

ADMINISTRATION PRESENTATION

TO: Brent Johnson, Assembly President
Members, Kenai Peninsula Borough Assembly

FROM: John Hedges, Purchasing & Contracting Director
Todd Sherwood, Deputy Borough Attorney

DATE: November 7, 2022

RE: In the Matter of Appeal of MAYOR'S DECISION ON APPEAL DATED
OCTOBER 19, 2022 REGARDING RFP23-001 MASS NOTIFICATION SYSTEM

INTEGRATED NOTIFICATIONS SYSTEMS, LLC., Appellant

Kenai Peninsula Borough Case No. 2022-02-BAA

Administration Written Argument and Presentation

The appellant, Integrated Notifications Systems, LLC., a West Shore Services Company, (hereinafter INS) raised six points in its appeal to the mayor. The appeal points are in the materials, and the background, along with additional information, is outlined below.

On August 2, 2022 the Kenai Peninsula Borough released a Request for Proposals (RFP), RFP23-001, directed at qualified firms for the replacement of the Borough's existing siren warning system with a new comprehensive mass notification system.

Due to the large potential for different variables in modifications to our existing infrastructure, an RFP process was used so that quality could be measured against cost and qualifications of proposers.

During the RFP process and per the instructions to proposers, a pre-proposal meeting was held via zoom with an opportunity to ask questions and discuss the details associated with the RFP. The questions discussed were included in a subsequent Addendum and provided to all potential proposers. Three addenda were released that provided requested information and responded to questions timely submitted by proposers. All proposers acknowledged the receiving of these addenda.

On September 15, 2022, six (6) responsible and responsive proposals were received at the office of the Borough's Purchasing and Contracting Department. Consistent with long standing policies and procedures, evaluations of all six proposals were completed by four qualified Borough employees using criteria outlined in the RFP.

On October 3, 2022 an Intent to Award was provided to all proposers providing the scores of all six proposals and listing them in the order of rank with HQE Systems Inc. ranked as the highest responsible and responsive proposer. Arcticom/Bering Straits Native Corporation came in second, followed by the appellant INS, ranking third in the evaluation process.

An Intent to Award the contract to HQE Systems Inc. was issued to all proposers on October 3, 2022. Within the required 3-day appeal period, INS submitted a written appeal to the Mayor through the Purchasing and Contracting office of the Borough in accordance with Borough code.

After careful review and coordination with the Mayor's office and the other Borough administrative staff the Mayor agreed to uphold the award and deny the appeal from INS. On October 19, 2022 a letter, addressing each reason for INS' appeal and the reasoning behind the mayor's denial was sent to INS in accordance with the requirements of Borough code.

The 6 reasons for the appeal provided by INS and the response from the Administration is outlined as follows;

Summary of Decision on Appeal

Reason #1: The awarded vendor influenced RFP23-001 Mass Notification System specifications during the design phase.

We strenuously object to the fact that the consultant HQE hired by the Kenai Borough Peninsula was allowed to provide a proposal on this project. We consider that to be a serious conflict of interest, one which provided a distinct advantage to HQE in responding to this RFP.

It is also very apparent that the consultant either wrote or contributed to the Borough specifications that is plainly clear in the request for a certain siren output which we deemed to be only possibly obtainable in a strict aniconic [sic] chamber environment. It is our opinion that this resulted in HQE being the only compliant responder since, at least speaking for Integrated Notification Systems, our experience tells us that we should not provide a proposal that agrees to this requirement.

Response to Reason #1: The consultant, HQE, was contracted to conduct an assessment and gap analysis of the current system, which has been documented as grossly inadequate. HQE did not write nor contribute to RFP23-001. The Borough wrote the RFP in its entirety, using excerpts from its previous iteration RFP07-006 (pg. 17) used in 2007 for the original system development.

inspections and tests.

5.04 Siren and Speaker Array

A. The Contractor shall furnish and install siren/speaker units capable of emitting a variety of warning tones and signals. The units shall also be capable of clear and intelligible broadcast of voice messages. The Contractor shall ensure that public address speech intelligibility at each site has a Speech Transmission Index (STI) rating of at least 0.5 at 4,500 feet distance from the equipment. STI shall be measured in accordance with Appendix A of NFPA 72.

B. Audio coverage at each site shall be delivery of an intelligible voice message and audio sound level of at least 80 decibels (dB) at 4,500 feet in all directions from the siren/PA equipment.

The Contractor shall select the combination of siren/speaker pole height and output power for each individual AHAB site to ensure a measured sound level of at least 80 db (70 db above assumed 10 db seaside background noise level) at 4,500 feet in all directions from the siren/PA equipment. The contractor shall conduct the measurements in accordance with the FEMA Guide to Outdoor Warning Systems, CPG 1-17. The audio output capacity of the units may vary, as required to achieve the audio coverage specified.

