory requirements), and remains only in the local land use code, the applicant will have one coastal management review at the state level, and a second review at the local level under local code. The stated goal of the coastal management program changes was a simplified, streamlined, and predictable review process for applicant.

The state's active coastal districts, including Anchorage, the North Slope Borough, the Kenai Peninsula Borough, the Lake and Peninsula Borough, and the Aleutians West and Cenaliulriit Coastal Resource Service Areas are unanimous in seeking an extension. The June 30, 2005 deadline is unrealistic and ill timed. We simply do not have enough time to complete this work satisfactorily, much less have any hope of a meaningful process for public involvement. The statutory deadline for plan completion has always been short, but has been compounded by continually evolving guidance from DNR, particularly with regard to policy development. I believe that completing plans under these circumstances is premature and wasteful, particularly since the federal Office of Ocean and Coastal Resource Management (OCRM) appears unlikely to approve the state program revisions in their current iteration, leaving the door open for yet another round of plan revisions in six months or a year. Rather than struggle under an unrealistic deadline to prepare a plan that could become quickly outdated, we believe the deadline for plan revision should be 18 months, following final federal approval of the state's ACMP revisions

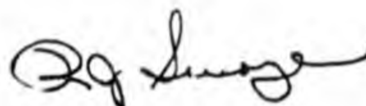
Without an extension, the program will either lapse or suffer a significant gap in implementation and funding. The federal OCRM has stated that the changes are a significant amendment, and thus require preparation of an Environmental Impact Statement (EIS). DNR must present OCRM with a complete program amendment document, which it has not yet done. After OCRM officially accepts this package, an EIS must be completed. Then OCRM must review and approve the EIS and make a decision on the program. All of this has to be completed by July 1, 2005, a clearly impossible deadline. If the State of Alaska wants to have a coastal management program, in any form, the deadline must be extended.

In closing, I would observe that Juneau is one of the premier cruise ship destinations in the world, and has averaged almost 10% growth in cruise visitors annually. It is one of the hard-rock mining centers of the state, home to the largest silver mine in North America, and has recently issued a permit for development of the Kensington gold mine. It has extensive port and industrial development within waterfront areas designated in the JCMP for water-dependent industry. It is homeport to a large commercial fishing fleet and has an expanding seafood processing sector. All of this development has occurred under the auspices of the Juneau Coastal

Management Program, a program that promoted a local voice and a local role in coastal economic development.

Thank you for your time and attention. Please feel free to contact me or Peter Freer, Community Development Planning Supervisor, should you have any questions or desire any follow-up to this correspondence.

Sincerely,



Rod Swope
City & Borough Manager

cc: Mayor Bruce Botelho
Assemblymember Randy Wanamaker
Clark Gruening, CBJ Lobbyist

State of Alaska

OFFICE OF THE GOVERNOR

Frank H. Murkowski
Governor
P.O. Box 110001
Juneau, Alaska 99811-0001

NEWS RELEASE

Becky Hultberg
Press Spokeswoman
907-465-3500
FAX: 907-465-3532
www.gov.state.ak.us

FOR IMMEDIATE RELEASE: February 23, 2005 No. 05-030

Governor Rejects New NOAA Mandates

Asserts state's rights to manage coastal resources

(Juneau) – Citing the need for the state to manage its coastal resources without excessive federal intervention, Governor Frank H. Murkowski sent a letter to the National Oceanic and Atmospheric Administration Wednesday asking NOAA to abandon new requirements for the Alaska Coastal Management Program. If NOAA does not reject the new requirements, the ACMP will expire in the summer of 2005.

"Alaskans deserve a coastal management program that works for Alaska," said the governor. "This is another example of the federal government dictating from afar program requirements that don't make sense in Alaska. I promised to stand up to the federal government when they overreach their authority -- and through this action I am upholding that commitment."

Alaska voluntarily implemented the ACMP program in 1979. After 25 years, the program had evolved into a complex, confusing set of requirements that delayed projects in Alaska without corresponding environmental benefits. Discontent grew with the program, until in 1997 a bill was introduced to repeal it.

In 2003, the state Legislature passed HB 191 mandating a simplified program that responsibly managed Alaska's coastal resource while eliminating duplication. After the bill's passage, the state worked with NOAA to develop and describe an amended program that met Alaska's needs. Talks proceeded constructively until January 2005, with NOAA identifying minor changes to the ACMP regulations.

On January 28, 2005, NOAA denied Alaska's amended ACMP. NOAA's denial is contrary to federal regulations that allow for state management of coastal resources through an existing network of state and federal regulatory agencies. NOAA also refuses to abide by the intent of federal law to "assist the states" in managing their coastal resources. Instead, NOAA seeks to impose duplicative, complex, and burdensome requirements that do not increase environmental protection.

For a copy of the governor's letter and a letter to Alaskans from the commissioners of four state departments: http://www.alaskacoast.state.ak.us/

###

Alaska Defends State's Right to Develop Voluntary Coastal Management Program by Rejecting Expanded and Prescriptive Federal Mandates

- The State of Alaska has voluntarily implemented the Alaska Coastal Management Program (ACMP) since the National Oceanic and Atmospheric Administration (NOAA) approved the program in 1979.

- After 15 years of changing circumstances and application, the ACMP had evolved into a complex, confusing set of requirements that unnecessarily delayed projects in Alaska without corresponding environmental benefit. By late 1995, the ACMP faced growing discontent from program administrators and stakeholders, and in 1996, an ACMP Steering Committee found the ACMP "duplicative and sometimes in conflict with other regulatory responsibilities." In 1997, discontent with the fragmented state of the program reached a point where a bill was introduced to simply repeal the ACMP.

- In 2003, the Alaska State Legislature and Administration passed HB 191, which mandated a simplified program that meets the priorities and needs of Alaska while still comprehensively and responsibly managing Alaska's coastal uses and resources.

- Following passage of HB 191, the State and NOAA partnered to forge an amended program that best managed the competing uses and demands placed upon Alaska's coastal resources. Discussions between the State and NOAA to reach this goal were proceeding constructively into January 2005, with NOAA identifying minor modifications to the ACMP regulations and program description as appropriate for program approval.

- On January 28, 2005, NOAA by letter denied Alaska's amended ACMP. NOAA's denial decision rescinded promises made during the past two years, and refused to acknowledge Alaska's rights in developing a program that works best for the State.

- NOAA has adopted a new, prescriptive interpretation of federal law that extends beyond Congress' mandate to NOAA to "assist the states" in managing their respective coastal uses and resources. Among other erosions of Alaska's control over its program, NOAA now refuses to honor its federal regulations that allow for a State's comprehensive management of its resources through a network of existing state and federal regulatory authorities. NOAA also seeks to impose duplicative, onerous, and complex new standards beyond what the State feels is necessary and appropriate. Representatives from other federal agencies have also expressed concern with OCRM's new requirements.

- On February 23, 2005, Governor Murkowski informed NOAA by letter that unless NOAA immediately abandons its new requirements, the ACMP will expire by operation of law in the summer of 2005.

- Also on February 23, 2005, the four Commissioners of the Departments of Natural Resources, Environmental Conservation, Fish and Game, and Commerce, Community, and Economic Development, jointly wrote a "Letter to Alaskans," in which the Commissioners assured Alaskans, "we are confident that Alaska will continue to be involved and our voice heard in federal activity and authorization processes, even without the formality of the voluntary ACMP," and that "we will continue to aggressively and comprehensively manage Alaska's coastal and inland natural resources."

STATEMENT OF

ELDON HOUT
DIRECTOR
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE

BEFORE THE
HOUSE STATE AFFAIRS COMMITTEE
ALASKA STATE LEGISLATURE

FEBRUARY 24, 2005

Good morning members of the committee, officials from the Alaska Department of Natural Resources (DNR) and district representatives. I am Eldon Hout, Director of the Office of Ocean and Coastal Resource Management, within the National Oceanic and Atmospheric Administration (NOAA). Thank you for this opportunity to describe NOAA's role in the review and approval of proposed changes to the Alaska Coastal Management Program (ACMP). This is a matter of great importance for NOAA, the State and the national coastal management program.

I am also submitting for the record our January 28, 2005, letter (with enclosures) to the Alaska DNR. This letter describes in detail the remaining approval and procedural issues that need to be addressed before NOAA can make a preliminary approval finding and initiate the National Environmental Policy Act (NEPA) process.

Please let me make clear that NOAA supports Alaska's efforts to streamline and clarify the ACMP. Unfortunately, streamlining efforts have resulted in gaps that must be addressed to meet minimum Coastal Zone Management Act (CZMA) requirements. The changes mandated by Alaska's House Bill 191, and the ensuing regulations, effectively constitute the most significant change to any federally approved state coastal management program. NOAA and Alaska DNR staff have worked together and made significant progress on many of the issues

regarding approval of the ACMP amendment. NOAA's January 28 letter continues this process by providing a definitive response to the State's most recent proposal. NOAA's response is based on a careful review of the documents provided by the Alaska DNR, the approval and procedural requirements of the CZMA, and NOAA's responsibilities under NEPA. It is important to note that this has been an iterative process and our January 28 letter could not have been provided earlier because the State's regulations and descriptive documents have continued to change over the past six months. The CZMA requirements described in NOAA's January 28 letter reflect the many discussions between NOAA and Alaska DNR, and identify only a few remaining issues. NOAA's January 28 letter provides Alaska with specific recommendations to meet these remaining CZMA requirements.