As part of Reason #1, the claim that the specification for siren output is too strict is not a reason for an appeal and would have been addressed in the question period of the RFP should it have been brought forward as a question. *It is important to note that none of the proposers were credited or penalized based on their response to this specification during the evaluation process.*

Reason #2: Another serious issue is the fact that the Boroughs consultant HQE, in their consulting capacity with the Borough, had months of opportunity to become intimately familiar with the Borough's existing infrastructure along with the infrastructure available in the surrounding Kenai Borough area. Therefore, putting other vendors who only had thirty days to respond at a significant disadvantage.

We also ask you to consider the fact that HQE was paid by the Borough to accumulate the information that they were able to use in developing and submitting their response to their RFP. This created a significant and unfair advantage compared to the

opportunities allowed to the other proposers. The RFP specifications, which we alleged were developed by HQE or influenced by HQE, significantly reduced the ability of the proposer to provide creative solutions, which may have included utilizing the Boroughs existing infrastructure, along with other opportunities which prevented Kenai Borough from receiving proposals that would provide the best, most cost-effective solution for the Kenai Borough tsunami warning system both now and in the future.

Response to Reason #2: A pre-proposal meeting was provided to all proposers. A question period that allowed for requests, questions, and substitution requests was provided to all proposers. All questions and requests from proposers in that time period were responded to by addendum. INS did not make the request to expand the existing site inspection prior to the deadline for questions.

Arguably, there is an inherent advantage for a Consultant/Contractor to have performed previous work for the Kenai Peninsula Borough. However, to limit that advantage by denying a consultant/contractor an opportunity to propose/bid on any similar work in the future would not be in the best interest of the Borough and would cause redundant expenditures in the delivery of service. Ultimately, the process is designed to do what is best for the Borough, and not to do what is best for an individual contractor. The policy of not limiting consultants/contractors due to previous experience with the Borough is well established in the Borough and in the industry. Any other policy would - over time - lead to a severely reduced pool of contractors, resulting in less choice and higher costs for the Borough; an illogical outcome that is clearly not in the best interest of the Borough.

Reason #3: Page 19, section 5.1 of the original RFP states that there is [sic] 100 possible points available to be earned during the RFP review process. Page 20, section 5.2 of the original RFP qualitative rating factor only the maximum for outstanding is 1. So the possible total points earned during the review process is 100. Yet, when we received the intent to award dated October 3, 2022, it stated that HQE Systems Inc earned 369 points. Please provide a written explanation within five (5) business days of how the discrepancy in the point system exists.

Response to Reason #3: 100 points are available from each evaluator. (There were 4 evaluators. $4 \times 100 = 400$ total possible points). The total score is measured by the sum of 400 possible points using the factors provided to all proposers in the RFP.

Reason #4: Furthermore, under criteria 5.1.1 experience/qualifications/references were 35 points. Integrated Notifications Systems has confirmed with one of our primary references they were not contacted during the RFP review process. Please explain how this item is weighted the evaluation of proposals.

Response to Reason #4: In accordance with Section 4.2 Experience / Qualifications / References, third paragraph, "Borough reserves the right to revise qualifications requirements as determined to be in the best interest of the Borough". The Borough elected *not* to contact references for any of the proposers. References were *not* used as a factor in the evaluation of *any* of the proposals received by the Borough.

Reason #5: Addendum 1, Question #4: Are site visits acceptable and supported?

Answer: Contractors are welcome and encouraged to make site visits at their own expense. The owner will be glad to meet with contractors at the OEM offices in Soldotna Alaska to review any and all questions.

When we indicated, we were making a site visit at our own expense, after we requested a meeting, we were denied proper access and support to help with our response to the RFP. Please see the attached email.

It is obvious that potential bidders were not provided the same access to information as available to Borough consultant HQE.

Also, we are concerned with the changes in the Borough's own response, not only to the discussion in the Prebid conference but also the change in policy as identified in addendum 1.

Response to Reason #5: Section 2.12 Oral Exchange / Interpretation of the RFP states that, "No oral change or interpretation of any provision contained in this RFP is valid whether issued at a pre-proposal conference or otherwise". The deadline for questions was provided in the RFP under Section 1.3 Questions and established on August 12, 2022. All requests for an additional pre-proposal meeting came *after* the deadline for questions, specifically, the attached emails were received on August 16th, 2022. Addendum #1 was provided to proposers on August 10, 2022.

INS was not denied access to the publicly accessible sites. The interpretation that a site visit would include a Borough representative was not the intent of the response and is not reflected in the language used in the response.

RFP23-001, Section 1.3 Questions (page 6) states: "Verbal Requests for information will not be accepted. Questions or requests for clarification directed at any employee or elected official of the Borough other than the Purchasing and Contracting Director may be grounds for disqualification from the process. All questions will be complied, answered, and distributed to all proposers." In accordance to the RFP, no individual questions and answer sessions could be provided. Due to the timing of the request, an explanation

detailing beyond the information provided in the RFP was not appropriate or in the best interest of the Borough.

Reason #6: Addendum 3

Question #2: Question 6, addendum 2- You mention that the Borough completed a radio communications study in 2020. Could you please provide a copy of that study for review?

Answer: The appropriate sections have been attached.

No sections of the radio communication study in 2020 were attached to addendum 3 or any other correspondence or RFP documents. If this study provided essential information that would have assisted with the preparation of the vendor response to the RFP that is serious oversight.

Response to Reason #6: The radio study information was mistakenly not provided in Addendum #3 to *any* of the proposers and therefore, *none* of the proposers had access to the information and thus it was not relevant to the outcome of the proposal evaluation.

Additional Information:

It is important to note that in the drafting of the letter to INS an error was made in regards to the submission of the request for a site visit, the request for Borough staff to review the existing Tsunami warning system with INS, and access to the equipment housings at each location. This request came in prior to the last day for questions and was not denied due to its timeliness but rather based on the concerns about a fair process of site review, the timeliness of question responses, and the necessity of the request. INS was the only proposer that asked for this more intensive discussion and site inspection. Also important is the fact that INS did not respond back to the Borough's denial of the requested site visit until August 23rd, *after* the last day for questions, a period of 7 calendar days.

As the Assembly considers this appeal from the Mayor's decision, it is important to note the purpose of the purchasing code as established by the Assembly in code:

5.28.010. - Purpose.

The purpose of this chapter is to:

A. Establish consistent procurement principles for all agencies of the borough;

- B. **Ensure the fair and equitable treatment of all persons who deal with the procurement system of the borough;**
- C. **Maximize fair and open competition and to discourage collusive bidding for borough contracts;**
- D. **Maximize to the fullest extent practicable, the purchasing value of borough funds; and to**
- E. **Clearly define authority for the purchasing function within the borough organization.**

Also, because this proposed contract was to be awarded through the Request for Proposal (RFP) process it is also important to note that, ultimately, the final criteria in awarding is what is "most advantageous to the borough."

5.28.250. - Proposals for professional services or where bidding not practicable.

...

F.

Awards shall be made by written notice to the qualified and responsible proponent whose final proposal is determined to be most advantageous to the borough. No criteria other than those set forth in the request for proposals may be used in proposal evaluation. If the mayor determines that it is in the best interest of the borough to do so, the borough may reject any and all proposals.

(Emphasis added).

In short, as long as the process – including any minor errors or oversights by Purchasing – used in ultimately awarding the bid fulfills the purpose of the purchasing code and is advantageous to the borough, then the award of the bid is legal and should be upheld.

The entire RFP process, including the alleged minor errors, fulfilled these purposes. It was, and remains, a fair and open competition that ensured the fair and equitable treatment of all persons involved. It also ensured the maximization of the purchasing value of borough funds, which, ultimately is advantageous to the borough as required by the code.

Further, based on an Alaska Supreme Court case with similar facts (Chris Berg, Inc. v. State, Dep't of Transp. & Pub. Facilities, 680 P.2d 93, 94 (Alaska 1984)) KPB was, under the factual circumstances, not only permitted, but *legally required* to award the contract to HQE. To do otherwise, as the Court in the Berg case stated, would have been an abuse of discretion on the part of the Purchasing Officer.

In the Berg case, Chris Berg's corporation bid on a State DOT project, but in bid documents he mistakenly wrote price information for a line item, that was meant to be on one line lower than where it was written. In the Berg case, a state contract official, by examining the bid, determined that the price information for that line item had mistakenly been written one line below. Using the total bid price, which was not mistaken, as well as some elementary mathematics, the official was able to discern the nature of the mistake and the intended price for the line item.

The state official then contacted Chris Berg's corporation and asked a representative to read him the intended bid for the mistaken portion. The intended bid corresponded to official's interpretation. Accordingly, the official stated to the corporate representative that no further documents were necessary and that the bid would be accepted.

However, higher State DOT officials later reversed that determination stating the bid was "non-responsive" and "beyond the flexibility" of DOT. Chris Berg filed an administrative appeal which was denied and then appealed to Superior Court which also denied his request.

However, upon appealing to the Alaska Supreme Court it reversed the lower court and ruled in Mr. Berg's favor stating:

"A minor technical defect or *irregularity* which does not and could not affect the substance of a low bid in any way does not justify the rejection of that bid on the ground that it is not responsive, when the agency is required by law to award the contract to the "lowest responsible bidder." We believe that the bid error in the present case falls within this category, since the mistake and the bid actually intended are reasonably ascertainable from the invitation to bid and the bid itself, and the mistake was discovered immediately by the agency. Thus, any rejection of Chris Berg's bid on the basis of the bid error would constitute an abuse of discretion as a matter of law." (Emphasis added).

Chris Berg, Inc. v. State, Dep't of Transp. & Pub. Facilities, 680 P.2d 93, 94–95 (Alaska 1984)

Similarly, the RFP process at issue in the administrative appeal before the Assembly parallels in Supreme Court's Berg decision in that it too, had some minor glitches.

Most importantly, none of these points can be seen as anything beyond minor errors at best. None of them in any way undercut the overall fairness and openness of the process, and the RFP result remains "the most advantageous to the borough" as required by KPB 5.28.250.F.

Accordingly, the Administration asks the Assembly to follow the example of the Alaska Supreme Court and uphold the Mayor's decision and deny the appeal from INS.