Allow me to briefly address the State's July 1, 2005, deadline. NOAA and the Alaska DNR have exerted tremendous energy to meet the deadline, while recognizing that the deadline was extremely tight given CZMA and NEPA requirements. By January of this year, however, it became apparent to NOAA that the State's deadline could not be met, because Alaska has not yet submitted a program document which sufficiently clarifies and specifies several key issues, including the role of districts in the program. Also, the State has continued to propose regulatory and policy changes, preventing NOAA from initiating NEPA review, which can only begin once the program document and regulatory changes are final and their implementation clear.

Therefore, NOAA recommends the State's July 1, 2005, deadline be removed or extended until at least December 31, 2005, so that discussions can continue and afford Alaska sufficient time to meet CZMA requirements.

Finally, on the afternoon of February 23, 2005, NOAA received Governor Murkowski's response to our January 28 letter. NOAA has not had time to sufficiently analyze the Governor's response, but we will provide a written response as soon as possible. NOAA can state at this time that we have not set aside previous positions or agreements, and have not added new CZMA criteria or mandates. NOAA's January 28 letter is based on clear directives in the CZMA and NOAA regulations regarding the content of state CZMA programs, state responsibilities for local government components, and the application of the federal consistency requirement. NOAA has not established "new national policy" regarding the CZMA federal consistency provision.

In conclusion, I continue to believe that the few remaining obstacles toward approval of the new ACMP can be resolved through further discussion and negotiation. NOAA is committed to working with the State to develop a new Alaska coastal management program that meets the requirements of the CZMA. NOAA continues to believe that the CZMA requirements and NOAA's recommendations in our January 28 letter are consistent with Alaska's objectives to streamline the ACMP and would ensure that Alaska remain part of a unique national program for managing our nation's important coastal uses and resources.

Thank you again for the opportunity to provide the committee with this statement.

Louie Flora

From: Jane Alberts
Sent: Monday, February 28, 2005 11:29 AM
To: Douglas Letch; Ian Laing; Katie Shows; Louie Flora
Subject: Kenai Peninsula Online - Alaska Newspaper -

Words from Bob.....

Powered by

Local Interest
- Home
- Election 2004
- News
- Outdoors
- Sports
- Community
- Obituaries
- Classifieds
- Editorial
- Letters to Editor
- Art + Events
- Schools

Features
- Business
- NIE
- Religion
- Dispatch
- Seniors
- Neighbors
- Health
- TV Listings
- Stocks
- For Kids
- Movies
- Pets
- Recipes

Peninsula Guide
- Web Guide
- About Us
- Web Search
- Churches
- Forms
- Archives
- Yellow Pages
- Online Services
- Circulation
- Exploring

More Links

More Local Weather

20° Deadhorse
3° Fairbanks
19° Anchorage

Web posted Monday, February 28, 2005

Governor's coastal management stance erodes Alaska's rights

Frank Murkowski came into office and immediately set out to remove Alaskans from decisions affecting coastal communities. Now, after bungling the process to revise the Alaska Coastal Management Program, he's blaming the federal government Ð and claiming he's defending "states rights." But once again, Frank misses the mark. The federal coastal zone management law actually grants states more rights then they otherwise have without it. How? First, it provides money to state and local communities to implement their own local standards. By attacking this program, Frank is attacking decisions made by Alaskans, for Alaskans — not decisions made by faceless bureaucrats in D.C. or Juneau. Second, the federal law provides a powerful appeal process where states can challenge federal decisions affecting state and local interests. California used these very provisions last year to protect its coastal communities from federal intrusion.

Why is this relevant for Alaska? Among other reasons, there are efforts underway in Congress to allow fish farming in waters 3 to 200 miles offshore. But if Frank has his way, the state won't have a meaningful say in how the federal government manages our offshore waters. If you care about states' rights and local decision making, let the Governor and the Legislature know now. It's not too late to demand local control over coastal decision making in Alaska.

Bob Shavelson, Executive director, Cook Inlet Keeper, Homer

Municipality of Anchorage

P.O. Box 196650 • Anchorage, Alaska 99519-6650 • Telephone: (907) 343-4431 • Fax: (907) 343-4499 http://www.muni.org

Mayor Mark Begich

Office of the Mayor

February 17, 2005

The Honorable Paul Seaton
Alaska State Legislature
State Capitol, Room 102
Juneau, AK 99801-1182

Dear Representative Seaton:

Last October I received a letter regarding the need to update Anchorage's Coastal Management Plan from Bill Jeffress, Director of the Office of Project Management and Permitting at the State of Alaska's Department of Natural Resources. The letter provided reasons for the revision as outlined in House Bill 191, which was passed by the Legislature in May 2003. The legislation provided some funding ($41,000 for Anchorage) and required that coastal districts complete their plan updates by June 30, 2005. For a number of reasons, I am writing now to request that the Legislature revisit and adjust this deadline.

I understand the State is not expecting a comprehensive update of the plan, due to limited time and funding. However, the proposed deadline does cause concern as the plan update will have to be based on the State's new regulations and these have yet to be approved by the administering federal agency. The timing of the federal review and anticipated changes to the proposed regulations will affect the ability of Anchorage and other districts to update their plans under the current schedule. Given the pending federal review and approval, the schedule appears unattainable and should be revised to accommodate expected changes in the proposed standards and regulations.

To help address these concerns, the Municipality requests that the legislated submittal deadline for a concept-approved draft plan be extended by at least one year from the date of federal approval of the State's new regulations. This approach provides a more realistic schedule for completing the plan update and may better meet the intent of the original legislation.

Thank you for your consideration and action on this matter. The Municipality is available to work with the State's Office of Project Management and Permitting and the Legislature.

Sincerely,

Mark Begich
Mayor

cc: Governor Frank Murkowski
Bill Jeffress, Director, SOA, OPMP
Eldon Hout, Director, NOAA, OCRM
Tom Nelson, MOA, Planning Department

Community, Security, Prosperity

Lake and Peninsula Borough
P.O. Box 495
King Salmon, Alaska 99613

Telephone: (907) 246-3421
Fax: (907) 246-6602

Lake and Peninsula Borough
Incorporated April, 1989

FAX COVER SHEET

Send To: House State of Affairs Oversight Hearing on ACMP	From: Marv Smith
Attention: Louie Flora	Date & Time 2/24/05 10:45 AM
Fax Number 907-465-[illegible] 3k72	Phone Number

Total pages, including cover page 11

COMMENTS:

Attention Committee Members:

Attached is the testimony by Mayor Glen Alsworth on behalf of the Lake and Peninsula Borough for the House State of Affairs Oversight Hearing on House Bill 191. On behalf of the Mayor and the citizens of Lake and Peninsula Borough we thank you for the opportunity to testify on this very important issue.

Sincerely,

Marv Smith

Marv Smith

P.S. Sorry for the Delay but the Fax failed all day yesterday!

Lake and Peninsula Borough
P.O. Box 495
King Salmon, Alaska 99613

Telephone: (907) 246-3421
Fax: (907) 246-6602

MAYOR ALSWORTH'S TESTIMONY FOR HOUSE STATE OF AFFAIRS COMMITTEE OVERSIGHT HEARING ON COASTAL MANAGEMENT PLANS
02/24/2005

Questions for 2/24/05 (8:00 a.m. to 10:00 a.m.) House State Affairs Committee Over sight hearing on the Coastal Management Plan district plan revisions.

As there is only two hours for this oversight hearing, we felt that the best thing to ensure that testimony would be short and to the point would be to provide you with a list of questions pertinent to the oversight hearing. Please limit responses to ten minutes so that we can fit all testifiers within the two-hour time period.

1. **Please provide an example for the committee of an enforceable policy that was utilized in your coastal district prior to the revision process, and how the revision will affect the activity that the policy was used to enforce.**

Answer: The example I will use is L&P Borough Policy A-6 Disposal of Dredge Spoil. First I will read you the existing policy and then I will read you the revised version trying to utilize the new regulations and statutes as explained by DNR staff.

A-6 Disposal of Dredge Spoil

Existing Policy

Dredged materials disposed of in shoreline landfills shall not cause significant alternation of important habitats or significant adverse impacts to coastal processes such as circulation, sediment transport, and coastal erosion and deposition patterns. On shore disposal sites for dredged material shall be contained and stabilized to prevent erosion and leaching into adjacent waters. Off shore

disposal of dredged spoil shall avoid important marine habitat and be conducted in compliance with state and federal water quality regulations.

New Revised Policy

Dredged materials disposed of in coastal water shall not cause significant adverse impacts to coastal processes such as circulation, sediment transport, and coastal erosion and deposition patterns.

The new policy would not have any power nor the detail and exact identification as the old policy and has zero local control over off shore disposal of dredged material.

Another example is Policy A-7 which we have used on numerous consistency reviews requiring compliance for project approval,

A-7 Navigation Obstructions

Existing Policy

Uses and activities in coastal waters shall meet the following requirements:

a) Structures and buoys placed in navigable waters shall be visibly marked and placed in a manner to minimize navigation hazards or obstructions to other uses of coastal habitats; and

b) To the extent feasible and prudent, all developments, structures, and facilities in marine and estuarine waters of the Borough shall be sited, constructed, operated, and maintained in a manner that does not create a hazard or obstruction to marine transportation or commercial fishing operations.

New Revised Policy A-7

Structures in navigable coastal waters shall be visibly marked and placed in a manner to minimize navigation hazards or obstructions to other uses including marine transportation or commercial fishing operations.

The Borough Planning Commission used this policy on several occasions in the last five years to enforce safety issues. Recently it was used on projects in Lake Clark and the Ugashik River. In

both cases because of this policy we were able to require the project to be modified and in one case required the applicant to remove the structure because it was a navigational hazard. If this policy is lost the borough will have to depend on other state and federal agencies to police local safety issues.

2. Why is the program important to your district and how has it been used to address specific issues. For programs managed by a municipality with planning powers, what does the ACMP give you above what you can do in your municipal code under Title 29 powers? For programs in the unorganized borough, Coastal Resource Service Areas (CRSA), how is this program useful considering the CRSA does not have planning and zoning powers?

Answer: The Alaska Coastal Management Program has been very helpful to the Lake and Peninsula Borough. Through this program we have been very successful in getting grants from such programs as the Coastal Impact Assistance Program (CIAP) which was instrumental in helping the Borough accomplish Community Profile Mapping of all 18 of our communities. We applied for grants directly from the ACMP that also contributed to this very successful mapping program. However the coastal management program is most important to the Borough because it allows local input on development matters. For example under the States new revised regulations Lake Iliamna would no longer be within the newly defined "coastal zone" because Lake Iliamna is not salt water affected. The Lake and Peninsula Borough has the five largest fresh water lakes in Alaska within its boundaries. Lake Iliamna, Becherof Lake, Naknek Lake, Lake Clark and the Ugashik Lakes. All of our communities are located on either a saltwater coastline or a freshwater river or lake. The coastline whether it is salt or freshwater is very vital to our citizens subsistence life style. We depend on the ocean and the freshwater lakes within our Borough for a large portion of our food. Lake Iliamna is the largest fresh water lake in Alaska and is one of the largest natural red salmon hatcheries in the world. It is also home to fresh water harbor seals, one of only two lakes in the world with this distinction. Lake Iliamna must remain protected under our coastal management program. A lot of work by a lot of local residents went into the current plan. The Lake and Peninsula Borough spent five years writing our last coastal management plan and held public meetings in all 18 of our communities to get buy in by the local citizens. The public

process within our Borough is very important because the men, women and children of our Borough are the Borough. We think the removal of Lake Iliamna from the coastal management program can be compared to requiring the Great Lakes to be removed from the coastal management program in the lower 48 states. But because Iliamna, Becherof, Naknek, Lake Clark and the Ugashik Lakes are not within the newly defined coastal zone we will have no local say on development on their shorelines.

Infancy of Borough: *The L&PB is a relatively new Borough and as such our title 29 powers are still in the development stage. We have ordinances for development permits, subdivision and flood insurance that have enforced Title 29 to some degree. We know the new Community Profile mapping and future GIS system we are building will serve us well into the future. However, the current Borough coastal management plan provides a vital tool for managing the coastal zone, critically important to a young borough such as ours. Many of our coastal management policies are interwoven throughout our Borough ordinances and will prove to be a challenge to sort out and effectively change.*

Federal Consistency: It is however more important to note that the ACMP provides the only tool that requires federal agencies to be consistent to the maximum extent practicable with the ACMP and L&PB CMP. This was one of the main reasons Alaska chose to participate in the program back in the 70's. In the L&PB, as with many parts of Alaska, vast areas are under federal management. The ACMP is the only way to ensure that activities conducted on federal lands and waters address local issues and concerns. This is a critical tool that must be safeguarded. L&PB is very concerned with the manner in which the State is proposing to implement the ACMP. It pretty much cleans out our tool box. For example within Katmai National Park, a recent project by the Park Service to dredge an area used for barge landing came through the Borough for review. Under the new program we would not even be at the table.

3. What are the main problems that you are experiencing with the enforceable policy revision process mandated by HB 191 and associated regulations?

Answer: